COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DARNELL BUFFERT,

Defendant.

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DECISION & ORDER

Indictment No: 21-0447

ROBERT J. PRISCO, J.

Defendant **DARNELL BUFFERT** is charged by Indictment Number 21-0447 with two counts of Attempted Gang Assault in the First Degree pursuant to Penal Law [PL] §§ 110 and 120.07 [Counts One and Three], one count of Attempted Assault in the Second Degree pursuant to PL §§ 110 and 120.05 (2) [Count Two], two counts of Attempted Assault in the First Degree pursuant to PL §§ 110 and 120.10 (1) and (4) [Counts Four and Five], two counts of Assault in the Second Degree pursuant to PL § 120.05 (2) and (6) [Counts Six and Seven], one count of Criminal Possession of a Weapon in the Third Degree pursuant to PL § 265.02 (1) [Count Eight], one count of Robbery in the First Degree pursuant to PL § 160.15 (3) [Count Nine] and two counts of Robbery in the Second Degree pursuant to PL § 160.10 (1) and (2) (a) [Counts Ten and Eleven]. In sum and substance, the charges pertain to Defendant's alleged intentional attempt with others to cause serious physical injury to an individual by means of a dangerous instrument, the resulting injury allegedly sustained by that individual, and Defendant's alleged participation with others in the forcible theft of property from said individual. The above offenses are alleged to have occurred at 1 Park Avenue in the City of Mount Vernon, at approximately 1:30 a.m. on October 31, 2020.

On September 27, 2021, Defendant was arraigned by the Honorable David S. Zuckerman on the charges contained in Indictment Number 21-0447. Attached to the indictment are a Criminal Procedure Law [CPL] § 710.30 (1) (a) Notice regarding the People's intent to offer evidence of a statement allegedly made by the defendant to a public servant, nine (9) CPL § 710.30 (1) (b) Notices signifying the People's intent to offer testimony of an observation 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 him as such, and the People's Demand for a Notice of Alibi pursuant to CPL § 250.20. Also attached to the indictment is an Information

accusing the defendant of having been previously convicted of the crime of Attempted Murder in the Second Degree on or about February 18, 2015, in the Bronx County Supreme Court.

On October 26, 2021, 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 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, exculpatory and impeachment information, and Judgments of Conviction for defendants and witnesses excluding law enforcement and expert witnesses. Also attached to the Certificate of Compliance are Discovery Package Transmittal Notices from the Westchester County District Attorney's Office.

On October 26, 2021, Defendant filed a "Demand for Bill of Particulars" and the People provided such to the defendant on November 8, 2021.

On November 18, 2021, Defendant filed a Notice of Motion, Attorney's Affirmation and Memorandum of Law, seeking various forms of judicial intervention and relief.

On December 2, 2021, the People filed an Affirmation in Opposition and a Memorandum of Law. The Court has also been provided with an unredacted certified copy of the stenographic transcript of the September 7, 2021 Grand Jury proceeding, along with copies of the Grand Jury Exhibits.

On January 24, 2022, the People filed a Supplemental Certificate of Compliance[1] pursuant to CPL §§ 245.50 (1) and 245.60, wherein the People again confirmed and announced their readiness for trial "on all counts charged in this matter." Attached to the Supplemental Certificate of Compliance are Discovery Package Transmittal Notices from the Westchester County District Attorney's Office.

After consideration of the above referenced submissions and the unredacted certified stenographic transcript of the September 7, 2021 Grand Jury proceeding, the Court decides Defendant's Motion as follows:

[1] The Court notes that in the cover letter attached to the Supplemental Certificate of Compliance, the People state "that scientific testing by the Westchester County Department of Laboratories and Research is not yet completed" and that the People "will provide the results of this testing as well as any final reports, documents, records, data, calculations or writings and relevant laboratory information as soon as testing is completed."

1. MOTION FOR DISCLOSURE OF MATERIAL INFORMATION.

Defendant moves for discovery and provides a list of items, property and information that the defendant contends is "within the control of the prosecution" and "is necessary to the preparation of an effective defense" (*see* Point A, Pages 2-5, of Defendant's Notice of Motion).

In response, the People assert that they "have provided defendant with substantial discovery beginning on June 9, 2021,...have continued to do so throughout the pendency of this case" and oppose discovery "to the extent it exceeds CPL Article 245" (*see* Point II, Pages 2-3, of the People's Memorandum of Law). The People further assert that "[a]ny motion by defendant for discovery within the parameters of CPL Article 245 is moot because, to the extent such material exists and is in [the] possession or control of the People, it has or will be provided to defendant" (*see* Point II, Page 2, of the People's Memorandum of Law).

Pursuant to CPL § 245.50 (1), the People served and filed a Certificate of Compliance dated October 26, 2021, and provided a Discovery Disclosure Index, along with Discovery Package Transmittal Notices identifying the material and information that was provided and made available to Defendant. On January 24, 2022, the Court received a copy of the People's Supplemental Certificate of Compliance, along with Discovery Package Transmittal Notices identifying the additional items that were provided to defense counsel. Both the Certificate of Compliance and the Supplemental Certificate of Compliance set forth that, after exercising due diligence and making reasonable inquiry to ascertain the existence of material and information subject to discovery, the People have disclosed and made available to Defendant all known material and information subject to discovery.

Accordingly, as the People have presumably satisfied the requirements of CPL § 245.50 (1) by providing the discovery required by CPL § 245.20 (1), serving upon the defendant and filing with the Court a Certificate of Compliance and a Supplemental Certificate of Compliance, and by specifically identifying the material and information provided, Defendant's request for discovery and production is denied as moot. If Defendant has specific challenges or questions related to the People's disclosure representations within the Certificate of Compliance or Supplemental Certificate of Compliance, such challenges or questions must be addressed by motion (CPL § 245.50 (4)). If there are no specific challenges or questions thereto, Defendant should have

performed his reciprocal discovery obligations, subject to constitutional limitations, no later than thirty (30) calendar days after being served with the Supplemental Certificate of Compliance (CPL § 245.20 (4)).

Notwithstanding the above, CPL § 245.20 (2) directs the prosecutor to make a diligent, good faith effort to ascertain the existence of material and information discoverable under CPL § 245.20 (1) and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control. If the People subsequently learn of additional discoverable material or information, they must expeditiously notify and disclose such material and information to the defense, including material or information that became relevant to the case or discoverable based on reciprocal discovery received from the defendant (*see* CPL § 245.60). In such case, they are also required to serve upon Defendant and file with the Court an additional Supplemental Certificate of Compliance identifying the additional material and information provided (CPL § 245.50 (1)).

2. MOTION FOR EXCULPATORY INFORMATION.

Defendant moves to be provided with "all information material and property of whatever kind within the knowledge, possession or control of the District Attorney or any law enforcement agency which may assist the defense or tend to exculpate defendant, or to negate any element of any crime charged against him, or to mitigate the degree of any such crime, or to reduce his criminal liability or lessen his potential punishment, or which supports the position of the defense or tends to disprove the position of the prosecution at any anticipated trial or hearing of this matter" (*see* Point B, Pages 5-7, of Defendant's Notice of Motion and Pages 1-5 of Defendant's Memorandum of Law).

In response, the People aver that they "recognize their continuing obligation to disclose exculpatory evidence that is within their possession pursuant to *Brady v Maryland* (373 US 83 [1963]) and *People v Fein* (18 NY2d 162 [1966])," [2] state that "[t]o the extent that such material becomes known and is in possession of the People, it will be provided to the defendant...[and

[2] The People also acknowledge their obligation "to disclose the terms of any deal or agreement between the government and any prosecution witness under the guidelines set forth in *Giglio v United States* (405 US 150 [1972])" (*see* Page 1, Footnote 9, of the People's Memorandum of Law).

represent that] the People have or will comply with their obligations under CPL 245.20 (1) (k), (l), and (p)" [3] (*see* Point I, Page 1, of the People's Memorandum of Law).

The People are respectfully reminded to remain cognizant of their discovery obligations not only as required by *Brady*, *Giglio v United States,* 405 US 150 [1972], *People v Geaslen*, 54 NY2d 510 [1981], and their respective progeny, but also as mandated by CPL Article 245. Specifically, CPL § 245.20 (1) (k) requires that the prosecutor disclose "[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in this case, that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment" and such disclosure must occur expeditiously upon its receipt, "whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information."

Pursuant to CPL § 245.20 (1) (l), the People must also disclose "a summary of all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement."

To the extent that such evidence and information is known but has not yet been disclosed, the People are directed to do so expeditiously. Further, should the People ascertain the existence of *Brady, Geaslen*, or *Giglio* material, or of any of the materials and information itemized in CPL § 245.20 (1) (k) and (l), through their mandated diligent, good faith effort to do so or otherwise, they are directed to expeditiously disclose the same upon its receipt.

3. MOTION TO STRIKE THE PEOPLE'S CPL 710.30 STATEMENT NOTICE.

Pursuant to CPL § 710.30 (1) (a), the People served a notice upon Defendant regarding their intent to offer evidence of an oral statement allegedly made by the defendant to members of

[3] Item K of the Discovery Disclosure Index, referring to "Exculpatory and Impeachment Information," indicates that such information was provided to the defendant. Direction is also given to "[s]ee 1K addendum(s) provided: Date 6/14/21; 10/21/21; 10/26/21; Method-Portal."

the City of Mount Vernon Police Department at 79 Alexander Street in the Bronx at approximately 12:30 p.m. on June 1, 2021. In substance, Defendant is alleged to have stated "Go, go, go!"

Citing CPL § 710.30 (1), Defendant moves to strike the People's statement notice on the ground that the "notices provided in this matter provide neither the circumstances nor the identities minimally required" (*see* Pages 5-6 of Defendant's Memorandum of Law).

In response, the People claim that Defendant's motion to strike the People's statement notice should be denied since such notice provides the time, place, and manner in which it was given and the substance of the statement (*see* Point III, Page 4, of the People's Memorandum of Law).

As the People's notice is in conformity with the statutory requirements of CPL § 710.30 (1) (a), in that it provides the time, place and manner in which the statement was made and the substance of the statement (*see People v Lopez*, 84 NY2d 425, 428 [1994]; *People v Raszl*, 108 AD3d 1049, 1050 [4th Dept 2013]; *People v Coleman*, 256 AD2d 473, 474 [2d Dept 1998], *lv. denied* 93 NY2d 872 [1999]), and, thus, has provided the defendant an "opportunity to challenge before trial the voluntariness of statements [allegedly] made by him" *(People v Lopez*, 84 NY2d at 428, citing *People v O'Doherty,* 70 NY2d 479, 484 [1987]; *see People v Simpson*, 35 AD3d 1182, 1183 [4th Dept 2006], *lv. denied* 8 NY3d 990 [2007]; *People v Laporte*, 184 AD2d 803, 804 [3d Dept 1992], *lv. denied* 80 NY2d 905 [1992]), Defendant's motion to strike the People's statement notice is denied.

4. MOTION TO STRIKE THE PEOPLE'S CPL 710.30 IDENTIFICATION NOTICES AND TO SUPPRESS IDENTIFICATION TESTIMONY.

Pursuant to CPL § 710.30 (1) (b), the People served nine (9) notices upon Defendant regarding their intent to offer trial testimony from a witness or witnesses who allegedly identified him through single photographic identifications that occurred at approximately 11:30 a.m. on November 1, 2020, at an "[a]ddress known to the Westchester County District Attorney's Office" and at approximately 3:05 p.m. on December 1, 2020, at 79 Alexander Street in the Bronx; via alleged photographic array identifications that occurred at approximately 1:40 p.m. on November 13, 2020, at Mount Vernon Police Department Headquarters and at a previous hearing or proceeding held at 2 Roosevelt Square North in the City of Mount Vernon at approximately 2:00

p.m. on June 17, 2021, and; by way of alleged video identifications that took place at approximately 2:15 p.m. on June 17, 2021, at 2 Roosevelt Square North in the City of Mount Vernon, at approximately 3:00 p.m. on August 26, 2021, at 111 Dr. Martin Luther King Jr. Blvd. in the City of White Plains, at approximately 2:00 p.m. on September 2, 2021, and at approximately 9:30 a.m. and 11:00 a.m. on September 7, 2021, at the same location.

Citing CPL § 710.30 (1), Defendant moves to strike the People's identification notices on the ground that the "notices provided in this matter provide neither the circumstances nor the identities minimally required" (*see* Pages 5-6 of Defendant's Memorandum of Law). Pursuant to CPL Articles 710 and 60, the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 6, of the New York State Constitution, Defendant also moves to suppress from use at trial "the identification noticed to the defense" and "any in court identification of Darnell Buffert by any person present at any such noticed procedure" (*see* Point C, Page 7, of Defendant's Notice of Motion and Pages 6-8 of Defendant's Memorandum of Law). In the alternative, Defendant moves for a "*Wade/Dunaway* hearing" claiming that the identification procedures were suggestive or prejudicial and that there was no probable cause for his arrest (*see* Point C, Page 7, of Defendant's Notice of Motion and Pages 6-8 of Defendant's Memorandum of Law).

In response, the People claim that Defendant's motion to strike the People's identification notices should be denied since Defendant "waived any claim of deficiency in the People's CPL 710.30 notices" when Defendant moved to suppress such notices (*see* Point III, Pages 4-5, of the People's Memorandum of Law). The People also claim that the "identification notices, at a minimum specify the time, place, and manner in which they were given" (*see* Point III, Page 4, of the People's Memorandum of Law).

As to the November 13, 2020 photographic array identification, the People consent to a hearing "limited to the issue of the suggestiveness of the photo array procedure" and contend that "Defendant's motion to suppress identification evidence should be denied following a hearing pursuant to *United States v Wade*, 388 US 218 (1967) and CPL 710.64 (4)" (*see* Point IV, Page 6, of the People's Memorandum of Law). Regarding the single photographic identification on November 1, 2020, the People contend that such identification should not be suppressed as there was sufficient attenuation "between the single photo identification and the subsequent photo array

twelve days later...to dissipate any taint of suggestiveness" and that the victim has "a source from which to identify defendant that is independent of police procedure" (*see* Point IV, Page 8, of the People's Memorandum of Law).

With respect to the video surveillance identifications of Defendant on June 17, 2021, August 26, 2021, September 2, 2021, and September 7, 2021, the People assert that such identifications should not be suppressed nor the subject of a hearing as "the victim viewing surveillance video of an event for which he himself experienced...represent a ratification of the events depicted" and are therefore not identification procedures within the meaning of CPL § 710.30 (*see* Point IV, Page 9, of the People's Memorandum of Law).[4] As to the identification of Defendant on June 17, 2021 at a felony hearing, the People claim that such identification should not be suppressed because defendant "was represented by counsel...and did not object to the victim's identification of defendant or suggest that it should be precluded as unnecessarily suggestive" (*see* Point IV, Pages 10-11, of the People's Memorandum of Law).

With respect to the single photographic identification that allegedly occurred on November 1, 2020, as the defendant has moved for suppression of the identification testimony related thereto, he has waived his right to be heard on the sufficiency of the notice (*People v Merrill*, 87 NY2d 948, 949 [1996], *revg. on dissent* at 212 AD2d 987, 988 [4th Dept 1995]; *see People v Kirkland*, 89 NY2d 903, 904 [1996], *People v Lopez*, 84 NY2d at 428; *People v Perrilla*, 247 AD2d 326, 326-327 [1st Dept 1998], *lv. denied* 91 NY2d 1011 [1998]; *People v Estrada*, 241 AD2d 378, 379 [1st Dept 1997], *lv. denied* 90 NY2d 1011 [1997]; *People v Fuentes*, 240 AD2d 511, 512 [2d Dept 1997]).

As to the remaining eight (8) identification notices, because they are in conformity with the statutory requirements of CPL § 710.30 (1) (b), in that said notices provide the time, place and manner in which the identifications were made (*People v Lopez*, 84 NY2d at 428; *see People v Poles*, 70 AD3d 1402, 1403 [4th Dept 2010], *lv. denied* 15 NY3d 808 [2010]; *People v Sumter*, 68 AD3d 1701, 1701 [4th Dept 2009], *lv. denied* 14 NY3d 893 [2010]; *People v Mayers*, 233 AD2d

[4] While the People contend that the identification of Defendant by his parole officer, Marie Skyers, from a still photograph taken from the video surveillance is "not an identification procedure within the meaning of CPL 710.30" and that this "Court will see upon its inspection of the grand jury minutes, the officer was properly offering her lay opinion that the person in the video was defendant" (*see* Point IV, Page 10, of the People's Memorandum of Law), Parole Officer Skyers did not testify during the Grand Jury proceeding in this matter. According to the People's Affirmation in Opposition (*see* Page 4), the identification allegedly made by Parole Officer Skyers took place at approximately 2:00 p.m., on December 1, 2020, at 79 Alexander Street in the Bronx.

407, 407-408 [2d Dept 1996], *lv. denied* 89 NY2d 944 [1997]; *People v Ocasio*, 183 AD2d 921, 923 [2d Dept 1992], *lv. dismissed* 80 NY2d 932 [1992]), Defendant's motion to strike such notices is denied.

However, Defendant's motion to suppress is granted to the extent that a hearing pursuant to *United States v Wade*, 388 US 218 [1967], will be held in connection with the nine (9) noticed identifications. If the Court finds that any or all of the identification procedures were unduly suggestive or the result of a procedurally-defective pretrial identification procedure, then the People must prove by clear and convincing evidence the existence of an independent source for the witness' identifications in those unduly suggestive procedures (*People v Rahming*, 26 NY2d 411, 417 [1970]; *see People v Marshall*, 26 NY3d 495, 507 [2015]; *People v Goondall*, 173 AD3d 896, 898 [2d Dept 2019]; *People v McDonald*, 138 AD3d 1027, 1030 [2d Dept 2016]; *People v Pride*, 129 AD3d 869, 870 [2d Dept 2015]). Moreover, as the People have neither addressed nor opposed Defendant's request for a hearing pursuant to *Dunaway v New York*, 442 US 200 [1979], such a hearing will be conducted regarding the issue of probable cause.

5. MOTION FOR RELEASE OF THE GRAND JURY MINUTES TO DEFENDANT, INSPECTION THEREOF, AND DISMISSAL OR REDUCTION OF THE CHARGES CONTAINED IN INDICTMENT NUMBER 21-0447 DUE TO THE LEGAL INSUFFICIENCY OF THE EVIDENCE PRESENTED AND THE INSTRUCTIONS PROVIDED.

Citing CPL Article 210, Defendant moves to dismiss Indictment 21-0447 "for failure of the proceedings before the Grand Jury to conform to the standards of fundamental fairness and the requirements of law" (*see* Point D, Page 7, of Defendant's Notice of Motion). Defendant further moves for inspection "of the minutes of all Grand Jury hearings and proceedings" and dismissal pursuant to CPL § 210.30 of "all [c]ounts of [Indictment 21-0447], for lack of legally sufficient evidence before the said Grand Jury to support those counts or [reduction] of the charges in those counts to offenses actually supported by the evidence" (*see* Point D, page 7, of Defendant's Notice of Motion and Pages 8-10 of Defendant's Memorandum of Law). While acknowledging that a prior conviction is an element of the Criminal Possession of a Weapon in the Third Degree charge, Defendant claims that the People's failure to possess or to provide the defendant with "certified fingerprint comparison reports" evidencing Defendant's prior convictions, renders the grand jury

proceeding "prejudicially defective" (*see* Page 10 of Defendant's Memorandum of Law).[5] Finally, Defendant requests that the People "[p]rovide the defense counsel with a copy of the instructions of law given to the grand jury which voted indictment No. 21-0447" (*see* Point A, Page 4, of Defendant's Notice of Motion).

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 V, Pages 12-13, of the People's Memorandum of Law), and assert that "Defendant has failed to meet his high burden of showing the existence of any error in the grand jury proceeding which rendered it defective" (*see* Point V, Page 14, of the People's Memorandum of Law). The People further contend that "a certified fingerprint comparison report pertaining to defendant's prior conviction was presented to the grand jury, and a copy of that report has since been provided to defendant" (*see* Point V, Page 13, of the People's Memorandum of Law).[6]

Initially, regarding Defendant's request for the Grand Jury minutes in their entirety, this Court notes that CPL § 245.20 (1) (b) provides for automatic discovery of "[a]ll transcripts of the *testimony* of a person who has testified before a grand jury" (emphasis added). Similarly, CPL § 210.30 (3), which addresses motions to inspect grand jury minutes speaks only to the release of "grand jury *testimony* (emphasis added)." Accordingly, as there exists no statutory authority for the release to Defendant of those portions of the Grand Jury minutes that constitute colloquy or instructions and as the People have complied with the discovery mandate of CPL § 245.20 (1) (b) by providing the defendant with the transcript of the testimony of the four (4) witnesses who testified before the Grand Jury,[7] the defendant's request for the Grand Jury minutes in their entirety is denied.

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[5] While Defendant claims that "[c]ount[s] four and five of Indictment 21-0447 charges Darnell Buffert with Criminal Possession of a Weapon in the Third Degree" (*see* Page 10 of Defendant's Memorandum of Law), such counts charge Defendant with Attempted Assault in the First Degree; Count Eight charges Defendant with Criminal Possession of a Weapon in the Third Degree.

[6] During the September 7, 2021 Grand Jury presentation, a redacted certified Criminal History Record Information reflecting Defendant's Bronx County conviction and sentencing for the crime of Attempted Murder in the Second Degree was received into evidence as Grand Jury Exhibit Number 8B. A Discovery Package Transmittal Notice attached to the People's Supplemental Certificate of Compliance purports that the "Grand Jury Exhibits" were provided to defense counsel on November 18, 2021.

[7] A Discovery Package Transmittal Notice attached to the People's Supplemental Certificate of Compliance purports that the "Grand Jury Minutes" were provided to defense counsel on November 5, 2021.

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 September 7, 2021 presentation.

On September 7, 2021, prior to the commencement of the given sworn testimony, the People specifically inquired of and confirmed with the foreperson that twenty (20) grand jurors were present. The subsequent 20-0 vote to indict on the eleven charges presented for their consideration regarding Defendant satisfies this Court that the twenty grand jurors who deliberated and voted on the charges contained in Indictment Number 21-0447 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 Castro*, 2022 NY Slip Op 00874 [2d Dept 2022]; *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 Jessup*, 90 AD3d 782, 783 [2d Dept 2011], quoting *People v Bello*, 92 NY2d at 526; *see People v Ryan*, 125 AD3d at 696; *People v Woodson,* 105 AD3d 782, 783 [2d Dept 2013]). 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 Pino*, 162 AD3d 910, 911 [2d Dept 2018]).

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 21-0447.

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 Mitchell*, 188 AD3d 1101,1102 [2d Dept 2020]; *People v Sealy*, 181 AD3d 893, 894 [2d Dept 2020]; *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 Addimando*, 197 AD3d 106, 121 [2d Dept 2021]; *People v Sealy*, 181 AD3d at 894; *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, 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 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 September 7, 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 21-0447 is denied.

6. MOTION FOR THE DISCLOSURE OF DEALS AGREEMENTS OR DISCUSSIONS OF RETURN.

Defendant moves for the "District Attorney to disclose to defense counsel the existence, substance and details of any and all deals, agreements or discussions of return made or had with any witnesses or informants pertaining to this case or incident by the District Attorney or any representative of any correctional or law enforcement agency" (*see* Point F, Pages 7-8, of Defendant's Notice of Motion).

Pursuant to CPL § 245.20 (1) (l), the People are required to disclose "a summary of all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement."

While the People have acknowledged their obligation "to disclose the terms of any deal or agreement between the government and any prosecution witness under the guidelines set forth in *Giglio v United States*" (*see* Page 1, Footnote 9, of the People's Memorandum of Law), if such evidence and information exists and is known, but has not yet been disclosed, the People are directed to do so expeditiously. Should the People ascertain the existence of any of the materials and information referred to in *Giglio* or itemized in CPL § 245.20 (1) (l), through their mandated diligent, good faith effort to do so or otherwise, they are directed to expeditiously disclose the same upon its receipt.

To the extent that there are informants in this matter and Defendant is moving for disclosure of such, the motion is denied as there has not been a showing of "the relevance of the inform[ant]'s testimony to the guilt or innocence of the accused" (*People v Goggins*, 34 NY2d 163, 170 [1974], *cert. denied* 419 US 1012 [1974]; *see People v Singleton*, 42 NY2d 466, 468-469 [1977]; *People v Jenkins*, 41 NY2d 307, 308 [1977]; *People v Lynn*, 27 AD3d 381, 382 [1st Dept 2006], *lv. denied*

7 NY3d 791 [2006]; *People v Allen*, 298 AD2d 856, 856 [4th Dept 2002], *lv. denied* 99 NY2d 579 [2003]; *People v Vega*, 23 AD3d 504, 505 [2d Dept 2005], *lv. denied* 6 NY3d 782 [2006]; *People v Cole*, 224 AD2d 540, 540 [2d Dept 1996], *lv. denied* 88 NY2d 965 [1996]).

7. 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 at trial for any purpose of any and all alleged criminal convictions and/or criminal, vicious or immoral acts of defendant" (*see* Points G and H, Page 8, of Defendant's Notice of Motion and Pages 10-12, of Defendant's Memorandum of Law). Defendant also requests that the District Attorney notify him "of all specific instances of defendant's alleged prior uncharged criminal, vicious or immoral conduct of which the prosecution has knowledge, and which the District Attorney intends to use at trial" (*see* Point I, Page 8, of Defendant's Notice of Motion).

In response, the People acknowledge their *Sandoval* and *Ventimiglia* obligations and consent to hearings on same if such disclosure is made (*see* Point VI, Page 16, of the People's Memorandum of Law).[8] 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 VI, Page 16, 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

[8] Item P of the Discovery Disclosure Index, referring to "Judgments of Conviction for Defendants and Witnesses Excluding Law Enforcement and Expert Witnesses," indicates that Defendant's "Criminal History" was provided to defense counsel on October 26, 2021 via the "Portal." A Discovery Package Transmittal Notice attached to the People's Certificate of Compliance also purports that the "Buffert Criminal History" was provided to defense counsel on October 26, 2021.

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 his acts of misconduct and criminality which the prosecution intends to use at trial for purposes of impeaching his 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 his 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.

8. MOTION TO STRIKE ALIBI NOTICE.

Defendant moves to strike the prosecution's demand for alibi notice (*see* Point J, Page 8, of Defendant's Notice of Motion) on the grounds that such demand and CPL § 250.20, the statute upon which the People's notice is based, violate "defendant's right to the due process of law" and "impermissibly impinge upon his right to the effective assistance of counsel" pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 6, of the New York State Constitution (*see* Pages 12-13 of Defendant's Memorandum of Law).

As it is well-settled that CPL § 250.20 is constitutional (*People v Dawson*, 185 AD2d 854, 855 [2d Dept 1992], *lv. denied* 80 NY2d 974 [1992]; *People v Cruz*, 176 AD2d 751, 752 [2d Dept 1991], *lv. denied* 79 NY2d 855 [1992]; *People v Gill*, 164 AD2d 867 [2d Dept 1990], *lv. denied* 76 NY2d 893 [1990]; *People v Peterson*, 96 AD2d 871, 872 [2d Dept 1983]) and provides reciprocal disclosure rights to defendants (*see* CPL § 250.20 (2); *Wardius v Oregon*, 412 US 470 [1973]; *People v Crevelle*, 125 AD3d 995, 996-997 [2d Dept 2015]; *People v Ortiz*, 133 AD2d

853, 854-855 [2d Dept 1987], *lv. denied* 70 NY2d 959 [1988]; *People v Peterson*, 96 AD2d at 872), Defendant's motion to strike the People's alibi notice is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
February 15, 2022

HONORABLE ROBERT J. PRISCO
County Court Judge

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