COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

STEVEN SISTRUNK and TREMANE KERSON,

Ind. No.: 2020-0097

Defendant.
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ZUCKERMAN, J.

Defendants stand accused under Indictment No. 2020-0097 of one count each of Robbery in the First Degree (Penal Law §160.15[]) and Robbery in the Second Degree (Penal Law §160.10[]); Gang Assault in the First Degree (Penal Law §120.07); two counts of Assault in the Second Degree (one count each under Penal Law §§120.05[1] and 120.05[6]); and three counts of Grand Larceny in the Fourth Degree (one each under Penal Law §§155.30[4], 155.30[5], and 155.30[1]). Defendant Sistrunk only also stands charged under the instant indictment with two counts of Criminal Possession of Stolen Property in the Fifth Degree (Penal Law §165.40), Robbery in the Third Degree (Penal Law §160.05), and Grand Larceny in the Fourth Degree (Penal Law §155.30[5]), while Defendant Kerson alone also stands charged with Criminal Possession of Stolen Property in the Fourth Degree (Penal Law §165.45[2]).

As set forth in the Indictment, it is alleged that, on or about January 12, 2020, in Westchester County, Defendants, while aiding and abetting and acting in concert with each other and another person, forcibly stole property, and in the course or commission thereof, or immediate flight therefrom, with intent to cause serious physical injury to another, caused that injury to another who was not a participant; stole property consisting of a debit or credit card; stole property from the person of another; and stole property valued in excess of $1,000.00. As also set forth in the Indictment, it is alleged that, on or about January 12 and 13, 2020, in Westchester County, Defendant Sistrunk possessed stolen property, namely a wallet and a cell phone, with intent to benefit himself or a person other than the owner thereof. As further set forth in the Indictment, it is alleged that, on or about January 17, 2020, in Westchester County, Defendant Sistrunk forcibly stole property, and stole property from the person of another. Finally, as further set forth in the Indictment, it is alleged that, on or about January 13, 2020, in Westchester County, Defendant Kerson possessed stolen property, namely a credit card, with intent to benefit himself or a person other than the owner thereof. By Motions dated April 19 and June 23rd, 2020, with accompanying Affirmations, Defendants Kerson and Sistrunk respectively moved for omnibus relief. In

response, the People have submitted Affirmations in Opposition dated May 27 and July 1, 2020.

The motions are disposed of as follows:

I. DEFENDANT KERSON

A. DISCOVERY AND INSPECTION

Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 245 and/or already provided by the People. If any items set forth in CPL Article 245 have not already been provided to Defendant pursuant to that Article, said items are to be provided forthwith. Any party is granted leave, if required, to apply for a Protective Order in compliance with CPL Article 245, upon notice to the opposing party and any party affected by said Protective Order. The People are directed to file a Certificate of Compliance with CPL Article 245 and the instant Order upon completion of their obligations thereunder, if they have not already done so. The People's cross-motion for reciprocal discovery is likewise granted to the extent provided for in Criminal Procedure Law Article 245, and/or already provided to the People. Further, the People's response to Defendant's demand for a bill of particulars is that said demand is untimely. Defendant's motion for a Bill of Particulars is granted to the extent that the people are directed to provide a Bill of Particulars to Defendant which adequately informs Defendant of the substance of the alleged

conduct, and in all respects complies with CPL Article 245 and §200.95, within 15 days of the date of the instant Order.

In addition, pursuant to Administrative Order 393/19, it is

ORDERED that the District Attorney and the Assistant District Attorney responsible for the case, are required to make timely disclosure of information favorable to the defense as required by *Brady v Maryland,* 373 US 83 [1963]; *Giglio v United States,* 405 US 150 [1972]; *People v Geaslen,* 54 NY2d 510 [1981]; and their progeny under the United States and New York State Constitutions and by Rule 3.8(b) of the New York State Rules of Professional Conduct; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representatives, have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and are therefore expected to confer with investigative and prosecutorial personnel who acted in the case and to review all files which are directly related to the prosecution or investigation of this case. For purposes of this Order, favorable information can include but is not limited to:

a) Information that impeaches the credibility of a testifying prosecution witness,

including (I) benefits, promises, or inducements, express or tacit, made to a

witness by a law enforcement official or law enforcement victim services

agency in connection with giving testimony or cooperating in the case; (ii) a

witness's prior inconsistent statements, written or oral; (iii) a witness's prior

convictions and uncharged criminal conduct; (iv) information that tends to

show that a witness has a motive to lie to inculpate the defendant, or a bias

against the defendant or in favor of the complainant or the prosecution; and (v)

information that tends to show impairment of a witness's ability to perceive,

recall, or recount relevant events, including impairment resulting from mental

or physical illness or substance abuse;

b) Information that tends to exculpate, reduce the degree of an offense, or

support a potential defense to a charged offense;

c) Information that tends to mitigate the degree of the defendant's culpability as

to a charged offense. or to mitigate punishment;

d) Information that tends to undermine evidence of the defendant's identity as a

perpetrator of a charged crime, such as a non-identification of the defendant

by a witness to a charged crime or an identification or other evidence

implicating another person in a manner that tends to cast doubt on the

defendant's guilt; and

e) Information that could affect in the defendant's favor the ultimate decision on

a suppression motion; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent prosecuting the case is hereby advised of his/her duty to disclose favorable information whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is directed that favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as

well as CPL Article 240. Disclosures are presumptively "timely" if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL sections 240.44 or 240.45[1]. Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is hereby reminded and informed that his/her obligation to disclose is a continuing one; and it is further

ORDERED, notwithstanding the foregoing, that a prosecutor may apply for a protective order, which may be issued for good cause, and CPL Section 240.50 shall be deemed to apply, with respect to disclosures required under this Order. Moreover, the prosecutor may request a ruling from the court on the need for disclosure. Only willful and deliberate conduct will constitute a violation of this Order or be eligible to result in personal sanctions against a prosecutor; and it is further

ORDERED, that counsel for the defendant is required to:

a) confer with the defendant about his/her case and is required to keep the defendant informed about all significant developments in the case; and

b) timely communicate any and all plea offers to the defendant and to provide him/her with reasonable advice about the advantages and disadvantages of any such plea offer including the potential sentencing ranges that apply in the case;

c) where applicable, insure the defendant receives competent advice concerning immigration consequences as required under *Padilla v Kentucky*, 559 US 356 [2010];

d) perform a reasonable investigation of the facts and the law pertinent to the case (including, as applicable, visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts; inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.) or, as appropriate, making a reasonable professional judgment not to investigate a particular matter;

e) comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;

f) possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and

g) in accordance with statute, provide notices as specified in CPL sections 250.10, 250.20 and 250.30. (e.g., a demand, intent to introduce the evidence, etc.)

B. MOTION FOR A *HUNTLEY/DUNAWAY* HEARING

Defendant moves to preclude and/or suppress noticed statements pursuant to CPL §710.20(3) alleging, *inter alia,* that they were made after a seizure that was not based on probable cause. The People, in their Affirmation in Opposition, state that there was no impropriety regarding the acquisition of statements from Defendant, and in particular that the instant arrest was based on probable cause, but they do consent to a hearing. Consequently, the motion to preclude or suppress noticed statements is granted, solely to the extent that a pre-trial *Huntley/Dunaway* is Ordered.

C. MOTION FOR A *WADE* HEARING

Defendant moves to suppress noticed identification procedures pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state there was no impropriety regarding the identification procedures herein, a photo-array, which was noticed to Defendant. The People also consent to an independent source hearing as to the procedure. Consequently, the motion to suppress noticed identification procedures is granted to the extent that a hearing is ordered to consider whether the noticed identification was unduly suggestive *(United States v Wade,* 388 US 218 [1967]). Specifically, the court shall determine whether

the identification was so improperly suggestive as to taint any in-court identification. In the event the identification is found to be unduly suggestive, the court shall then go on to consider whether the People have proven by clear and convincing evidence that an independent source exists for such identification.

D. MOTION FOR A *MAPP* HEARING

Defendant moves to suppress physical evidence seized from his person which the People seek to introduce against him at trial, alleging that the property was recovered after a warrantless search. The People, in their Affirmation in Opposition, state that there was no impropriety in the search conducted and the seizure made and add, in particular, that it were based on probable cause and further that Defendant has no standing to contest the seizure of property taken from the person of Defendant Sistrunk. The motion to suppress physical evidence to the extent it relates to evidence seized from Defendant Kerson's person is granted to the extent that a pre-trial *Mapp* hearing is ordered to determine the propriety of any such search and seizure.

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

Defendant moves pursuant to CPL §§210.20(1)(b) and © 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. 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 NY2d 103 [1986]). "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 NY2d 523 (1998); *People v Ackies*, 79 AD3d 1050 (2nd Dept 2010). 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." *Bello, supra*, quoting *People v Boampong*, 57 AD3d 794 (2nd Dept 2008-- 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 offenses charged (see CPL §210.30[2]).

Accordingly, Defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to Defendant's claim that the Grand Jury proceeding was defective within the meaning of CPL §210.35, a review of the minutes supports a finding that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the Grand Jury on the law, that the grand jurors who voted to indict heard all the "essential and critical evidence" (*see People v Collier*, 72 NY2d 298 [1988]; *People v Julius*, 300 AD2d 167 [1st Dept 2002], *lv den* 99 NY2d 655 [2003]), and that the Grand Jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980] and *People v. Valles*, 62 NY2d 36 [1984]).

In making this determination, the Court does not find that release of such portions of the Grand Jury minutes as have not already been disclosed pursuant to CPL Article 245 to the parties was necessary to assist the Court.

F. MOTION FOR *SANDOVAL/VENTIMIGLIA/MOLINEUX* HEARING

Granted, solely to the extent that *Sandoval/Ventimiglia/Molineux* hearings, as the case may be, shall be held immediately prior to trial, as follows:

A. Pursuant to CPL §245.20, the People must notify the Defendant, not less than fifteen days prior to the first scheduled date for trial, of all specific instances of

Defendant's uncharged misconduct and criminal acts of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant, or as substantive proof of any material issue in the case, designating, as the case may be for each act or acts, the intended use (impeachment or substantive proof) for which the act or acts will be offered; and

B. Defendant, at the ordered hearing, must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (*see, People v. Malphurs*, 111 AD2d 266 [2nd Dept. 1985]).

G. MOTION TO SEVER FROM CO-DEFENDANT AND TO SEVER COUNTS

Defendant moves to sever the trial of the instant Indictment from that of his co-defendant, asserting that, if the co-defendant testifies at trial, a joint trial would violate his constitutional rights to a fair trial and his right to cross-examine witnesses his defense. Defendant also asserts that his defenses are in conflict with that of the co-defendant, and that a joint trial would result in undue prejudice to him, in particular regarding the joined counts relating to co-defendant's separately-charged robbery.

Defendant properly asserts that the People have given notice of statements made by the co-defendant, in regards to which he would not have the right of cross-examination should that

defendant decline to testify at trial. *See generally Bruton v US*, 391 US 123 (1968). In response, the People correctly assert, and Defendant does not thereafter contest, that it is premature to seek severance where the court has not yet ruled on the admissibility of those statements. Consequently, the motion to sever based on a potential *Bruton* conflict is denied in all respects as premature, with leave to renew at such time, if any, that a pre-trial *Huntley* ruling permits admission of the challenged inculpatory statements against the co-defendant at trial.

Defendant also moves to sever certain counts in the instant indictment relating to his co-defendant, namely counts 12 and 13 of the indictment, from the trial of the instant indictment, asserting that those counts relate to a separate crime committed by the co-defendant only, were not properly joined, and would cause him prejudice if joined against him at trial. As the People note above, however, the instant motion is premature until such time, if any, that the court rules on severing the indictment and the counts against the co-defendant on *Bruton* grounds. Consequently, the motion to sever Counts 12 and 13 is likewise denied in all respects as premature, with leave to renew at such

time, if any, that Defendant's motion to sever on *Bruton* grounds is denied[1].

II. DEFENDANT SISTRUNK

A. DISCOVERY AND INSPECTION

Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 245 and/or already provided by the People. If any items set forth in CPL Article 245 have not already been provided to Defendant pursuant to that Article, said items are to be provided forthwith. Any party is granted leave, if required, to apply for a Protective Order in compliance with CPL Article 245, upon notice to the opposing party and any party affected by said Protective Order. The People are directed to file a Certificate of Compliance with CPL Article 245 and the instant Order upon completion of their obligations thereunder, if they have not already done so. The People's cross-motion for reciprocal discovery is likewise granted to the extent provided for in Criminal Procedure Law Article 245, and/or already provided to the People. Further, the People's response to Defendant's demand for a bill of particulars is that said demand is untimely. Defendant's motion for a Bill of Particulars is granted to the extent that the people are

[1] The Court notes that the People, while arguing the application is premature, conceded that, if the counts were not severed on *Bruton* grounds counts 12 and 13 would have to either be severed or a separate trial ordered.

directed to provide a Bill of Particulars to Defendant which adequately informs Defendant of the substance of the alleged conduct, and in all respects complies with CPL Article 245 and §200.95, within 15 days of the date of the instant Order.

In addition, pursuant to Administrative Order 393/19, it is

ORDERED that the District Attorney and the Assistant District Attorney responsible for the case, are required to make timely disclosure of information favorable to the defense as required by *Brady v Maryland,* 373 US 83 [1963]; *Giglio v United States,* 405 US 150 [1972]; *People v Geaslen,* 54 NY2d 510 [1981]; and their progeny under the United States and New York State Constitutions and by Rule 3.8(b) of the New York State Rules of Professional Conduct; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representatives, have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and are therefore expected to confer with investigative and prosecutorial personnel who acted in the case and to review all files which are directly related to the prosecution or investigation of this case. For purposes of this Order, favorable information can include but is not limited to:

a) Information that impeaches the credibility of a testifying prosecution witness,

including (I) benefits, promises, or inducements, express or tacit, made to a

witness by a law enforcement official or law enforcement victim services

agency in connection with giving testimony or cooperating in the case; (ii) a

witness's prior inconsistent statements, written or oral; (iii) a witness's prior

convictions and uncharged criminal conduct; (iv) information that tends to

show that a witness has a motive to lie to inculpate the defendant, or a bias

against the defendant or in favor of the complainant or the prosecution; and (v)

information that tends to show impairment of a witness's ability to perceive,

recall, or recount relevant events, including impairment resulting from mental

or physical illness or substance abuse;

b) Information that tends to exculpate, reduce the degree of an offense, or

support a potential defense to a charged offense;

c) Information that tends to mitigate the degree of the defendant's culpability as

to a charged offense. or to mitigate punishment;

d) Information that tends to undermine evidence of the defendant's identity as a

perpetrator of a charged crime, such as a non-identification of the defendant

by a witness to a charged crime or an identification or other evidence

implicating another person in a manner that tends to cast doubt on the

defendant's guilt; and

e) Information that could affect in the defendant's favor the ultimate decision on

a suppression motion; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent prosecuting the case is hereby advised of his/her duty to disclose favorable information whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is directed that

favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL Article 240. Disclosures are presumptively "timely" if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL sections 240.44 or 240.45[1]. Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is hereby reminded and informed that his/her obligation to disclose is a continuing one; and it is further

ORDERED, notwithstanding the foregoing, that a prosecutor may apply for a protective order, which may be issued for good cause, and CPL Section 240.50 shall be deemed to apply, with respect to disclosures required under this Order. Moreover, the prosecutor may request a ruling from the court on the need for disclosure. Only willful and deliberate conduct will constitute a violation of this Order or be eligible to result in personal sanctions against a prosecutor; and it is further

ORDERED, that counsel for the defendant is required to:

a) confer with the defendant about his/her case and is required to keep the defendant informed about all significant developments in the case; and

b) timely communicate any and all plea offers to the defendant and to provide him/her with reasonable advice about the advantages and disadvantages of any such plea offer including the potential sentencing ranges that apply in the case;

c) where applicable, insure the defendant receives competent advice concerning immigration consequences as required under *Padilla v Kentucky*, 559 US 356 [2010];

d) perform a reasonable investigation of the facts and the law pertinent to the case (including, as applicable, visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts; inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.) or, as appropriate, making a reasonable professional judgment not to investigate a particular matter;

e) comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;

f) possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and

g) in accordance with statute, provide notices as specified in CPL sections 250.10, 250.20 and 250.30. (e.g., a demand, intent to introduce the evidence, etc.)

B. MOTION FOR A *HUNTLEY* HEARING

Defendant moves to preclude and/or suppress noticed statements pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state that there was no impropriety regarding the acquisition of statements from Defendant, but they do consent to a hearing. Consequently, the motion to preclude or suppress noticed statements is granted, solely to the extent that a pre-trial *Huntley/Dunaway* is Ordered.

C. MOTION FOR A *WADE* HEARING

Defendant moves to suppress noticed identification procedures pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state that there was no impropriety in conducting the identification procedures noticed to Defendant and, in particular, that the party involved in the identification procedure challenged was and is very familiar with Defendant. Consequently, the motion to suppress noticed identification procedures is granted to the limited extent that a hearing is ordered to determine whether the identifying witnesses had a

sufficient prior familiarity with the defendant as to render them impervious to police suggestion *(People v Rodriguez*, 79 NY2d 445[1992]). In the event the court finds that there was not a sufficient familiarity with the defendant on the part of the witnesses, the court will then consider whether the noticed identification was unduly suggestive *(United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identifications was so improperly suggestive as to taint any in-court identification. In the event the identification is found to be unduly suggestive, the court shall then go on to consider whether the People have proven that an independent source exists for such witnesses' proposed in-court identification.

D. MOTION FOR A *MAPP/DUNAWAY* HEARING

Defendant moves to suppress physical evidence seized from his person which the People seek to introduce against him at trial, alleging that the property was recovered after a warrantless search and an arrest that was not based on probable cause. The People, in their Affirmation in Opposition, state that there was no impropriety in the search conducted and the seizure made and add, in particular, that it were based on probable cause and further that Defendant has no standing to contest the seizure of property taken from other than his own person. The motion to suppress physical evidence to the extent

it relates to evidence seized from Defendant Sistrunk's person is granted to the extent that a pre-trial *Mapp* hearing is ordered to determine the propriety of any such search and seizure.

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

Defendant moves pursuant to CPL §§210.20(1)(b) and © 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. 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 NY2d 103 [1986]). "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 NY2d 523 (1998); *People v Ackies*, 79 AD3d 1050 (2nd Dept 2010). 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." *Bello, supra*, quoting *People v Boampong*, 57 AD3d 794 (2nd Dept 2008--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 offenses charged (see CPL §210.30[2]). Accordingly, Defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to Defendant's claim that the Grand Jury proceeding was defective within the meaning of CPL §210.35, a review of the minutes supports a finding that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the Grand Jury on the law, that the grand jurors who voted to indict heard all the "essential and critical evidence" (*see People v Collier*, 72 NY2d 298 [1988]; *People v Julius*, 300 AD2d 167 [1st Dept 2002], *lv den* 99 NY2d 655 [2003]), and that the Grand Jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980] and *People v. Valles*, 62 NY2d 36 [1984]).

In making this determination, the Court does not find that release of such portions of the Grand Jury minutes as have not already been disclosed pursuant to CPL Article 245 to the parties was necessary to assist the Court.

F. MOTION FOR *SANDOVAL/VENTIMIGLIA/MOLINEUX* HEARING

Granted, solely to the extent that *Sandoval/Ventimiglia/Molineux* hearings, as the case may be, shall be held immediately prior to trial, as follows:

A. Pursuant to CPL §245.20, the People must notify the Defendant, not less than fifteen days prior to the first scheduled date for trial, of all specific instances of Defendant's uncharged misconduct and criminal acts of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant, or as substantive proof of any material issue in the case, designating, as the case may be for each act or acts, the intended use (impeachment or substantive proof) for which the act or acts will be offered; and

B. Defendant, at the ordered hearing, must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (*see, People v. Malphurs*, 111 AD2d 266 [2nd Dept. 1985]).

G. MOTION TO SEVER FROM CO-DEFENDANT

Defendant moves to sever the trial of the instant Indictment from that of his co-defendant, asserting that, if the co-defendant testifies at trial, a joint trial would violate his constitutional rights to a fair trial and his right to cross-examine witnesses his defense. Defendant also asserts that his

defenses are in conflict with that of the co-defendant, and that a joint trial would result in undue prejudice to him.

Defendant properly asserts that the People have given notice of statements made by the co-defendant, in regards to which he would not have the right of cross-examination should that defendant decline to testify at trial. *See generally Bruton v US*, 391 US 123 (1968). In response, the People correctly assert, and Defendant does not thereafter contest, that it is premature to seek severance where the court has not yet ruled on the admissibility of those statements. Consequently, the motion to sever based on a potential *Bruton* conflict is denied in all respects as premature, with leave to renew at such time, if any, that a pre-trial *Huntley* ruling permits admission of the challenged inculpatory statements against the co-defendant at trial.

Defendant also moves to sever Indictment Counts 12 and 13, asserting that they are not properly joinable and that inclusion of the counts would result in undue prejudice to him.

CPL §200.20 provides

> 1. An indictment must charge at least one crime and may, in addition, charge in separate counts one or more other offenses, including petty offenses, provided that all such offenses are joinable pursuant to the principles prescribed in subdivision two.

2. Two offenses are "joinable" when:

(a) They are based upon the same act or upon the same criminal transaction, as that term is defined in subdivision two of section 40.10; or

(b) Even though based upon different criminal transactions, such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first; or

(c) Even though based upon different criminal transactions, and even though not joinable pursuant to paragraph (b), such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law; or

(d) Though not directly joinable with each other pursuant to paragraph (a), (b) or ©, each is so joinable with a third offense contained in the indictment. In such case, each of the three offenses may properly be joined not only with each of the other

two but also with any further offense joinable with either of the other two, and the chain of joinder may be further extended accordingly.

3. In any case where two or more offenses or groups of offenses charged in an indictment are based upon different criminal transactions, and where their joinability rests solely upon the fact that such offenses, or as the case may be at least one offense of each group, are the same or similar in law, as prescribed in paragraph © of subdivision two, the court, in the interest of justice and for good cause shown, may, upon application of either a defendant or the people, in its discretion, order that any such offenses be tried separately from the other or others thereof. Good cause shall include but not be limited to situations where there is:

(a) Substantially more proof on one or more such joinable offenses than on others and there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense.

In order to effect a severance of counts of an indictment, a defendant "must either demonstrate that the counts were not

joinable under the statutory criteria ... or seek a discretionary severance under CPL 200.20 (subd. 3)." *People v Lane*, 56 NY2d 1, 9 (1982). Where (like here) the crimes charged in the indictment are joined because they are the same or similar in law, applications for severance are addressed to the sound discretion of the Court. *Lane, supra; People v. Jenkins*, 50 NY2d 981 (1980); *People v. Barnett*, 125 AD3d 878 (2nd Dept 2015); CPL §200.20(3). Where counts are properly joined, a trial court lacks authority to sever them. *People v Dobbins*, 123 AD3d 1140 (2nd Dept 2014).

The People argue that the counts are properly joinable because they are defined by the same or similar statutes, and thus are the same or similar in law. Notably, the counts sought to be severed are for Robbery and Theft, which are the same as five of the other charges in the indictment against Defendant. Defendant does not contest the People's assertions. Thus, since the People allege that the offenses are joinable based upon the fact that the offenses are the same or similar in law, the court, in the interest of justice and for good cause shown, may, upon application of either the defendant or the People, in its discretion, order severance. Good cause includes there being substantially more proof on one offense than on others, and that there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense,

or that movant has made a convincing showing that a defendant has both important testimony to give concerning one count and a genuine need to refrain from testifying on the other, which satisfies the court that the risk of prejudice is substantial. CPL §200.20(3).

Defendant, however, has made neither of those showings, merely asserting that there might be a conviction on all counts based on the cumulative weight of the evidence, or that he may wish to testify regarding one, and not the other. Consequently, Defendant having failed to demonstrate that the counts were not properly joinable under CPL §200.20, and failing to demonstrate the prejudice from joinder such as to constitute good cause to sever, the court has no choice but to deny severance of Counts 12 and 13 at this time from the balance of the indictment for the purposes of trial.

All other motions are denied.

Dated: White Plains, New York
July 31, 2020

HON. DAVID S. ZUCKERMAN, A.J.S.C.

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