People v Thomas
2018 NY Slip Op 33942(U)
October 30, 2018
County Court, Westchester County
Docket Number: 18-0522
Judge: Barry E. Warhit

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.: 18-0522

RICHARD THOMAS,

Defendant.
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WARHIT, J.

Defendant, RICHARD THOMAS, stands indicted for Grand Larceny in the third degree (three counts), Grand Larceny in the fourth degree, Offering a False Instrument for Filing in the first degree (two counts) and Offering a False Instrument for Filing in the second degree (two counts). Through the within Omnibus Motion, *inter alia*, Defendant moves for dismissal of counts three and four, each of which is a charge of Offering a False Instrument for Filing in the first degree, on grounds that the statute is unconstitutionally vague, for dismissal of counts two, three and four on grounds that they are multiplicitous of count one, dismissal of the indictment based upon alleged insufficiency of the evidence presented and the instructions given, suppressing any evidence obtained prior to the New York State Comptroller having referred the matter to the Office of the Attorney General for prosecution, suppressing evidence received which is outside the scope of search warrants, directing the People to supplement Disclosures and the Bill of Particulars, to provide any material which constitutes *Brady* and granting a *Ventimiglia* hearing.

In consideration of the within Omnibus Motion, this Court read and considered:

Notice of Motion, Affirmation of Randall W. Jackson, Esq. and *Annexed Exhibits 1 through 8; Richard Thomas's Memorandum of Law in Support of His Omnibus Motion to Dismiss the Indictment; Affirmation of AAG Brian Weinberg in Opposition to Defendant's Motion to Dismiss; People's Memorandum of Law in Opposition to Defendant's Omnibus Motion; Richard Thomas's Reply Memorandum of Law in Support of His Omnibus Motion to Dismiss the Indictment*

Based upon these submissions as well as this Court's *in camera* inspection of a stenographic transcript of the grand jury minutes and a review of documentary evidence presented to the grand jury, the motion is disposed of as follows[1]:

I. MOTION TO DISMISS COUNTS FIVE AND SIX

This branch of the motion is denied. Contrary to Defendant's assertions, the statute which defines the crime of Offering a False Instrument for Filing in the first degree is not unconstitutionally vague and has not been interpreted by the courts in such a way that the conduct and *mens rea* of this crime and that of Offering a False Instrument in the second degree are indistinguishable thereby giving rise to the possibility of arbitrary and discriminatory enforcement (*see*, Richard Thomas's Memorandum of Law in Support of His Omnibus Motion to Dismiss the Indictment ("Defendant's Memorandum of Law"), p. 7, 9 and 12).

There is a "strong presumption that a statute duly enacted by the Legislature is

[1]Defendant maintains the Attorney General is without jurisdiction to prosecute the instant criminal proceeding (Richard Thomas's Memorandum of Law in Support of His Omnibus Motion to Dismiss the Indictment ("Defendant's Memorandum of Law"), p. 5). This court considered this claim previously and rendered a determination to the contrary (*People v. Richard Thomas*, Westchester County indictment number 18-0522, (Warhit, J.), August 31, 2018).

constitutional" (*People v. Pagnotta*, 25 NY2d 333, 337 [1669]. The party challenging the statute bears the heavy burden of proving the statute's unconstitutionality beyond a reasonable doubt (*City of NY v. State of NY*, 76 NY2d 479, 485 [1990]).

A statute is not unconstitutionally vague so long as it "provide[s] sufficient notice of what conduct is prohibited" and is "not . . . written in such a manner as to permit or encourage arbitrary and discriminatory enforcement" (*People v. Bright*, 71 NY2d 376, 378 [1988]). The statute delineating the crime of Offering a False Instrument for Filing in the first degree is clearly written and the conduct which is criminalized is easily understandable (*see*, *Id.*). Furthermore, this crime is easily distinguishable from the lesser crime of Offering a False Instrument for Filing in the second degree as the former charge includes an element the latter does not[2] (*see*, Penal Law § 175.35(1) and PL § 175.30)). The charge of Offering a False Instrument for Filing in the first degree encompasses each of the elements of the crime of Offering a False Instrument for Filing in the second degree, but in addition requires proof that a defendant presented or offered a written instrument containing false information to a public office or public servant *with intent to defraud the state or any political subdivision* (*see*, *Id.*; *see*, CJ2d NY Penal Law Offenses (emphasis added); *and see*, Donnino, Practice Commentary, McKinney's Cons Laws of NY, Penal Law § 175.30). The inclusion of this additional element renders the conduct required to commit each crime unique.

Furthermore, and again contrary to Defendant's contention, court interpretation

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[2] Under our law, a single element commonly distinguishes a misdemeanor charge from a felony (*see.*, PL § 120.05(1) and PL § 120.00(1); *and see*, PL § 140.15(1) and PL § 140.20).

of the statute has not resulted in the "intent to defraud" component of the felony charge of Offering a False Instrument for Filing in the first degree having been "collapsed into the knowing falsity element common to both" it and the crime of Offering a False Instrument for Filing in the second degree (*see*, Defendant's Memorandum of Law, pp. 9-10). In point of fact, courts have uniformly maintained that a distinguishing feature of the crime of Offering a False Instrument for Filing in the first degree is that a defendant must act with intent to perpetrate a fraud against the state or a political subdivision thereof in order to be found guilty of this crime (*see, People v. Thompson*, 823 NYS2d 112 [2d Dept. 2006]; *People v. Stumbrice*, 599 NYS2d 325 [3d Dept. 1993]; *People v. Scutt*. 796 NYS2d 816 [4th Dept. 2005]. The courts have merely held that proof of a defendant's intent to defraud the state can be inferred based upon his or her conduct (*see, People v. Thompson*, 823 NYS2d 112 (finding defendant's intention to defraud the state, particularly the State Insurance Fund, could be inferred based upon his failure to disclose employment activities on forms he submitted for the purpose of receiving continued benefits); *People v. Stumbrice*, 599 NYS2d 325(finding a defendant's intention to defraud the state could be inferred from the fact that she made purposeful misrepresentations on the application she submitted in order to receive public assistance, medical assistance and food stamp benefits); *People v. Scutt*. 796 NYS2d 816(finding a defendant's intention to defraud the state could be inferred from the knowing misstatements of fact he included in his application to re-certify for Medicaid benefits). Consequently, as the charge of Offering a False Instrument for Filing in the first degree requires proof that a defendant acted with a specific intent which does not

apply to the charge of Offering a False Instrument for Filing in the second degree, the *mens rea* and conduct required for these crimes are distinguishable and the statue is constitutional.

Furthermore, Defendant's contention that the statute permits or encourages arbitrary and discriminatory enforcement is without merit (*cf.*, *Bright,* 71 NY2d at 382). The statutory construction purposely envisions the imposition of a more significant consequence where a defendant acts with the specific intent to defraud the state or a political subdivision thereof (*cf.*, PL § 175.35(1) and PL § 175.30; *and see*, Donnino, Practice Commentary, McKinney's Cons Laws of NY, Penal Law § 175.30). At the crux of Defendant's claim, that the statute allows for discriminatory enforcement, is the fact that, under the within indictment, he is charged with felony counts of Offering a False Instrument for Filing in the first degree for his alleged filing of false written statements with the State Board of Elections but is charged with misdemeanor counts of Offering a False Instrument for Filing in the second degree for his alleged filing of false written statements with the Mount Vernon City Clerk (*see*, Jackson Affirmation, Exhibits 2 and 3; *and see*, People's Memorandum of Law in Opposition to Defendant's Omnibus Motion ("People's Memorandum of Law"), p. 23). Defendant contends the People had "no principled basis" for this charging determination (Defendant's Memorandum of Law, p. 13).

At the outset, it bears comment that the fact that a statute offers wide prosecutorial discretion does not render it unconstitutional (*People v. Eboli*, 34 NY2d 281 [1974]). It is well established that, in the absence of legislative intent to the

contrary, "overlapping in criminal statutes, and the opportunity for prosecutorial choice they represent, is no bar to prosecution"(*Id.* at p. 287 (internal citations omitted)). This is true "[d]espite . . . the concomitant opportunity for choice by the District Attorney, prosecution for the higher crime [is] permissible (*Id.*, citing *People v. Lubow*, 29 NY2d. 58, 67 [1971]).

Regardless, the People have explained a reasoned and non-discriminatory basis for their charging decision with respect to Defendant. While recognizing that Defendant's conduct of filing knowingly false information in connection with the 2016 and 2017 Annual Statements of Financial Disclosure he filed with the political subdivision of Mount Vernon made out a *prima facie* case of Offering a False Instrument for Filing in the first degree, the People elected to charge Defendant with Offering a False Instrument for Filing in the second degree for this conduct because the Mount Vernon City Charter directs that "[a] reporting individual who knowingly and willfully fails to file an annual statement of financial disclosure or who knowingly and willfully with intent to deceive makes a false statement or gives information which such individual knows to be false . . .shall be assessed a civil penalty in an amount not to exceed $10,000 . . . [or] in lieu of a civil penalty, . . .upon conviction . . . such violation shall be punishable as a class A misdemeanor" (People's Memorandum of Law, p. 24, footnote 6; *and see*, *Eboli,* 34 NY2d at 287, citing, *People v. Knatt*, 156 NY 302 [1898])). Consequently, there is no basis to conclude that the statutes at issue are unconstitutional or to otherwise find that the People abused their discretion in levying charges against the within Defendant (*see*, *Bordenkircher v. Hayes*, 434 US 357, 364 [1978](holding "the conscious exercise of some selectivity in enforcement is not in itself

a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification).

II. MOTION TO DISMISS COUNTS TWO, THREE AND FOUR

This branch of Defendant's motion is denied. Considering the indictment in conjunction with the Bill of Particulars, it is apparent that count one charges Defendant, in the aggregate, with having committed the conduct separately addressed in counts two, three and four. In particular, count one charges Defendant with the alleged theft of $6,400 from the Friends of Richard Thomas Campaign Committee ("FORT") on or about October 2, 2015, the alleged theft of $4,000 from FORT on or about October 31, 2015, the alleged theft of $2,500 from FORT on or about November 25, 2015 and the impermissible use of a debit card issued to FORT to purchase meals at a restaurant in the John F. Kennedy airport on December 21, 2015 and at a Bubba Gump franchise in Mexico on December 28, 2015. Counts two, three, and four charge Defendant, respectively, for the individual thefts alleged to have occurred on or about October 2, 2015, October 31, 2015 and November 25, 2015.

Multiplicity is not an enumerated legal ground set forth in CPL § 210.20. Nevertheless, an indictment is multiplicitous when a single offense is charged in more than one count (*see*, *People v. Jagdharry*, 118 AD3d 722 [2d Dept. 2014), citing, *People v. Alonzo*, 16 NY3d 267, 269 [2011], *People v. Smalls*, 81 AD3d 860, 861 [2d Dept. 2011]). A multiplicitous indictment "creates the risk that a defendant will be punished for, or stigmatized with a conviction of, more crimes than he actually committed" (*Alonzo,* 16 NY3d at 269). Unlike in the *Alonzo* and *Jagdharry* cases, the

charges at issue allege conduct which occurred on distinct days which, while arguably part of a continuing scheme or plan, do not constitute a single criminal act without interruption (*Alonzo,* 16 NY3d at 270; *and see*, *People v. Quinn*, 103 AD3d 1258 [4th Dept. 2013](declaring counts of Falsifying Business Records multiplicitous as the charges were based upon the same instrument which had only been offered for filing on a single occasion); *and see*, *People v. Partridge, et. al*, 1987 WL 92057 [Sup. Ct. NY Co. 1987](finding counts that separately accused a defendant of stealing a lease and the proceeds paid under that same lease to be multiplicitous).

Of significance, the Court of Appeals has recognized that "even in the face of seemingly multiplicitous counts, "[w]here the evidence reasonably permits a grand jury to find that either one or two crimes occurred, an indictment charging two should not be dismissed. . . ." (*Alonzo*, 16 NY3d at 271). In reaching this conclusion, the Court recognized that, if a multiplicitous indictment is allowed to stand, the trial court "can reevaluate the evidence and decide how many crimes the trial jury should consider" (*Id.*; *and see*, *People v. Thompson*, 2016 NY Slip O. 50777(U), 51 Misc.3d 1222(A) [Sup. Ct. NY Co. 2016]). Accordingly, at this juncture, it is appropriate for each of the charged counts to stand.

Defendant is invited to raise a claim of multiplicity at the close of the evidence, in connection with the charge conference, to address which charges are appropriate for submission to the jury. At that time, the trial judge will determine which, if any, of the charges should be submitted to the jury for its consideration (*Alonzo*, 16 NY3d at 271).

It bears noting that the within indictment is also not duplicitous. Although as a

general rule an indictment is duplicitous when one count charges more than one offense, where multiple acts constitute a scheme to commit grand larceny against a single victim, the charge is not duplicitous (*see*, *People v. Rosich*, 170 AD2d 703 [2d Dept. 1991], lv. denied 77 NY2d 1000 [1991]).

III and IV. MOTION TO RELEASE GRAND JURY MINUTES AND FOR DISMISSAL OF THE INDICTMENT FOR ALLEGEDLY INSUFFICIENT EVIDENCE AND IMPROPER INSTRUCTION

Defendant's motion is granted to the extent that, upon consent of the prosecution, this Court conducted an in camera inspection of a transcript of the grand jury proceedings and reviewed the documentary evidence presented to the grand jury.

A presumption of regularity attaches to grand jury proceedings (*Virag v. Hynes*, 54 NY2d 437, 442-443 [1981]). Defendant herein has not set forth any factual allegations to negate or overcome this presumption of regularity. In addition, as Defendant has not set forth a compelling or particularized need for production of the grand jury minutes and as this Court does not require the release of the grand jury minutes or evidence presented to assist it in determining the sufficiency of the evidence or legal instructions, the application for release of the grand jury minutes is denied (*see*, *People v. Antonelli*, 300 AD2d 312 [2d Dept. 2002] citing *Matter of Brown v. LaTorella*, 229 AD2d 391 [2d Dept. 1996]; *see also*, Matter *of Brown v. Rotker*, 215 AD2d 378 [2d Dept. 1995]).

The defense's motion to dismiss counts of the indictment on grounds that insufficient evidence was presented to support the indictment is also denied. "Judicial

review of evidentiary sufficiency is limited to a determination of whether the bare competent evidence establishes the elements of the offense...and a court has no authority to examine whether the presentation was adequate to establish reasonable cause, because that determination is exclusively the province of the grand jury." (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 190.60 (citations omitted)). In contrast to a trial at which the prosecution is required to prove a defendant's guilt beyond a reasonable doubt, the prosecutor is merely required to present a prima facie case before the grand jury (*People v. Bello*. 92 NY2d 523 [1988]; *People v. Ackies*, 79 AD3d 1050 [2d Dept 2010]. At this stage of the proceeding, the determination regarding sufficiency of the evidence does not concern the weight or adequacy of the proof but rather whether competent evidence presented, which accepted as true, establishes a defendant's commission of every element of each of the crimes charged (*see*, *People v. Galatro*, 84 NY2d 160 [1994]; *see also*, *People v. Jensen*, 86 NY2d 248 [1995]; *People v. Jennings*, 69 NY2d 103, 114-116) [1986]). 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*, 92 NY2d 523, quoting, *People v. Boampong*, 57 AD3d 794 (2d Dept 2008); *People v. Batashure*, 75 NY2d. 306, 311-12 [1990]). The fact that "other, innocent inferences could possibly be drawn from the facts is irrelevant on this pleading stage inquiry, as long as the Grand Jury could rationally have drawn the guilty inference" (*People v. Burnett*, 2004 NY Slip Op 50290(U), ¶ 3, 2 Misc. 3d

1011(A), 1011A [Rochester City Court 2004]; *People v. Correira*, 57 AD3d 1487 [4th Dept. 2008](referring to the sufficiency of evidence adduced at trial) and *People v. Glessing*, 206 AD2d 786 [3d Dept. 1994](dismissing a count of larceny upon proof that the defendant was the rightful owner of the property at the time of the theft). Significantly, the prosecution is not required to charge the grand jurors with every and any potential defense suggested by the evidence or to present defenses in mitigation as these ordinarily involve factual matters proper for resolution by a petit jury (*see*, *People v. Valles*, 62 NY2d at 38-39).

The in-camera review conducted in this case reveals that the competent evidence presented, when viewed in the light most favorable to the People, if unexplained and uncontradicted, is legally sufficient to establish the defendant's commission of every element of each of the charged offenses. The herein Defendant's claims regarding alleged failings and flaws in the evidence presented to the grand jury are unavailing and are tantamount to defenses likely to be interposed at trial in an attempt to defeat the charges. Defendant has not set forth a meritorious claim that the prosecution was required, in its presentation of evidence to the grand jury, to introduce evidence to establish that Defendant "did not incur reimbursable campaign expenses in amounts at least equal to the amount of the checks he allegedly stole" (*see*, Defendant's Memorandum of Law, Point III). Additionally, this Court's in camera review of the grand jury proceeding does not support Defendant's claim that the People failed to set forth evidence from which the grand jury could not reasonably infer Defendant's *mens rea* with respect to the charges of offering a false instrument for filing (*Id.*).

Further, this Court finds the grand jury was properly instructed (*see*, *People v. Calbud*, 49 NY2d 389 [1980]; *and see*, *People v. Valles*, 62 NY2d 36 [1984]). The minutes reveal a quorum of the grand jurors was present during the presentation of evidence, that only those grand jurors who were present throughout the presentation of evidence for each charge were permitted to vote that charge and, moreover, the prosecutor did not improperly summarize the testimony in a misleading or inappropriate manner (*see*, *Id.*).

A prosecutor is not required to instruct the grand jury with the same detail that a judge must relate to a petit jury. The Criminal Procedure Law directs the prosecutor to give legal instruction to the grand jury "where necessary or appropriate" while, in contrast, it requires a judge presiding over a trial to state in detail "the fundamental legal principles applicable to criminal cases in general" as well as "the material legal principles applicable to the particular case" and "the application of the law to the facts" (*Calbud*, 49 NY2d at 394-95). As a general rule, it is "sufficient if the District Attorney provides the Grand Jury with enough information to enable it 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" (*Id.*). Ordinarily, this standard may be met by reading the grand jury the appropriate sections of the Penal Law. In the instant case, the prosecutor read the sections of the Penal Law which applied to this case with sufficient clarity and completeness to satisfy his responsibilities as legal advisor.

It bears note to the extent the prosecutor did not define the applicable mental states and the reasonable cause standard during this grand jury presentation, dismissal

of the indictment is not required as the empaneling judge instructed this grand jury as to the applicable quantum of proof required and assistant district attorneys defined reasonable cause and the applicable mental states were defined to the panel previously[3]. Consequently, the instructions to the Grand Jury are no so incomplete or misleading as to substantially undermine this essential function to the extent that it may fairly be said that the integrity of that body has been impaired (*see*, CPL 210.35[5]; *Calbud*, 49 NY2d at 396.

V. MOTION TO SUPPRESS EVIDENCE OBTAINED BEFORE CRIMINAL REFERRAL

This branch of Defendant's motion is denied. The New York State Executive Law ("Executive Law" or "Exec. Law") empowers the Attorney General to prosecute crimes upon receipt of a referral from, among others, the New York State Comptroller (Exec. Law § 63(3)). Executive Law § 63(3) directs that, upon appropriate request, the Attorney General may investigate and prosecute potentially illegal activity that falls within the authority of the officer who made the request (*Id.*). In the present case, prosecutorial authority was conveyed upon the Office of the Attorney General ("OAG") by written request of the Comptroller dated April 27, 2016. The OAG is permitted to conduct interviews and gather evidence in advance of receiving a referral pursuant to Executive Law § 63(3) (*see*, *People v. Rogers*, 157 AD3d 1001 [3d Dept. 2018])(holding that the prosecutorial authority established by a request made pursuant to Executive

[3]In connection with the within issue, this Court conducted *in camera* reviews of the grand jury transcripts prepared in connection with *People v. Jarrod James and Daryl Curry* (Indictment No.: 18-0032), *People v. Dwayn Wilkinson*, Indictment No.: 17-1005) and *People v. Arnelle Branch*, Indictment No.: 18-0186).

Law § 63(3) is not negated where staff of the Attorney General had "previously reviewed investigation files, spoken with participants in the federal investigation and informed the investigator that a referral pursuant to Executive Law § 63 (3) was required" (*see, Id.*, citing, *People v Codina*, 297 AD2d 539 [1st Dept. 2002], lv denied 98 NY2d 767 [2002](additional internal citations omitted)). The within matter is distinguishable from *People v. Codina* as, unlike in that case, in the instant matter search warrants were neither sought nor issued prior to the OAG's receipt of a referral from the Comptroller (*cf.*, *People v. Codina*, 297 AD2d 539 ("[a]bsent the referral, the Attorney General lacked authority to execute the search warrant against defendant").

Defendant has not set forth a legal basis for suppression or for a hearing. Accordingly, the within aspect of the motion is denied in its entirety.

VI. MOTION TO SUPPRESS EVIDENCE OBTAINED OUTSIDE THE SCOPE OF THE SEARCH WARRANT

At the outset it bears note that in connection with the within motion, this Court has been provided with the sealed affidavit and copies of search warrants issued by Judge Barbara G. Zambelli on June 12, 2017. This Court has reviewed the affidavit in support of the search warrants and finds it provided the signing magistrate with ample probable cause to support its issuance.

The OAG acknowledges that, in response to search warrants executed in connection with this matter, Google forwarded electronic information which included a calendar that permitted access to dates of outside those specified in the search

warrants. All items of information that exceed the scope of the warrants are suppressed and shall not be admissible at trial (*see generally*, *People v. McCullars*, 174 AD2d 118, 121 [3d Dept. 1992]).

In accordance with their Discovery, *Rosario* and *Brady* obligations, the People are directed to provide the defense with access to all items in their possession which were obtained in connection with the warrants issued by Judge Barbara G. Zambelli. At defendant's request, prior to trial a hearing shall be held at which a record shall be made of all items received in response to the search warrants[4]. Any items received outside the scope of the search warrants shall be indicated. Any and all items received in excess of the scope of the search warrants shall be inadmissible at trial.

Nevertheless, upon the facts of the within case, there is no basis to conclude the scope of a search warrants was grossly exceeded, that its execution was handled with flagrant disregard or that suppression of all seized property is required (*see generally, US v. Foster*, 100 F.3d 846 [10th Cir. 1996], *People v. Molloy*, 8 AD3d 679 [2d Dept. 2014]; *United States v. Liu*, 239 F.2d 138 [2d Cir. 2000]. Accordingly, Defendant's application for suppression of all evidence received in satisfaction of the search warrants issued on July 12, 2017 is denied.

Further, and as counsel have each fully briefed the issue, this Court would be remiss if it did not note that to the extent the Assistant Attorney General admitted having reviewed and relied upon a Google calendar entry which fell outside the scope

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[4]In accordance with the requirements of the Criminal Procedure Law, the prosecution has provided the court with an inventory of the search warrant. Nevertheless, it is not particularized and references, in relevant part, "two (2) zipped folders containing 71,064 email records from Google, Inc".

of dates designated by the search warrant in his efforts to ascertain whether a particular member of court staff or the judge to whom he is assigned had an alleged conflict of interest, this action is without bearing upon the defendant's guilt or innocence. The information was not presented to the grand jury nor will it be presented at trial.

VII. MOTION FOR DISCOVERY AND INSPECTION

Defendant's motion for discovery is granted to the extent provided for in Article 240 of the Criminal Procedure Law ("CPL"). If any items set forth in CPL Article 240 are yet to be provided to Defendant pursuant to the Consent Discovery Order entered in this matter, the People are directed to provide same forthwith.

Defendant's motion for discovery is denied in all other respects as it seeks material or information beyond the scope of discovery (*see*, *People v. Colavito*, 87 NY2d 423; *Matter v. Brown v. Grosso*, 285 AD2d 642, lv. denied, 97 NY2d 605; *Matter of Brown v. Appelman*, 241 AD2d 279; *Matter of Catterson v. Jones*, 229 AD2d 435; *Matter of Catterson v. Rohl*, 202 AD2d 420, lv. denied, 83 NY2d 755).

Specifically, Defendant's request for production of the correspondence sent by the Comptroller to the Attorney General referring the within matter for prosecution, if warranted, is denied. This Court, having received a copy of such letter and reviewed same *in camera*, is satisfied that Comptroller Thomas P. DiNapoli made a referral to the OAG, by written correspondence dated April 27, 2016, which expressed concern regarding the "procurement and payment" of funds of the City of Mount Vernon and requested that the OAG "investigate the possible commission of any indictable offense or offenses in violation of law and to prosecute any person or persons believed to have

committed the same and any crime or offense arising out of such investigation or prosecution or both, including but not limited to appearing before and presenting all such matters to a grand jury".

VIII. MOTION FOR A FURTHER BILL OF PARTICULARS

The Bill of Particulars set forth in the Voluntary Disclosure Form previously provided to the defendant adequately informs the defendant of the substance of his alleged conduct and, in all respects, complies with the requirements of Criminal Procedure Law § 200.95. In addition, Defendant has received a detailed felony complaint and, despite his demand *supra*, has also received extensive discovery. These items sufficiently inform Defendant of the conduct which forms the basis of the accusations against him (*see*, *People v. Fitzgerald*, 45 NY2d 574 [1978]).

IX. MOTION FOR EXCULPATORY MATERIAL

Through the response to the within motion, the OAG has recognized its obligation and continuing duty to disclose exculpatory material (*Brady v. Maryland,* 373 US 83 [1963]; *Giglio v. United States*, 405 US 150 [2972]). Through the instant decision and its issued Order, dated September 20, 2018, this Court has directed the prosecution to disclose any and all exculpatory material. Toward that end, this Court now directs that, to the extent the OAG is or becomes aware of any material which is arguable exculpatory which it is not willing to consent to disclose, the prosecutors are directed to disclose such

material to the Court forthwith for an in camera inspection and determination as to whether the material shall be disclosed to Defendant.

X. MOTION FOR DISCLOSURE PURSUANT TO *VENTIMIGLIA*

Defendant's application for disclosure of prior uncharged criminal, vicious or immoral conduct or other bad acts the People intend to use at trial is denied with leave to renew in the event the People indicate an intention to use evidence of any prior bad act or uncharged crimes allegedly committed by Defendant during its case in chief (*People v. Ventimiglia*, 52 NY2d 350; *and see*, *People v. Molineaux*, 168 NY2d 264, 61 NE 286).

In the event the OAG intends to introduce evidence of prior uncharged criminal, vicious or immoral conduct or other bad acts allegedly committed by Defendant, the OAG is directed to move prior to jury selection, by *motion in limine,* for a judicial determination with respect to any such application.

XI. MOTION FOR A SANDOVAL HEARING

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent to which the People may inquire into Defendant's prior criminal convictions, prior uncharged criminal, vicious or immoral conduct in the event he elects to testify. The People have consented to such hearing.

Accordingly, it is ordered that a pre-trial hearing shall be conducted pursuant to *People v. Sandoval* (34 NY2d 371). At such hearing the People shall be required to

notify Defendant of all specific instances of his criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach his credibility in the event he chooses to testify on his own behalf at trial. At the hearing, Defendant will bear the burden of identifying those instances of his prior misconduct which he submits the People should not be permitted to use to impeach his credibility. In particular, Defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to his ability to testify as a witness on his own behalf (*see, People v. Matthews*, 68 NY2d 118; *People v. Malphurs*, 111 AD2d 266 [2d Dept. 1985], *lv. denied* 66 NY2d 616).

XII. MOTION TO FILE ADDITIONAL MOTIONS

In the event counsel seeks to file an additional motion, including to resolve outstanding discovery issues, such motion is to be brought by order to show cause and shall set forth and specify the reason the application was not made in conformity with CPL § 255.20.

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

Dated: White Plains, New York
October 30, 2018

Honorable Barry E. Warhit
Westchester County Court

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CLERK OF THE COURT