COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No.: 22-70982

CESAR ULLOA,

Defendant.

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FUFIDIO, J.

Defendant, CESAR ULLOA, having been indicted on or about April 20, 2022 on one count of manslaughter in the second degree (Penal Law § 125.15 [1]) and leaving the scene of an incident without reporting (resulting in death) (Vehicle and Traffic Law § 600 [2]) has filed an omnibus motion which consists of a Notice of Motion, an Affirmation in Support and a Memorandum of Law. In response, the People have filed an Affirmation in Opposition together with a Memorandum of Law. Upon consideration of these papers, the stenographic transcript of the grand jury minutes this Court disposes of this motion as follows:

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

Defendant moves pursuant to CPL §§210.20(1)(b) and (c) to dismiss the indictment, or counts thereof, on the grounds that the evidence before the Grand Jury was legally insufficient and that the Grand Jury proceeding was defective within the meaning of CPL §210.35. 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]). In addition to simply presenting the Defendant's speed with which he was driving, the People presented evidence which demonstrated the impact that speed and the manner in which he was driving his car had on other drivers on the road. The sum total of that evidence, in the light most favorable to the People, easily meets the criteria necessary to secure an indictment on recklessness at this stage of the process. 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]). 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.

B. MOTION TO SUPPRESS STATEMENTS

The Court grants the Defendant's motion to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by the Defendant, which have been noticed by the People pursuant to CPL 710.30 (1)(a) were involuntarily made by the Defendant within the meaning of CPL 60.45 (*see* CPL 710.20 (3); CPL 710.60 [3][b]; *People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of Defendant's Sixth Amendment right to counsel, and/or obtained in violation of the Defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

C. MOTION TO SUPPRESS PHYSICAL EVIDENCE

The Defendant has moved to suppress physical evidence, "including, but not limited to data recovered from his Samsung Galaxy as well as data recovered from his Honda Civic" and argues that the warrant application offers, "nothing more than mere speculation that evidence of a crime will be located on the phone and is therefore fatally overbroad." The Court agrees with this argument in part; finding that the warrant with respect to location data is supported by probable cause, but that a general search of his phone for other evidence of the alleged crime is not. Such a determination may be made by a review of the four corners of the warrant application (*Franks v Delaware*, 438 US 154 [1978]).

In order to establish probable cause for a search warrant, the application must present a reasonable belief that evidence of the crime may be found in a certain place (*People v Boothe*, 188 AD3d 1242 [2nd Dept. 2020]).

Search of the Defendant's Phone:

Westchester County Police Detective Hochron, in his affidavit, swore that through his investigation, he was able to link the defendant's car, with a licence plate which was left at the scene of the crash and through that evidence was able to get the Defendant's cellular phone number. With that number, the police were able to get an emergency ping order which gave them, "location records for the phone's location" which showed the police that the Defendant had returned back to his home by the morning after the crash, meaning that the phone was presumably with the Defendant and on the move until he returned home. Further, when members of the Westchester County Police Department went to the Defendant's house that morning, they saw that his red Honda Civic was parked nearby. In this instance, the police were able to show that the

Defendant had likely possessed his phone at the time of the collision and because that generally Detective Hochron, is "aware that cellular phones have the ability to access Apple and Google Maps application as well as other application (sic) which allow the user to use GPS directional based services" and that these applications, "have the ability to store prior location, routes and location information" they have shown that a search of the Defendant's phone for location based data, "would yield evidence that a crime had occurred," and more specifically, that the Defendant was the perpetrator (*People v Jemmott*, 164 AD3d 953 [3rd Dept. 2018]). However, the warrant application/order makes no attempt to place any temporal limit on the location data that was sought. The failure to do so makes the search for GPS/location data overly broad. Accordingly, the Court would suppress any GPS/location data recovered except for the data recovered which provides GPS/location information from 12:00 am on October 21, 2021 through 11:59 pm on October 22, 2021. In addition, the search for the assigned telephone number is also valid.

Concerning the remaining information that Detective Hochron sought to search for in the Defendant's phone, as itemized in Paragraph 42, page 19 of his search warrant affidavit, the Court finds the order authorizing such a search to be overbroad and unsupported by probable cause. In his application he wanted to search for, "all digital evidence, telephonic data and computer data including, but not limited to recorded or stored telephone numbers, names, addresses or any other alpha or numeric information contained within said cellular telephone...the ESN, IMEI, and/or EMSI number, text messages, photographs, videos, emails, applications and their stored data, records of calls made, received, missed callas including the contents of any messages stored in voice-mail, internet data...and any and all "computer data," as that term is defined in Penal Law section 156.00(3). All messaging data, including content of text messages, calls or other telephonic communications including any and all telephonic data contained on any application including those capable of messaging and/or calling including social media contest and information and/or web history,..." The Detective made no evidentiary showing whatsoever that other than simply the defendant being in possession of a phone, that there would be any evidence of the crime of the sort for which he sought to search (*Boothe* at 1243). He surmises that the phone may contain evidence of communications between the defendant and witnesses that could show what he was doing before the crime and a potential cover up of the crime, but factually, all he is able to offer is that generally, based presumably on his training and experience as a detective and as a person in the world today, "cellular telephones often contain evidence of criminal activity" people use cellphones to communicate in all the various ways people are able to communicate with cellphones. "In other words, the mere fact that an accused possesses a cell phone at the time of his arrest does not mean that the cell phone is subject to search pursuant to a judicial warrant. The mere assumption that his cell phone may contain evidence – no matter how sensible that may be – does not sufficiently recognize the significant privacy interest embodied in a cell phone...the investigating officer must articulate *facts* demonstrating reason to believe that the phone contains evidence of the particular crime under investigation" (*People v Perez*, 72 Misc 3d 310 [Sup. Ct. Kings Co. 2021, Hecht, J.], *citing Carpenter v United States*, 138 S.Ct. 2206 [2018]; *Riley v California*, 573 US 373 [2014], *emphasis in the original*). Accordingly, the search of the Defendant's cell phone for anything other than GPS/location data and for the assigned telephone number is invalid on the four corners of the warrant and all the information recovered from that search, again, other than the GPS/location data by the parameters set above, and the search for the assigned telephone number is suppressed.

That said, the Court realizes that the above analysis may be entirely academic, because in the warrant application the Detective states that the Defendant provided a "consent to search for his phone and his vehicle" however, this point was argued by neither the Defendant nor the People in the *omnibus* motion. Nevertheless, the Court orders a hearing to determine the propriety of the consent to search that the Defendant gave for his phone because that would form an independent basis for probable cause to sustain the entirety of the cellphone search warrant. However, if it turns out that the consent was not properly obtained, then the Court's order of suppression stands as stated above (*People v Knapp*, 57 NY2d 161, 173-74 [1982]; *Wong Sun v United States*, 371 US 471 [1963]).

Search of the Defendant's Red Honda Civic:

Based on a review of the four corners of the warrant application, the Court finds that the entirety of the search of the Defendant's car was amply based on probable cause (*Franks v Delaware*, 438 US 154 [1978])

Finally, with respect to any other evidence the Court grants the Defendant's motion solely to the extent that *Mapp* and *Dunaway* hearings are directed to be held prior to trial to determine the propriety of any search resulting in the seizure of property other than that mentioned above (*see*, *Mapp v Ohio*, 367 US 643 [1961]) and whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see*, *Dunaway v New York*, 442 US 200 [1979]).

D. 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:

I. 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

II. 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]).

E. DISCOVERY ORDER

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 statement, written or oral;

(iii) a witness's prior convictions and uncharged criminal conduct;

(iv) information that tends to sow 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 scupport 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 245. 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 Article 245. 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 further

ORDERED, notwithstanding the foregoing, that a prosecutor may apply for a protective order, which may be issued for good cause, and CPL Article 245 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 the 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 this 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 advise 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.) as to the defendant's demand

for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see, Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). In the event that the People are, or become, aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the court to permit an *in camera* inspection and determination as to whether the material must be disclosed to the defendant. Similarly, the People acknowledge their *Rosario* obligations and understand that such material is required to be disclosed to the extent required under CPL article 245.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
August 23, 2022

Honorable George E. Fufidio
Westchester County Court Justice

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