COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

NICOLE SMITH,

Defendant.

DECISION & ORDER

Indictment No: 21-0448

ROBERT J. PRISCO, J.

Defendant **NICOLE SMITH** is charged by Indictment Number 21-0448 with two counts of Tampering with Physical Evidence pursuant to Penal Law [PL] § 215.40 (2) [Counts Five and Six] and one count of Criminal Facilitation in the Fourth Degree pursuant to PL § 115.00 (1) [Count Seven]. The charges pertain to Defendant's alleged engagement in conduct which aided another person in the commission of a felony and Defendant's alleged disposal of a tire wrench and a blue ski mask that were allegedly used during the commission of an assault. The above offenses are alleged to have occurred at 17 South 13th Avenue in the City of Mount Vernon, at approximately 7:00 p.m. on March 28, 2021.

On February 10, 2022, Defendant was arraigned by the Honorable David S. Zuckerman on the charges contained in Indictment Number 21-0448. Attached to the indictment are a CPL § 710.30 (1) (a) Notice regarding the People's intent to offer evidence of statements allegedly made by the defendant to members of the Mount Vernon Police Department,[1] five (5) CPL § 710.30 (1) (b) Notices signifying the People's intent to offer testimony of observations of the defendant either at the time or place of the commission of the offenses or upon some other relevant occasion by a witness or witnesses who have previously identified her as such, and the People's Demand for a Notice of Alibi pursuant to CPL § 250.20.

On February 24, 2022, the People filed a Certificate of Compliance pursuant to CPL § 245.50 (1) which includes a "Statement of Readiness," wherein "[t]he People confirm and

[1] The CPL § 710.30 (1) (a) notice pertains to oral statements that were allegedly recorded electronically and made by Defendant to "POI Patterson" and "Detective Puff" at Mount Vernon Police Department Headquarters at approximately 2:00 p.m. on April 6, 2021.

announce their readiness for trial on all counts charged." Attached to the Certificate of Compliance is a copy of the People's Discovery Disclosure Index pursuant to CPL §§ 245.20 and 245.50, which includes, but is not limited to, disclosures pertaining to written or recorded statements of Defendant, Grand Jury testimony, tapes and electronic recordings, Judgments of Conviction for defendants and witnesses excluding law enforcement and expert witnesses, and tangible objects possessed by Defendant or Co-Defendant(s). Also attached to the Certificate of Compliance are Discovery Package Transmittal Notices from the Westchester County District Attorney's Office.

A Notice of Motion, an Attorney's Affirmation in Support of Omnibus Motion (hereinafter "Attorney's Affirmation"), and a Memorandum of Law in Support of Defendant's Pre-Trial Motions (hereinafter "Memorandum of Law"), all dated March 29, 2022, were filed by Defendant, seeking various forms of judicial intervention and relief.

On or about April 11, 2022, the People filed an Affirmation in Opposition and a Memorandum of Law. The People also provided the Court with an unredacted certified copy of the stenographic transcript of the August 25, 2021, Grand Jury proceeding, along with copies of the Grand Jury Exhibits.

After consideration of the above referenced submissions and the unredacted certified stenographic transcript of the August 25, 2021, Grand Jury proceeding, the Court decides Defendant's Motion as follows:

1. MOTION FOR INSPECTION OF GRAND JURY MINUTES AND DISMISSAL OR REDUCTION OF THE CHARGES CONTAINED IN INDICTMENT NUMBER 21-0448 DUE TO THE LEGAL INSUFFICIENCY OF THE EVIDENCE PRESENTED AND THE INSTRUCTIONS PROVIDED.

Citing CPL §§ 210.20 (1) (b), (1-a) and 210.30, Defendant requests that the Court inspect the minutes of the Grand Jury proceeding and dismiss Indictment Number 21-0448 or certain counts thereof "as not supported by legally sufficient evidence" (*see* Paragraph (a), Page 1, of Defendant's Notice of Motion and Point I, Page 2, of Defendant's Memorandum of Law). Defendant also requests that the Court inspect the minutes of the Grand Jury proceeding to determine whether the provided instructions were legally sufficient and proper and whether the Grand Jury proceeding was defective (*see* Point I (a)- (t), Pages 2-5, of Defendant's Memorandum of Law).

In their response, the People consent to an in-camera inspection of the Grand Jury minutes by the Court, contend that the indictment is supported by legally sufficient evidence (*see* Point I, Pages 1-2, of the People's Memorandum of Law), and assert that "Defendant has failed to meet her high burden of showing the existence of any error in the grand jury proceeding which rendered it defective" (*see* Point I, Page 2, of the People's Memorandum of Law).

The Court has conducted an in-camera review of the entirety of the Grand Jury proceedings, having examined an unredacted certified copy of the stenographic transcript of the August 25, 2021 presentation.

On August 25, 2021, prior to the commencement of the given sworn testimony, the People specifically inquired of and confirmed with the foreperson that twenty-two (22) grand jurors were present. The record establishes that the twenty-one (21) grand jurors who deliberated and voted on the charges contained in Indictment Number 21-0448 were present throughout the one-day presentation of the case.

"Courts assessing the sufficiency of the evidence before a grand jury must evaluate 'whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted – and deferring all questions as to the weight or quality of the evidence – would warrant conviction'" (*People v Mills*, 1 NY3d 269, 274-275 [2003], quoting *People v Carroll,* 93 NY2d 564, 568 [1999]; *see People v Bello*, 92 NY2d 523, 525 [1998]; *People v Jensen*, 86 NY2d 248, 251 [1995]; *People v Jennings*, 69 NY2d 103, 114 [1986]; *People v Booker*, 164 AD3d 819, 820 [2d Dept 2018]; *People v Hulsen*, 150 AD3d 1261, 1262 [2d Dept 2017], *lv. denied* 30 NY3d 950 [2017]; *People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL § 70.10 (1); *see People v Mills,* 1 NY3d at 274; *People v Franov*, 146 AD3d 978, 979 [2d Dept 2017]; *People v Wisey*, 133 AD3d 799, 800 [2d Dept 2015]; *People v Ryan* 125 AD3d 695, 696 [2d Dept 2015], *lv. denied* 25 NY3d 1077 [2015]). "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 Castro*, 202 AD3d 815, 816 [2d Dept 2022], quoting *People v Bello*, 92 NY2d at 526; *see People v Addimando*, 197 AD3d 106, 121 [2d Dept 2021]; *People v Ryan*, 125 AD3d at 696; *People v Woodson,* 105 AD3d 782, 783 [2d Dept 2013]; *People v Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). This Court's inquiry is "limited to 'whether the facts, if proven, and the inferences that logically flow from those facts supply proof

of every element of the charged crimes,' and whether 'the Grand Jury could rationally have drawn the guilty inference'" (*People v Bello*, 92 NY2d at 526, quoting *People v Deegan,* 69 NY2d 976, 979 [1987]; *see People v Castro*, 202 AD3d at 816; *People v Pino*, 162 AD3d 910, 911 [2d Dept 2018]; *People v Arcila*, 152 AD3d 783, 784 [2d Dept 2017], *lv. denied* 30 NY3d 978 [2017]).

Here, the evidence presented to the Grand Jury, when viewed in the light most favorable to the People, was legally sufficient to establish and support the charges contained in Indictment Number 21-0448.

A Grand Jury proceeding is "defective," warranting dismissal of the indictment, only where the "proceeding . . . fails to conform to the requirements of CPL Article 190 to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL § 210.35 (5); *see People v Arevalo*, 172 AD3d 891, 892 [2d Dept 2019]; *People v Williams*, 171 AD3d 804, 805 [2d Dept 2019]). Dismissal of an indictment under CPL § 210.35 (5) is an "exceptional remedy" that "should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury" (*People v Huston*, 88 NY2d 400, 409 [1996]; *see People v J.S. Atl. Dental, P.C.*, 202 AD3d 708, 709 [2d Dept 2022]; *People v Addimando*, 197 AD3d at 121; *People v Williams,* 171 AD3d at 805; *People v Burch,* 108 AD3d 679, 680 [2d Dept 2013], *lv. denied* 22 NY3d 1087 [2014]; *People v Thompson*, 81 AD3d 670, 671 [2d Dept 2011], *aff'd* 22 NY3d 687 [2014]). In the case at bar, the Court finds that no such wrongdoing, conduct or errors occurred.

While a prosecutor is required to instruct the grand jury on the law with respect to matters before it (*People v Valles*, 62 NY2d 36, 38 [1984]; *People v Tunit*, 149 AD3d 1110, 1110 [2d Dept 2017]; *People v Samuels*, 12 AD3d 695, 698 [2d Dept 2004]; *see* CPL § 190.25 (6)), "a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law" (*People v Calbud, Inc.*, 49 NY2d 389, 394 [1980]; *see People v Caracciola*, 78 NY2d 1021, 1022 [1991]; *People v Batashure*, 75 NY2d 306, 311 [1990]; *People v Goetz*, 68 NY2d 96, 115 [1986]; *People v Valles* 62 NY2d 36, 38 [1984]; *People v Tunit*, 149 AD3d at 1110; *People v Castaldo*, 146 AD3d 797, 798 [2d Dept 2017]; *People v Burch,* 108 AD3d at 680; *People v Malan-Pomaeyna*, 72 AD3d 988 [2d Dept 2010]). It is well settled that such instructions are sufficient so long as they provide "enough information to enable [the grand jury] intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime" (*People v Calbud, Inc.*, 49 NY2d at 394-

395; *see People v Valles* 62 NY2d at 38; *People v Ruvalcaba,* 187 AD3d 1553, 1554 [4th Dept 2020], *lv. denied* 36 NY3d 1053 [2021]; *People v Tunit*, 149 AD3d at 1110-1111; *People v Patterson,* 73 AD3d 1215, 1215 [2d Dept 2010], *lv. denied* 15 NY3d 776 [2010]; *People v Malan-Pomaeyna*, 72 AD3d at 988).

Here, after an in-camera review of the unredacted certified copy of the stenographic transcript of the Grand Jury presentation on August 25, 2021, this Court determines that the Grand Jury proceeding was not defective and that the instructions given during the presentation were legally sufficient and proper.

Accordingly, for the reasons set forth above, Defendant's motion to dismiss or reduce the charges contained within Indictment Number 21-0448 is denied.

2. MOTION TO SUPPRESS STATEMENTS.

Citing CPL Article 710, Defendant moves to suppress "certain statements noticed by the People alleged to have been made by the defendant" (*see* Paragraph (b), Page 1, of Defendant's Notice of Motion and Point II, Page 6, of Defendant's Memorandum of Law). In the alternative, Defendant requests that the Court conduct a "***Huntley*** hearing" (*see* Paragraph (b), Page 1, of Defendant's Notice of Motion). Specifically, Defendant contends that the "statements were made involuntarily and in violation of the defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 6 of the New York Constitution and CPL 60.45 (2)" (*see* Point II, Page 6, of Defendant's Memorandum of Law). Defendant further moves pursuant to CPL § 710.20 (4), "to suppress all evidence, including tangible property, identification evidence and any other statements of defendant, which were obtained as a result of or due to the...unlawfully obtained statement...[as] 'fruits of the poisonous tree'" (*see* Point II, Page 6, of Defendant's Memorandum of Law).

As to Defendant's Fifth Amendment claims, the People "consent to a *Huntley* hearing, after which her motion to suppress should be denied" and contend that the defendant's statements were made voluntarily (*see* Point II, Page 5, of the People's Memorandum of Law). Specifically, the People submit that "[p]rior to asking [Defendant] any questions, Officer Patterson read defendant her *Miranda* rights, which defendant indicated she understood" and "that defendant intelligently

and knowingly waived her *Miranda* rights[2] prior to speaking with the officers in this case" (*see* Point II, Pages 5-6, of the People's Memorandum of Law). The People further allege that "even if there was any defect in the waiver, Miranda warnings were not even required since defendant was not in custody" (*see* Point II, Page 6, of the People's Memorandum of Law). Finally, the People aver that while they are "unaware of any evidence obtained pursuant to defendant's statements, since defendant's statements were voluntarily given, anything obtained therefrom would be lawful and not subject to suppression" (*see* Point II, Page 7, of the People's Memorandum of Law).

Regarding Defendant's Sixth Amendment claims, the People argue that Defendant's motion should be denied because "defendant has failed to provide any facts in support thereof" and "at the time defendant made her statements, no accusatory instrument had been filed, no attorney actually entered the case, nor did defendant invoke her right to counsel" (*see* Point II, Page 7, of the People's Memorandum of Law).

Upon the issues raised by the parties, Defendant's motion to suppress statements is granted to the extent that hearings pursuant to *People v Huntley*, 15 NY2d 72 [1965], and *Dunaway v New York*, 442 US 200 [1979], will be conducted to determine the voluntariness and admissibility of the noticed statements allegedly made by Defendant to members of the Mount Vernon Police Department at approximately 2:00 p.m. on April 6, 2021.

3. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY.

Pursuant to CPL § 710.30 (1) (b), the People served five (5) notices upon Defendant regarding their intent to offer trial testimony from a witness or witnesses who allegedly identified the defendant via two (2) video identifications that allegedly occurred at 17 South 13th Avenue in the City of Mount Vernon and at the Mount Vernon Police Department on March 29, 2021, a single photographic identification at the Mount Vernon Police Department on March 30, 2021, and two

[2] The People state that "[t]he reading of Defendant's *Miranda* rights, her waiver of those rights, and the subsequent interview that transpired were captured on video, a copy of which was provided to defense counsel on February 18, 2022 via the Westchester County District Attorney's Office Discovery Portal" (*see* Point II, Page 6, of the People's Memorandum of Law). Items A and G of the Discovery Disclosure Index, referring to "Written and Recorded Statements of Defendant or Co-Defendant" and "Tapes and Electronic Recordings," allege that the recording of Defendant's Interview at the Mount Vernon Police Department was provided to defense counsel on "2/18/22." A Discovery Package Transmittal Notice also reflects that the video of the "Nicole Smith Interview" was provided to defense counsel on February 18, 2022.

(2) video identifications that allegedly occurred on August 25, 2021, at the Westchester County Grand Jury.

Citing CPL Article 710 and *United States v Wade*, 338 US 218 (1967), Defendant moves to suppress any "pre-trial identifications of the defendant noticed by the People" (*see* Paragraph (c), Page 1, of Defendant's Notice of Motion and Point III, Page 7, of Defendant's Memorandum of Law). In the alternative, Defendant requests that the Court conduct a "***Wade*** hearing" (*see* Paragraph (c), Page 1, of Defendant's Notice of Motion).

In response, the People contend that Defendant's motion should be denied because the identifications of defendant were confirmatory in nature and were therefore not subject to suppression pursuant to CPL § 710.30 (*see* Point III, Pages 8-9, of the People's Memorandum of Law). Specifically, as to the four identifications made by the victim, the People argue that as "the victim is the superintendent of the building in which defendant resided at the time of the crime(s)...[there] is no question, and defendant does not contest anywhere in her motion papers, that she and the victim were well known to each other" and, therefore, such identifications cannot "be the product of undue suggestiveness" (*see* Point III, Page 8, of the People's Memorandum of Law). The People also argue that the identifications should not be suppressed because "the victim has an independent source for his identifications of defendant" (*see* Point III, Page 9, of the People's Memorandum of Law).

As to the identification made by Officer Patterson as he was testifying before the grand jury, the People contend that since "the officer [was] viewing a video-recorded interview with defendant, a video of an event for which he himself experienced...[as] an active participant in the interview...this viewing represents a ratification of the events depicted" and, therefore, "there is no risk of suggestiveness" (*see* Point III, Pages 9-10, of the People's Memorandum of Law).

As the People contend that the alleged victim was so familiar with Defendant so as to negate any possibility of suggestiveness, the Court will conduct a hearing pursuant to *People v Rodriguez*, 79 NY2d 445, 454 [1992], in connection with such identification(s). At the conclusion of the *Rodriguez* hearing, if this Court concludes that the identification(s) was(were) confirmatory, no further hearing on the issue of identification testimony is needed. However, if this Court does not so conclude, a bifurcated *Wade* hearing will then be held. Defendant's motion to suppress the

identification testimony of Officer Patterson is granted to the extent that a *Wade* hearing will be conducted to determine if he "was merely ratifying the events he had personally experienced as depicted in the [videotape]" (*People v Deverow*, 153 AD3d 550, 551 [2d Dept 2017]).

4. MOTION TO SUPPRESS PHYSICAL EVIDENCE.

Citing CPL Article 710, *Mapp v Ohio*, 367 US 643 [1961], and *Dunaway v New York*, 442 US 200 [1979], Defendant moves to suppress any "tangible property seized from the defendant and any items, property or statements derived therefrom as such seizure occurred in violation of rights secured to the defendant under the Constitutions of the United States and the State of New York" (*see* Paragraph (d), Page 2, of Defendant's Notice of Motion). In the alternative, Defendant requests that the Court conduct a "***Mapp*/Dunaway** hearing" (*see* Paragraph (d), Page 2, of Defendant's Notice of Motion).

In response, the People state that "[a]s there was no physical evidence seized from the defendant in this case, or from any place where [she] would have an objectively reasonable expectation of privacy, this branch of defendant's motion should be denied" (*see* Point IV, Page 10, of the People's Memorandum of Law). Additionally, Item M of the Discovery Disclosure Index referring to "Tangible Objects Possessed by Defendant or Co-Defendant(s)," indicates that a "metal object/wrench" and a "Blue hat/mask" were possessed by both Defendant and co-defendant Jeffers, but that such objects were "[n]ot recovered."

Accordingly, as the People contend that there was no physical evidence seized/recovered from Defendant, the motion is denied as moot.

5. MOTION FOR SEVERANCE.

Citing CPL § 200.40, Defendant moves to sever the trial of the co-defendants and claims that "it is prejudicial to the defendant to have the defendants tried jointly" (*see* Paragraph (e), Page 2, of Defendant's Notice of Motion and Point IV, Page 8, of Defendant's Memorandum of Law). Specifically, Defendant contends that "[a]lthough the charges here arise out of the same incident, the codefendants are not charged with any of the same crimes in the Indictment" (*see* Point IV,

Page 8, of Defendant's Memorandum of Law). Defendant further alleges that "it is possible that the codefendants in this case will have antagonistic defenses" (*see* Point IV, Page 8, of Defendant's Memorandum of Law).

In response, the People claim that defendants were properly joined in Indictment Number 21-0448 pursuant to CPL § 200.40 (1) (c), since the charges arise from the same incident on March 28, 2021, that the same evidence will be presented to prove the guilt of both defendants, and that "mere inconsistent defenses are not grounds for severance" (*see* Point VI, Pages 12-13, of the People's Memorandum of Law).

Primarily, the Court finds that the joinder of Defendant and co-defendant Jeffers in Indictment Number 21-0448 is proper as "all the offenses charged are based upon the same criminal transaction" (CPL § 200.40 (1) (c)). Nonetheless, Defendant is entitled to seek severance "for good cause shown" which includes, but is not limited to, "a finding that a defendant...will be unduly prejudiced by a joint trial" (CPL § 200.40 (1)).

In *People v Mahboubian*, 74 NY2d 174, 183-184 [1989], the Court of Appeals, while recognizing that "[s]ome degree of prejudice is of course inherent in every joint trial," provided that "severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" (*see People v Cardwell*, 78 NY2d 996, 997-998 [1991]; *People v Perry*, 194 AD3d 849, 850 [2d Dept 2021], *lv. denied* 37 NY3d 1098 [2021]; *People v Boylan*, 193 AD3d 964, 965 [2d Dept 2021]; *People v Caldwell*, 150 AD3d 1021, 1022 [2d Dept 2017], *lv. denied* 29 NY3d 1124 [2017]; *People v Lau*, 148 AD3d 932, 935 [2d Dept 2017]; *People v Lessane*, 142 AD3d 562, 563 [2d Dept 2016]; *People v Mack*, 89 AD3d 864, 865 [2d Dept 2011], *lv. denied* 18 NY3d 959 [2012]). Moreover, where, as here, "the proof of the charges against the defendant will be premised on the same evidence used to establish [her] codefendant's guilt, only the most cogent reasons would warrant a severance" (*People v Fassino*, 169 AD3d 921, 923 [2d Dept 2019], *lv. denied* 33 NY3d 975 [2019]; *see People v Bornholdt*, 33 NY2d 75, 87 [1973], *cert. denied* 416 US 905 [1974]; *People v Boylan*, 193 AD3d at 965; *People v Caldwell*, 150 AD3d at 1022; *People v Turnbull*, 52 AD3d 747 [2d Dept 2008], *lv. denied* 11 NY3d 836 [2008]).

While recognizing that this Court must apply the standard set forth in *Mahboubian* "prospectively, based on its discretionary assessments of the strategies and evidence as forecast by

the parties" (*People v Mahboubian*, 74 NY2d at 184-185; *see People v Cardwell*, 78 NY2d at 998; *People v Lessane*, 142 AD3d at 564), there has not been anything forecast showing that "a joint trial necessarily will...result in unfair prejudice to the moving party and substantially impair [her] defense" (*People v Gordon*, 197 AD3d 723, 724 [2d Dept 2021], quoting *People v Mahboubian*, 74 NY2d at 184; *see People v Fassino*, 169 AD3d at 923). Further, because "severance is not required solely because of hostility between the defendants, differences in their trial strategies or inconsistencies in their defenses" (*People v Gordon*, 197 AD3d at 724, quoting *People v Mahboubian*, 74 NY2d at 184; *see People v Fassino*, 169 AD3d at 923; *People v Davydov*, 144 AD3d 1170 [2d Dept 2016], *lv. denied* 29 NY3d 996 [2017]), Defendant's speculative contention that "it is possible that the codefendants in this case will have antagonistic defenses" (*see* Point IV, Page 8, of Defendant's Memorandum of Law) does not provide the necessary cogent reason to warrant severance (*see People v Bornholdt*, 33 NY2d at 87; *People v Martin*, 154 AD2d 554 [2d Dept 1989], *lv. denied* 75 NY2d 815 [1990]; *People v Gonzalez*, 137 AD2d 558 [2d Dept 1988], *lv. denied* 72 NY2d 957 [1988]). Therefore, Defendant's motion for severance is denied.

6. MOTION FOR PRECLUSION OF DEFENDANT'S PRIOR CRIMES OR BAD ACTS; ASOCIATED SANDOVAL AND VENTIMIGLIA HEARINGS.

Relying on *People v Sandoval*, 34 NY2d 371 [1974], and *People v. Ventimiglia*, 52 NY2d 350 [1981], Defendant requests "a hearing to determine the admissibility of any prior criminal or bad acts for use by the [P]eople on their direct case or during the cross examination of the defendant" (*see* Paragraph (f), Page 2, of Defendant's Notice of Motion and Point V, Page 9, of Defendant's Memorandum of Law).

In response, the People acknowledge their *Sandoval* and *Ventimiglia* obligations and consent to hearings on same if such disclosure is made (*see* Point V, Page 11, of the People's Memorandum of Law). The People also indicate that should they "seek to introduce defendant's prior bad acts on their direct case, the People will inform defense counsel and the Court and request a hearing before introducing such *Molineux* evidence" (*see* Point V, Page 11, of the People's Memorandum of Law).

CPL § 245.20 (3) (a) provides, in substance and pertinent part, that "[t]he prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in

the indictment, which the prosecution intends to use at trial for purposes of impeaching the credibility of the defendant." To the extent that the People seek to use any of Defendant's prior acts of misconduct or criminality on their direct case as substantive proof of any material issue in the case, CPL § 245.20 (3) (b) likewise obligates "[t]he prosecution [to] disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, which the prosecution intends to use at trial [for such purpose]." Lastly, CPL § 245.20 (3) further requires that "the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof."

As the People have concededly not yet disclosed to the defendant a list of her acts of misconduct and criminality which the prosecution intends to use at trial for purposes of impeaching her credibility or as substantive proof of any material issue in the case, or designated their intended use thereof, this Court will not order the requested *Sandoval* and *Ventimiglia* hearings at the present time. Should the People seek to use at trial any prior acts of misconduct or criminality of the defendant for CPL § 245.20 (3) (a) or (b) purposes, they are directed to disclose to Defendant a list of all such acts of misconduct and criminality and to designate the intended purpose of each listed act. Pursuant to CPL § 245.10 (1) (b), the People "shall perform [these] supplemental discovery obligations *as soon as practicable* but not later than fifteen (15) calendar days prior to the first scheduled trial date" (emphasis added). If the People do so, Defendant may renew her application to preclude the People's use of such acts of misconduct or criminality at trial or, in the alternative, request a hearing thereon to determine the admissibility thereof. If the People fail to do so, no use of such acts will be permitted at trial.

7. RESERVATION OF RIGHTS TO MAKE ADDITIONAL PRE-TRIAL MOTIONS.

Defendant's request to make additional pre-trial motions (*see* Page 2 of Defendant's Notice of Motion and Page 10 of Defendant's Memorandum of Law) is granted to the extent that, if sought, she will be required to serve and file an Order to Show Cause detailing the reason(s) why said motions were not brought in conformity with the time provisions and motions practice set forth in CPL § 255.20 (1) and (2), respectively.

However, notwithstanding the provisions of CPL § 255.20 (1) and (2), this Court will "entertain and decide on its merits, at any time before the end of the trial, any appropriate pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been

previously aware, or which, for other good cause, could not reasonably have been raised within the period specified in [CPL § 255.20 (1)] or included within the single set of motion papers as required by [CPL § 255.20 (2)]" (CPL § 255.20 (3); *see People v Wisdom*, 23 NY3d 970, 972 [2014]; *People v Marte,* 197 AD3d 411, 413 [1st Dept 2021]; *People v Burke*, 174 AD3d 915, 915 [2d Dept 2019]; *People v Milman*, 164 AD3d 609, 610 [2d Dept 2018]).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 27, 2022

HONORABLE ROBERT J. PRISCO
County Court Judge

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