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

-against- **DECISION & ORDER**

GEORGE GALGANO, Ind. No.: 14-0043

Defendants.
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ZUCKERMAN, J.

Defendant moves for dismissal of the Indictment and other relief. The People oppose the motion and cross-move regarding certain materials that were recovered upon execution of search warrants.

THE INDICTMENT

Defendant George Galgano is charged in the instant Indictment with:

1. Bribing a Witness [P.L. § 215.00(a)],
2. Conspiracy in the Fifth Degree [P.L. § 105.05(1)] - two counts,
3. Bribing a Witness [P.L. § 215.00(b)],
4. Tampering with a Witness in the Fourth Degree [P.L. § 215.10(a)], and
5. Conspiracy in the Sixth Degree [P.L. § 105.00].

In each count, he is charged with acting in concert with one or more co-defendants: Eric Sharp (hereinafter "Sharp"), Quincy McQuaid (hereinafter "McQuaid") and Lia LoRusso. In addition, the

co-defendants, individually or acting in concert with one or more of each other, are charged as follows:

McQuaid

1. Tampering With a Witness in the Third degree [[P.L. § 215.11(1)],
2. Intimidating a Victim or Witness in the Third Degree [[P.L. § 215.15(1)],

Sharp

1. Criminal Purchase or Disposal of a Weapon [[P.L. § 265.17(2)],

2. Perjury in the Second Degree [[P.L. § 210.10] - two counts, and
3. Perjury in the Third Degree [[P.L. § 210.05].

The Instant Motion.

Defendant moves for dismissal of the Indictment on the following grounds:

1. Pursuant to C.P.L. § 210.20(1)(b), the evidence before the Grand Jury was insufficient to support the charges in the indictment and/or improprieties occurred during presentation of the evidence,
2. Failure to afford the defendant with an opportunity to testify before the Grand Jury in violation of C.P.L. § 190.50(5),
3. Failure to present certain evidence to the Grand Jury in violation of C.P.L. § 190.50(6),

4. Failure to present exculpatory evidence to the Grand Jury,
5. The indictment is the product of tainted and inadmissible evidence,
6. Failure to instruct the Grand Jury that Complainant Kim LoRusso and Co-Defendant Quincy McQuaid were accomplices and failure to inform the Grand Jury regarding McQuaid's cooperation agreement,
7. Defendant was prejudiced by improper joinder of counts charging Sharp with Criminal Purchase or Disposal of a Weapon and Perjury in the Second Degree,
8. Fewer than twelve Grand Jurors concurring in the indictment in violation of C.P.L. § 210.35(3),
9. The term of the Grand Jury was improperly extended in violation of C.P.L. § 190.15(1),
10. Defendant's due process rights were violated by prosecutorial misconduct,
11. The Grand Jury foreperson did not sign the indictment, and
12. Misjoinder of the weapon and perjury counts against Sharp with Defendant's bribery and related counts in a single indictment.

In the event that the motion to dismiss the Indictment is denied, Defendant also moves for suppression of any evidence and/or information obtained upon execution of certain search warrants on the following grounds:

1. The warrant applications contained affirmative

misrepresentations,

2. The search warrants do not designate that they be executed by a specific law enforcement agency in violation of C.P.L. § 690.25,

3. The warrant applications did not establish probable cause, and

4. The warrants were impermissibly overbroad.

The People oppose the defendant's motions, arguing that the Grand Jury presentation was, in all respects, appropriate and that the search warrants were legally authorized. In addition, the People cross-move for appointment of an "iron wall Assistant District Attorney" to review certain materials recovered from the defendant after execution of two search warrants.

FACTS

Defendant is an attorney. He represented Defendant Lani Zaimi in *People v. Lani Zaimi*, two unrelated Putnam County criminal actions denominated Indictment Nos. 0047-2013 and 0024-2014.[1] The instant indictment alleges that, between January 29, 2014 and July 1, 2014, Defendant attempted to improperly influence Kimberly LoRusso (also known as Kim LoRusso), the Complainant under Putnam County Indictment No. 0024-2014. Defendant counters that he was merely investigating wrongdoing by the Putnam County District Attorney and other law enforcement authorities.

[1]The two cases were not consolidated for trial. On March 14, 2014, Putnam County Court (Rooney, J.) declared a mistrial on Indictment No. 0047-2013 after the jury was unable to reach a verdict. That case is scheduled for retrial in early 2015.

On July 2, 2014, law enforcement officers executing search warrants at Defendant's home and law office recovered, *inter alia*, certain records and devices (hereinafter, "the recovered materials").[2] Although Defendant was not yet arrested on charges related to the instant Putnam County prosecution,[3] sometime thereafter, Defendant's attorney learned that the Putnam County District Attorney would be presenting evidence against him to the Grand Jury. Thereafter, Defendant indicated his desire to testify before the Grand Jury. On or about July 23, 2014, the Putnam County District Attorney informed Defendant's attorney that his Grand Jury testimony was scheduled for August 12, 2014, at 9:30 a.m. On August 6, 2014, in Putnam County Court, the District Attorney again informed Defendant's attorney that the defendant was scheduled to testify before the Grand Jury on the same date and time.

On August 7, 2014, in Putnam County Court, proceedings were held in connection with an Order to Show Cause brought by Lani Zaimi seeking an Order prohibiting the prosecution from reviewing

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[2]"The search warrant applications provide that the materials shall be provided to [the issuing magistrate] for an '*in camera* review of the evidence to verify that NO privileged information is seized and retained by law enforcement.'" *People v. Zaimi*, Putnam County Indictment Nos. 47-2013 and 24-2014, Decision by Rooney, J., 9/5/14, p. 4 (emphasis in original). The court went on to order "that law enforcement shall not review the material seized pursuant to the July 2, 2014 search warrants until authorized to do so by Court Order." *Id.*, at 5.

[3]Upon execution of the search warrants, Defendant was immediately arrested in Westchester County and charged there with Criminal Possession of a Controlled Substance.

the recovered materials. During the proceedings, the People indicated that they would not provide the recovered materials to the instant defendant prior to his Grand Jury testimony.

On August 8, 2014, defense counsel faxed correspondence to the Putnam County District Attorney requesting that the recovered materials, or a copy thereof, be provided to him and that his client's date for testifying before the Grand Jury be postponed until after he had an opportunity to review them. Later that day, the Putnam County District Attorney faxed a response indicating that the date and time for Defendant to testify before the Grand Jury would not be changed from the previously scheduled August 12, 2014 date. On or about August 11, 2014[4], Defendant faxed correspondence to the Putnam County District Attorney indicating that he "reluctantly has decided not to testify."

PROCEDURAL HISTORY

On or about August 20, 2014, the Putnam County Grand Jury voted a true bill charging the defendant with Bribing a Witness and related charges. On August 21, 2014, in Putnam County Court, Defendant was arraigned on the instant Indictment and pled not guilty.

On August 26, 2014, Defendant served a motion, pursuant to CPL §§ 190.50(5) and 210.20, for an Order dismissing the Indictment due

[4]The People assert that defense counsel's faxed correspondence was received on 8/12/14 at 12:01 a.m.

to the prosecution's failure to afford him an opportunity to testify before the Grand Jury. On September 2, 2014, in Putnam County Court, at the request of Defendant's new counsel, this court granted him permission to supplement his initial CPL §§ 190.50(5) and 210.20 motion within his omnibus motion (see CPL § 255.20). On September 29, 2014, at the request of the defendant and on consent of the People, the court amended its previously determined motion schedule to permit the defendant to make the instant application seeking dismissal of the indictment for improprieties in the Grand Jury process, or, in the alternative, suppressing the fruits of the search warrants, prior to submitting his omnibus motion.

On November 13, 2014, co-defendant McQuaid pled guilty to Bribing a Witness and co-defendant Lia LoRusso pled guilty to Tampering With a Witness in the Fourth Degree. Neither has been sentenced.

Defendant Galgano's Motion with Exhibits and Memorandum of Law in Support thereof, filed November 26, 2014, seeking the relief noted above; the People's Affirmation in Opposition with Exhibits and Memorandum of Law in Opposition thereto, filed December 10, 2014; and Defendant's Reply with Exhibits and Memorandum of Law in Further Support thereof, filed January 2, 2015, were the only papers considered in determining the instant motion.

DISCUSSION

The Grand Jury Process.

The lion's share of Defendant's motion concerns his application to dismiss the Indictment due to numerous improprieties which he alleges occurred during presentation of his case to the Grand Jury. He cites twelve distinct bases for relief.

Motions to dismiss an indictment are governed by CPL § 210.20. The statute sets forth nine different grounds for relief. Most of those asserted by the defendant are brought pursuant to CPL § 210.20(c) which provides that a court may dismiss an indictment or any count thereof if

> "[t]he grand jury proceeding was defective, within the meaning of section 210.35..."

CPL § 210.35 provides five grounds for dismissing an indictment. Most of the defendant's arguments in support of his motion to dismiss fall within paragraph five of CPL § 210.35, a catch-all provision which establishes a two-part test for determining whether a Grand Jury proceeding is defective:

> "[t]he proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result."

In *People v Huston*, 88 NY2d 400, 401-402 (1996), Judge Kaye characterized the Grand Jury as a "constitutionally and historically independent institution." She then added:

> "In our State justice system, the critical functions of investigating criminal activity and protecting citizens from

> unfounded accusations are performed by the Grand Jury, whose proceedings are conducted by the prosecutor alone, beyond public scrutiny....In order to protect the liberty of all citizens, the Legislature requires that an indictment be dismissed where the Grand Jury proceeding is defective. Moreover, dismissal of the indictment is specifically compelled by statute when the integrity of the Grand Jury proceeding is impaired 'and prejudice to the defendant may result.'" (citations omitted).

The Huston Court went on to hold that such dismissal is limited "to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the grand jury." *Id.*, at 409. Analysis of the two CPL § 210.35(5) criteria, impairment of the Grand Jury process and prejudice to the defendant, "does not turn on mere flaw, error or skewing. The statutory test is very precise and very high." *People v Darby*, 75 NY2d 449, 455 (1990); see also *People v Thompson*, 22 NY3d 687, 714 (2014, Lippman, J., dissenting) (standard for determining impairment of the Grand Jury process is "exacting"). Indeed, the Court in Huston went on to characterize dismissal as an "exceptional remedy." *People v Huston*, *supra*, at 409; *People v Mujahid*, 45 AD3d 1184 (3rd Dept 2007). In sum, it is a rare exception when a court must dismiss an indictment due to errors which occur during Grand Jury presentment. This, however, is one such rare case.

1. MOTION TO DISMISS FOR FAILURE TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT THE CHARGES IN THE INDICTMENT AND IMPROPRIETIES WHICH OCCURRED DURING THE GRAND JURY PROCESS.

Defendant moves, pursuant to CPL §§ 210.20(1)(b) and 210.30,

to dismiss the Indictment on the grounds that the evidence presented to the Grand Jury was legally insufficient to support the charges in the indictment and/or due to improprieties which occurred during the Grand Jury process. The People oppose the motion, asserting that the indictment "is based upon a plethora of legally sufficient evidence." People's Affirmation in Opposition, p. 7. On consent of the People, the court has reviewed the minutes of the proceedings before the grand jury as well as the exhibits admitted into evidence during the presentation.

Analysis.

Pursuant to CPL § 210.20(2), an indictment is defective if "the evidence before the grand jury was not legally sufficient to establish the offense charged...."

Pursuant to CPL § 190.65(1), the grand jury may indict a person for an offense when:

> "(a) the evidence before it is legally sufficient to establish that such person committed such offense...and (b)competent and admissible evidence before it provides reasonable cause to believe that such person committed the offense."

"'Legally sufficient evidence' means 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); *People v. Jennings*, 69 NY2d 103 (1986). "'Reasonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and

persuasiveness as to convince a person of ordinary intelligence, judgement and experience that it is reasonably likely that such offense was committed and that such person committed it." CPL § 70.10(2).

Notwithstanding the clear wording of the statute, "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). Thus, in contrast to a trial, where the prosecution must prove a defendant's guilt beyond a reasonable doubt, in the Grand Jury, the People are merely required to present a *prima facie* case. *People v Bello*, 92 NY2d 523 (1988); *People v Ackies*, 79 AD3d 1050 (2nd Dept 2010).

In all Grand Jury proceedings, prosecutors "enjoy wide discretion in presenting their case." *People v Lancaster*, 69 NY2d 20, 25 (1986), *cert denied* 480 US 922 (1987). Nonetheless, when presenting a case to the Grand Jury, the prosecutor must abide by the rules of evidence for criminal proceedings. CPL § 190.30(1); *People v Mitchell*, 82 NY2d 509 (1993). *But see People v Dunn*, 248 AD2d 87 (1st Dept 1998)(some evidence admissible at trial may not be presented to the Grand Jury). Prosecutorial discretion is

further limited by the prosecutor's "duty not only to secure indictments but also to see that justice is done." *People v. Lancaster*, *supra*, at 26. As the Court instructed over three decades ago, a prosecutor presenting a case to a the Grand Jury "owes a duty of fair dealing to the accused." *People v Pelchat*, 62 NY2d 97, 105 (1984).

A review of the minutes reveals that the evidence presented, viewed in the light most favorable to the People, does establish every element of the offenses charged. *See* CPL § 210.30(2). The presentation was defective, however, due to a lack of corroboration for the accomplice testimony. Moreover, the cumulative effect of numerous evidentiary and other errors which occurred during the Grand Jury presentment also compels the court to dismiss the indictment. The People are, however, granted leave to re-present to a new Grand Jury.

A. Insufficient Evidence Presented to the Grand Jury Due to Lack of Corroboration of Accomplice Testimony.

Pursuant to CPL § 60.22,

> "A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense."

"Although many States, and the Federal courts, permit a conviction to rest solely on the uncorroborated testimony of an accomplice, our Legislature requires that accomplice testimony be corroborated by evidence tending to connect the defendant with the

commission of the crime." *People v Steinberg*, 79 NY2d 673, 683 (1992). As noted in *People v Hudson*, 51 NY2d 233, 238 (1980), "[t]he purpose of [CPL 60.22(1)] is to protect the defendant against the risk of a motivated fabrication, to insist on proof other than that alone which originates from a possibly unreliable or self-interested accomplice (*People v Daniels*, 37 NY2d 624[1975])." This is because "accomplice testimony is inherently untrustworthy," *People v. Sweet*, 78 NY2d 263, 267 (1991), and "inherently suspect." *People v Cona*, 49 NY2d 26, 35 (1979). As a result, courts should approach accomplice testimony with "utmost caution." *People v Berger*, 52 NY2d 214, 219 (1981).

While the statute requires that corroborative evidence be truly independent of the accomplice's testimony, *People v. Nieto*, 97 AD2d 774 (2nd Dept 1983), "...it is sufficient if the corroborative evidence tends to connect the defendant to the crime so as to reasonably satisfy the jury that the accomplice is telling the truth." *People v. Glasper*, 52 NY2d 970, 971 (1981). As the Court held almost 100 years ago, "[m]atters in themselves of seeming indifference or light trifles of the time and place of persons meeting may so harmonize with the accomplice's narrative as to have a tendency to furnish the necessary connection between the defendant and the crime." *People v Dixon*, 231 NY 111, 116-117 (1921); *People v Daniels*, 37 NY2d 624 (1975).

Thus, "[a]ccomplice evidence does not have to be 'ironclad',

but rather only minimal." *People v Darby*, *supra*, at 455. In *People v Reome*, 15 NY3d 188, 194 (2010), the Court added:

> "There can be corroborative evidence that, read with the accomplice's testimony, makes it more likely that the defendant committed the offense, and thus tends to connect him to it. Some evidence may be considered corroborative even though it simply supports the accomplice testimony, and does not independently incriminate the defendant."

Notably, the accomplice corroboration requirement also applies to Grand Jury presentations. *See e.g., People v Emburey*, 61 AD3d 990 (2nd Dept. 2009). Examining the evidence presented to the Grand Jury in connection with Defendant Sharp's motion to dismiss, the court finds an almost complete lack of corroborating evidence.

To be sure, McQuaid's Grand Jury testimony, standing alone, makes out a *prima facie* case against the defendant for Conspiracy in the Fifth Degree, in violation of Penal Law § 105.05 (1) (to commit Bribing a Witness, Penal Law § 215.00 [a]) and [b]) and Conspiracy in the Sixth Degree, in violation of Penal Law § 105.00 (to commit Tampering with a Witness, Penal Law § 215.10 [a]). McQuaid, however, is an accomplice in these alleged offenses. Therefore, to satisfy the statutory mandates for Grand Jury presentment, the prosecution was required to introduce corroboration of McQaid's testimony.

The People properly recognized the accomplice corroboration requirement and so charged the Grand Jury. While the charge in some significant respects departed from the CJI Charge on

accomplice corroboration, it properly delineated the Penal Law corroboration requirement for accomplice testimony.

What, then, was the corroborative evidence which tends to connect the defendant with the commission of the offense in such a way as may reasonably satisfy the Grand Jury that the accomplice is telling the truth? In short, it is non-existent.

One type of information submitted to the Grand Jury that could arguably satisfy the accomplice corroboration requirement was wiretap evidence, but no such intercepts included Defendant Sharp as a party. The only other testimony which attempts to link the defendant to a conspiracy to bribe and tamper with Kim LoRusso comes entirely from one detective, who, either in response to questioning or unprompted, improperly offered his opinion as to the meaning of the text messages. For example, when testifying about texts introduced into evidence, the detective, without any factual foundation, stated his opinion that the patterns indicate that defendants Sharp and Galgano were involved with McQuaid and Lia LoRusso in a conspiracy to bribe and tamper with Kim LoRusso. As noted in greater detail below, that unsupported opinion testimony was wholly improper, should not have been admitted into evidence, and cannot be considered as corroboration in support of the charges in the indictment.

In *People v Reome*, *supra*, one of the corroborative pieces of evidence was a pattern of cell phone calls between the named

defendant and the cooperating accomplice. That the calls ceased during the criminal acts when the two were, according to the accomplice, together, was held to have corroborated the accomplice's description of the crime and his identification of the defendant as a perpetrator. That is not the case here, however, where not a single text message or telephone call included as a party Eric Sharp.

Another type of arguably corroborative evidence presented to the Grand Jury was the testimony, recorded telephone calls, and text messages, of certain non-accomplice witnesses. Since their communications were limited to defendants McQuaid and Lia LoRusso, what they add to the proof regarding the general conspiracy and accessorial conduct of any party is, at best, solely as to these two co-defendants, not to Defendant Sharp. *Compare People v. Koopalethes*, 166 AD2d 458 (2nd Dept 1990) *lv denied* 76 NY2d 1022(1990)(corroboration of bribery found from testimony of contractor who paid a bribe). Further support is found in a review of a number of other appellate decisions. In *People v Melendez*, 80 AD3d 534, 535 (1st Dept 2011), the Court found corroboration in the "exhaustive detail [and] forensic and other independent evidence" (as well as very strong consciousness-of-guilt evidence). In *People v Vantassel*, 95 AD3d 907 (2nd Dept 2012), a burglary case, the court held that accomplice testimony was corroborated by discovery of the fruits of the crime in the defendant's residence.

And, in *People v Cortez*, 81 A.D.3d 742, 743 (2nd Dept 2011), corroboration was found from "evidence that defendant's car was used by the perpetrators, that proceeds of the crime were found in the defendant's car", and that telephone records showed telephone contact with one of the perpetrators shortly before and after the robbery occurred.

In contrast, here, with the exception of the detective's improper opinion testimony, there is no non-accomplice evidence to corroborate McQuaid's assertions that the defendant conspired to tamper with and bribe Kim LoRusso. There were no proceeds of the crimes seized from the defendant's residence or office. No forensic evidence links him to the crimes. As in *People v Sage*, 23 NY3d 16 (2014), the evidence presented failed to corroborate the accomplice testimony in that the text messages admitted into evidence say nothing at all about whether Sharp intended to bribe or tamper with Kim LoRusso. And, while Roeme did turn, in part, on corroboration from telephone call patterns, there were no calls here to which Sharp was a party, hence there was no call pattern to support the accomplice testimony. In addition, that defendant's connection to the crime was amply supported by non-accomplice victim testimony, something completely absent here with respect to Sharp. Instead, the text messages here only involved attempts to contact Kim LoRusso; to converse with her about what happened in the restaurant; to find out what she knew about another criminal

case; and to glean any information she had about alleged wrongdoing by police or the Putnam County District Attorney's Office. Not only is there no corroborative information in any of the text messages, some of them arguably are exculpatory. Lastly, the relevant text messages were sent long after the alleged bribe offer and witness tampering occurred.

As the court held in *People v Wasserman*, 46 AD3d 915, 916 (2nd Dept 1974), "[a]ssociation with an actor in the crime is relevant only if it may reasonably give rise to an inference that the defendant was also a participant. Inferences flowing from presence or association must rest upon probability. Therefore, no such inference may be reasonably drawn in this case, since the probabilities based on experience and proof do not justify it." Here too, in the absence of corroborative evidence tending to connect the defendant with the alleged conspiracy to commit bribery and tampering, there is insufficient evidence to support the charges in the Indictment. Therefore, the Indictment must be dismissed.

In any event, even viewing the evidence in the light most favorable to the People (*People v Jennings*, 69 NY2d 103 [1986]; *People v Schulz*, 4 NY3d 521 [2005]; *People v Bello*, 92 NY2d 523 [1998]; *People v Keller*, 77 AD3d 852 [2010]; *People v Goldstein*, 73 AD3d 946 [2nd Dept 2010]), there is simply no evidence that Sharp was involved in the conspiracy alleged herein. The only evidence

presented by the People which could arguably connect Sharp to any involvement in the actions alleged here, are:

1. His downloading, on two or three occasions, calls between McQuaid and Donna Cianflone from a recording device to a computer, and

2. His providing, on one occasion, a recording device to McQuaid to record such calls.

No other testimony, no calls or no text messagess, nothing else demonstrates that Sharp conspired with Galgano, McQuaid, Lia LoRusso, or anyone else, to bribe and/or tamper with Kim LoRusso. For this reason too, the Indictment must be dismissed.

B. Evidentiary Errors During the Grand Jury Presentation.

In the course of presenting the case to the Grand Jury, there were a number of instances in which the People improperly introduced evidence and/or incorrectly advised the Grand Jury. These improprieties included improper admission of hearsay testimony, opinion testimony by non-expert police witnesses, testimony invading the province of the Grand Jurors, and irrelevant bad acts testimony. In addition, the prosecutor improperly responded to Grand Jurors' inquiries, omitted prompt curative instructions and improperly instructed the Grand Jury regarding the applicable law.

With regard to evidence which is admissible before a Grand Jury, CPL § 190.30 provides

> 1. Except as otherwise provided in this section, the provisions of article sixty, governing rules of evidence and related matters with respect to criminal proceedings in general, are, where appropriate, applicable to grand jury proceedings.
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> 6. Wherever it is provided in article sixty that the court in a criminal proceeding must rule upon the competency of a witness to testify or upon the admissibility of evidence, such ruling may in an equivalent situation in a grand jury proceeding, be made by the district attorney.

1. Hearsay

Hearsay evidence is, of course, improper evidence, and thus inadmissible in the Grand Jury. *People v Jackson*, 18 NY2d 516 (1966); *People v Wing Choi Lo*, 150 Misc2d 980 (Sup Ct, NY County 1991); *People v McGee*, N.Y.L.J., April 16, 1991, at 30, column 1 (Sup Ct, Westchester County). Much of the improper hearsay evidence was presented in connection with allegations of the defendant's juror-tampering in Westchester County Court. For example, a police witness was permitted to testify that Defendant Galgano was "confronted" in Westchester County Court about improper communication with a juror. It seems clear that none of the police officer's testimony regarding that question was based on his own knowledge. Similarly, a large amount of the other police testimony is denominated as "based upon the investigation." As is the case with much of the opinion testimony elicited from police officers (see below), it appears that most, if not all, of the information that is described as coming from "the investigation" was not based

upon first-hand knowledge.

2. Opinion Testimony Generally

"As a general principal of common-law evidence, lay witnesses must testify only to the facts and not to their opinions and conclusions drawn from the facts." *People v Russell*, 165 AD2d 327, 332 (2nd Dept 1991). In the instant Grand Jury presentation, however, a number of witnesses improperly gave opinion testimony. Both civilian and police witnesses were asked to, or simply permitted to, give their opinion as to what third parties thought or meant by certain statements. For example, on one occasion, a witness was asked by the prosecutor to interpret a particular conversation involving McQuaid. The witness proceeded to provide an opinion as to what McQuaid's thought process was during the conversation.

"Opinion evidence may not be received as to a matter upon which the jury can make an adequate judgment..." *People v Graydon*, 43 AD2d 842, 843 (2nd Dept 1974); *People v Robles*, 110 Ad2d 916 (2nd Dept 1985); Prince, Richardson on Evidence § 7-301 [Farrell 11th ed].

Even where opinion evidence is allowed, however, it must be based[5] upon facts that are already in evidence. As stated by the Court in *Cassano v Hagstrom*, 5 NY2d 643, 646 (1959),

[5]Subject to one narrow exception as regards medical testimony; see Prince, Richardson on Evidence, *supra*, §§ 7-307, 7-308 [Farrell 11th ed].

> "It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness."

See also People v Phillips, 269 A.D.2d 610 (2nd Dept 2000).

In total, on at least 25 different occasions, police or civilian witness were asked questions which called for, and/or were permitted to give answers which were, matters of opinion outside of any area of expertise, or to give an opinion as to the mental thought processes of other persons. For example, the prosecutor asked, after playing a recorded telephone call, what McQuaid understood from the call and to interpret what he had stated. The witness opined that McQuaid intended to offer Kim LoRusso money as "compensation," and that he had "more or less" meant that "they" wanted Kim not to testify.

On another occasion during the presentation, after a number of text message communications between the defendant and McQuaid were admitted into evidence, a detective improperly averred that the messages were made in furtherance of a conspiracy. There was absolutely no basis in the evidence for this testimony. The same detective also gave his opinion, without any factual foundation, that McQuaid's participation in certain telephone calls or attempted calls was at the defendant's direction and constituted an attempt to persuade Kim LoRusso from testifying against Lani Zaimi. Likewise, there was no factual basis for this testimony. This same

detective also improperly ascribed significance to McQuaid contacting the defendant after controlled calls were made to him and was improperly permitted to interpret the meaning of the plain words in the defendant's text messages. These are merely examples amongst numerous instances of a witness offering improper opinion evidence, usually not based on facts in the record.

3. Opinion on Ultimate Question

In *People v Cronin*, 60 NY2d 430, 432-433 1983), the Court held

> "For testimony regarding both the ultimate questions and those of lesser significance, admissibility turns on whether, given the nature of the subject, 'the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.' (*Van Wycklen v City of Brooklyn*, 118 NY 424, 429; *Noah v Bowery Savings Bank*, 225 NY 284, 292)."

Similarly, in *People v. Graydon*, *supra,* the court held

> "it is intolerable to permit a witness, cloaked in the garb of apparent expertise, to assume the function of the jury and attempt to answer the ultimate fact issue presented."

Cf People v Paschall, 91 AD2d 645 (2nd Dept 1982)(experts usurping the role of the jury as to the ultimate fact).

On several occasions, the question posed to a witness, and/or

the answer given, invaded the province of the jury by expressing an opinion as to the ultimate issue in the case. For example, on numerous occasions, witnesses (particularly one police witness) gave answers as to the nature of the "conspiracy" or "bribery" acts of the participants. Witnesses were also asked on many occasions to give their improperly admitted opinion regarding the conspiratorial relationship between or among the several defendants. This testimony was improper as it constituted evidence as to the ultimate issue for the Grand Jury.

4. Other Crimes/Bad Acts Evidence

It is well established that

> "[a] defendant is entitled to have the jury determine his guilt or innocence solely upon evidence tending to prove the crime charged and uninfluenced by irrelevant and prejudicial facts and circumstances."

People v Cook, 42 NY2d 204, 208 (1977). Other crimes/bad acts evidence is never admissible to show criminal propensity. It is admissible only where appropriate to complete a narrative or, in a narrow set of cases, to show such things as motive, intent, absence of mistake or accident, a common scheme or plan, or identity. *People v Molineux*, 168 NY 264 (1901); *People v Allweiss*, 48 NY2d 40(1979); *People v Ingram*, 71 NY2d 474 (1988)(proof of subsequent crimes admissible for same limited purposes).

The Grand Jury presentation included evidence regarding two unrelated and prejudicial crimes or bad acts allegedly committed by the defendant. The errors are compounded in that they allegedly occurred in another county; thus not subject to indictment by this Grand Jury under any circumstances.

In the first, the prosecution called a police witness who described an extensive background in narcotics enforcement. He then was asked questions regarding execution of a search warrant at the Westchester County law office shared by Defendant Galgano and co-defendant Sharp. The officer testified, over the next 40 pages of the transcript, about the nature and description of the 28 different types and quantities of illegal drugs seized during the warrant execution as well as their location in the office suite. Thereafter, a laboratory analysis of the drugs was entered into evidence. It identified the seized drugs and then attributed seven items to co-defendant Sharp and the remaining 21 to Defendant Galgano. Immediately thereafter, the officer was asked for and gave his opinion, from this evidence, that Galgano was ordering substantial quantities of narcotics to be delivered by Sharp. There was no evidence, including but not limited to wiretap or intercepted text message proof, introduced to the Grand Jury to remotely support this assertion. In addition, prior to the above narcotics testimony, another witness testified that the defendant was questioned by the Westchester County District Attorney's Office

in open court about tampering with a prospective trial juror in Westchester County. The witness then gave his opinion that the defendant may thereafter have been suspicious that his telephone was the subject of a wiretap and that subsequent statements and actions by him were indicative of his avoiding the use of the telephone to communicate with other persons.

According to the prosecutor, the reasons for introduction of the other crimes/bad acts evidence was, in the case of the former, solely to establish elements in the Perjury and Weapon charges against Sharp (in falsely claiming that the shotgun purchase was by and for himself), and in the case of the latter, solely to explain the timing of McQuaid and Lia LoRusso's June 25, 2014 arrests. Even if so, the significant prejudice to Defendant Galgano from introduction of these bad acts dramatically outweighed the benefit, if any, from presenting the evidence; particularly since the evidence failed to support the weapon count.[6]

5. Absence of Prompt Limiting Instructions

Proof of other crimes or bad acts, even where it may be introduced into evidence, should be accompanied by limiting instructions. *People v. Robinson*, 68 NY2d 541 (1986). *People v Taylor*, 150 Misc2d 91 (Sup Ct, Bronx County 1991). Such limiting

[6]See also discussion below regarding the impropriety of joining the Perjury and Criminal Purchase or Disposal of a Weapon charges in this indictment.

instruction, detailing the limited purpose for which the evidence is being admitted, should be delivered both immediately after the uncharged crime or bad act evidence is presented and at the close of the case. *People v Robinson*, *supra*; *People v Williams*, 50 NY2d 996 (1980).

The prosecutor elicited considerable testimony regarding seizure of a substantial amount of narcotics and other drugs from the defendant's home and office. The following day's Grand Jury session began with introduction of the laboratory analysis of the drugs. At no time, following either of these instances, did the prosecutor deliver a curative instruction regarding this other crimes evidence. The clear error of failing, at the time of the introduction of the drug evidence, to deliver a limiting instruction on the use of the testimony, was not fully ameliorated when a limiting instruction was given many days later at the end of the presentation. *People v Brown*, NYLJ, August 6, 1991, at 22, column 3 (Sup Ct, NY County)(indictment dismissed for failure of prosecutor to accompany other crimes testimony with prompt curative instruction).

The jury tampering evidence, on the other hand, once introduced by the prosecutor, was initially followed by a curative instruction. Thereafter, a grand juror posed questions about the testimony, twice referring to the defendant's alleged jury tampering. A colloquy between the grand juror and the prosecutor

followed. Unlike when the initial testimony was introduced, the subsequent colloquy was not followed by any curative instructions. While curative instructions were given in the final charge to the panel, it was error for the prosecutor to permit subsequent questions from a Grand Juror, and colloquy, on the subject of the tampering allegation without again delivering a curative instruction to the Grand Jurors.

While it is true that, on a few occasions, some of the other inadmissible testimony referenced above was followed by curative instructions, most of the improper testimony was introduced by the prosecutor without any comment at all. It is also true that, at the close of the case and immediately prior to the final charge on the law, the District Attorney generally charged the Grand Jury with respect to such testimony. Such charge, given on August 20, 2014, or a full 16 days after the first such testimony was received, failed to constitute a prompt curative instruction such as would be necessary to avoid the possibility of tainting the Grand Jury by admission of such improper evidence. Failure to deliver either a prompt, or a final, or both curative instructions, upon introduction of the testimony noted above, was error.

6. Failure of Prosecutor as Legal Advisor to the Grand Jury.

Pursuant to CPL § 190.30(7),

Whenever it is provided in article sixty that a court

> presiding at a jury trial must instruct the jury with respect to the significance, legal effect or evaluation of evidence, the district attorney, in an equivalent situation in a grand jury proceeding, may so instruct the grand jury.

In *People v Calbud, Inc., supra,* at 394-395, the Court noted that a prosecutor's instructions to the grand jury are

> "sufficient if the [prosecutor] 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."

See also People v Goff, 71 NY2d 101 (1987)*; People v Dillon*, 87 NY2d 885, 887 (1995)("lesser standard for measuring the sufficiency of Grand Jury instructions"). Nonetheless, the People may not abdicate their role as Legal Advisor by failing to provide appropriate instructions or by giving improper instructions to the Grand Jury. *People v Valles*, *supra,* at 38 ("The District Attorney is required to instruct the Grand Jury on the law with respect to matters before it"); *People v Dukes*, 156 Misc2d 386 (Sup Ct, NY County 1982)(prosecutor improperly advised Grand Jury regarding treatment of videotaped testimony by hospitalized witness).

One example of the prosecutor's failure to instruct occurred

when a witness testified about several recorded "controlled calls"[7] made to, or received from, McQuaid. When these audio recordings were played for the Grand Jury, the prosecutor provided the Grand Jurors with "transcripts" of the recorded conversations prepared by the same civilian witness. While transcription of calls by the civilian witness/participant is, at the very least, unusual, it is particularly troubling here where the witness has a strong interest in the outcome of the case due to close prior relationships with a number of the parties. Even more troublesome is that some of the calls, or portions thereof, are substantially inaudible, yet the "transcript" purportedly contains a verbatim account of what was said. In addition, the court, in listening to the tapes pursuant to its review of the Grand Jury presentation, can hear words which do not appear in the "transcript" created by the witness. More troubling, however, these omitted words, if actually said, are exculpatory as to one or more parties in this matter, including Defendant Galgano. Finally, while the recording and the "transcript" were both introduced into evidence, it is unclear whether the "transcript" constituted a jury aid or, to the extent it departed from the text of the recording, was intended to replace it. The prosecutor should have charged the Grand Jury regarding these issues.

[7]Telephone calls made with police officers present and after rehearsal of the prospective conversation.

Another charging impropriety occurred following the final instructions on the law. One of the grand jurors asked a question regarding accessorial liability. Rather than respond, the prosecutors merely re-charged the panel on that subject. Thereafter, the same juror specifically asked "If I assume that two people were acting in concert together, do I still need that circumstantial or direct evidence. If one person does something saying that they received instructions from another, do I need to see physical evidence of that direction?" The prosecutor, rather than provide a responsive instruction on the law, stated "That's up to you." These responses violated the prosecutor's obligation to "instruct the Grand Jury on the law with respect to matters before it". *People v Valles*, *supra*.

A final significant instance of prosecutorial charging error occurred with regard to the other crimes/bad acts evidence. As noted above, as part of his final charge to the panel, the prosecutor for the first time delivered a limiting instruction as to the narcotics evidence. The prosecutor specifically directed the panel that they should consider the drug possession charges against the defendant

> "only to the extent necessary to prove the elements of the crime of perjury and criminal purchase or disposal as you will be instructed as to the definitions when I ask you to vote."

The People thus suggested, in this curative instruction, that there were proper grounds to admit such prejudicial testimony and that the grounds would be explained subsequently in connection with the charge on the elements of a certain crime or crimes. Thereafter, however, the prosecutor never gave an instruction which adequately explained the proper use of the testimony as related to Defendant Galgano and/or the weapon or perjury counts; rather, he merely read the Penal Law definitions of those crimes to the jury. Contrary to his earlier promise, the prosecutor failed to explain the relationship, if any, of the drugs to either count, or the relationship of the narcotics evidence to Defendant Galgano. In sum, not only did the prosecutor fail to promptly follow this inherently prejudicial evidence with a curative instruction, he affirmatively represented that the panel would later be instructed on how the evidence should be used but never did so.

Overall, while the evidence was sufficient to establish every element of the offenses charged, the presentation was nonetheless defective due to a lack of corroboration for the accomplice testimony. In addition, the cumulative effect of numerous evidentiary and other errors which occurred during the Grand Jury presentment compels the court to dismiss the indictment. The People are, however, granted leave to re-present to a new Grand Jury. With the possibility of re-presentation and in the interests of judicial economy, the court will address the balance of the

defendant's motion.

2. MOTION TO DISMISS FOR FAILURE TO AFFORD THE DEFENDANT AN OPPORTUNITY TO TESTIFY BEFORE THE GRAND JURY.

Defendant asserts that the Indictment must be dismissed because he was effectively prevented from testifying before the Grand Jury by the District Attorney not providing him with copies of the recovered materials prior to the date he was scheduled to testify. In his attorney's August 8, 2014, correspondence to the District Attorney, Defendant claimed that

> "[w]ithout the ability to refresh his recollection and re-familiarize himself with his own records and work product, he will be severely curtailed from providing a full accounting of his conduct and recounting the relevant events accurately. Similarly, without access to his records, Mr. Galgano will be unable to identify documents and material that contain exculpatory material and warrant the Grand Jury's consideration."

The People respond that they followed the statutory requirements for giving the defendant an opportunity to testify before the Grand Jury. They add that, prior to the scheduled date for his Grand Jury testimony, the defendant affirmatively informed them that he did not wish to testify before that body.

Analysis.

The New York State Constitution entitles a defendant who is accused of felony charges to have the case presented to a Grand Jury, NY Const, Art. I, § 6, but does not afford the accused the right to appear or testify. *People v Smith*, 87 NY2d 715 (1996). Similarly, a defendant lacks any such right under the federal constitution. *Saldana v State of New York*, 665 F Supp 271, 275 (SDNY 1987), *rev'd on other grounds* 850 F2d 117 (1988), *cert denied* 488 US 1029 (1989)("A state is not required to create a right to testify before a grand jury. Indeed, there is no federal right with respect to state prosecutions even to be indicted by a grand jury, much less to appear before one [citations omitted]").

The procedure for affording the accused an opportunity to testify before the Grand Jury is codified in CPL § 190.50. The statute sets forth a multi-step protocol wherein the People and the defendant are required to exchange certain notices predicate to the defendant testifying.

Typically, an action charging the accused with one or more felonies is commenced by the People filing a Felony Complaint. If there is an unresolved Felony Complaint and the People seek an indictment, they are required to serve notice of Grand Jury presentment upon the accused. If the accused wishes to testify before the Grand Jury, he or she must then serve the prosecutor

with notice of such intent. The People are then required to serve notice upon the accused of the date and time of such testimony.

As in the case here, a defendant against whom an accusatory instrument has not been filed is not entitled to notice of Grand Jury presentment. *People v Tirado*, 197 AD2d 927 (4th Dept 1993); CPL § 190.50(5)(a). In the absence of such accusatory instrument, the accused may nonetheless serve notice upon the People of his or her desire to testify before the Grand Jury. If so, the People are then similarly obligated to serve notice upon the accused of the date and time for such testimony. Accord *People v Luna*, 129 AD2d 816 (2nd Dept 1987), *lv denied* 70 NY2d 650 (1987) (accused's notice of intention to testify must be honored even if Felony Complaint previously dismissed).

In either case, where the People are required to provide notice of a prospective Grand Jury proceeding, they must afford the accused "reasonable time" to exercise the right to testify before said Grand Jury. CPL § 190.50(5)(a). The "reasonable time" concept is not subject to rigid analysis. Rather, it is measured in relation to the particular facts of the individual case. *People v Jordan*, 153 AD2d 263,266 (2nd Dept 1990), *lv denied* 75 NY2d 967 (1990). Simply stated, the notice of Grand Jury presentment "must be reasonably calculated to...permit [the accused] to exercise his right to testify." *People v Sawyer*, 274 AD2d 603, 605 (3rd Dept 2000). The statutory "reasonable time" requirement applies equally

whether or not there is an unresolved accusatory instrument. *People v Morris*, NYLJ, Mar. 1, 1993, at 31, col. 1 (Sup Ct, Kings County); *People v Levine*, NYLJ, Mar. 8, 1996, at 36, col. 6 (Westchester County Ct).

Notwithstanding the absence of any constitutional mandate, the Court of Appeals has characterized an accused's opportunity to testify before the Grand Jury as a "right." *People v Evans*, 79 NY2d 407, 412-413 (1992)("The District Attorney must afford defendant reasonable time to exercise the *right* to appear as a witness at the Grand Jury"); *People v Corrigan*, 80 NY2d 326, 332 (1992)("A defendant's ... *rights* to testify before the Grand Jury...."))(emphasis added). Moreover, whether characterized as "valued," *People v Evans*, *supra*, at 413; "absolute," People v Jordan, *supra*; or "substantial" *People v Smith*, *supra*, at 721; the right of the accused to testify before the Grand Jury "must be scrupulously protected." *People v Corrigan*, *supra*; *People v Fields*, 258 AD2d 593 (2nd Dept 1999).

If the People violate the defendant's right to testify in the Grand Jury, the statute creates a "ministerial duty on the part of the court to dismiss an indictment." Matter of *Borrello v Balbach*, 112 AD2d 1051, 1052 (2nd Dept 1985); *People v Massard*, 139 AD2d 927 (4th Dept 1988). Absent a violation of the statute, however, the court has no inherent authority to dismiss an indictment for not

permitting the accused to testify before the Grand Jury. *People v Guzman*, 168 AD2d 154 (2nd Dept 1991).

In his motion to dismiss, Defendant does not allege that the People failed to provide him with an opportunity to testify prior to the Grand Jury voting a true bill. Nor does he challenge the timeliness of the notice or scheduled date for his testimony. Rather, Defendant argues that the prosecutor did not fairly discharge his duties in connection with his Grand Jury presentment in that he did not furnish copies of the recovered materials prior to the date Defendant was scheduled to testify. Defendant goes on to assert that failure to provide the recovered materials affirmatively prevented him from being able to testify. Thus, Defendant claims, the District Attorney obtained the instant Indictment in violation of his right to testify before the Grand Jury. This claim has no merit.

Generally, "[a]bsent a breach of a statutory command or some indication of likely prejudice, there is no legal basis for interfering with the prosecutor's prerogatives in determining the manner in which a Grand Jury presentment is made." *People v Adessa*, 89 NY2d 677, 682. (1997). Specifically, with regard to Defendant's argument that he was wrongfully denied access to certain materials prior to testifying, it has long been the rule that discovery in criminal cases is governed entirely by statute. *People v Copicotto*, 50 NY2d 222 (1980). New York's criminal

discovery statute, CPL Article 240, does not provide for discovery prior to indictment. Thus, the People are not required to provide and courts are without authority to order pre-indictment discovery. *Matter of Hynes v Cirigliano*, 180 AD2d 659 (2nd Dept 1992), *lv denied* 79 NY2d 757 (1992). Even in capital cases, the lack of statutory authority prohibits courts from ordering pre-indictment discovery. *Matter of Brown v Appelman*, 241 AD2d 279 (2nd Dept 1998); *People v Walker*, 15 AD3d 902, 903 (4th Dept 2005), *lv denied* 4 NY3d 836 (2005)("no right to discovery prior to indictment").

Moreover, even if the statute provided for pre-Grand Jury discovery, it would only be available to "a defendant against whom an indictment, superior court information, prosecutor's information, information or simplified information charging a misdemeanor is pending." CPL § 240.20(1). At the time of the instant Grand Jury presentation, Defendant had not been arraigned on any accusatory instrument (other than the unrelated Westchester County Felony Complaint) nor had one been filed. Thus, even if the discovery statute were applied, it would not avail Defendant because he did not have an accusatory instrument pending against him. In other words, there was no action within which he could obtain discovery.

Whether or not an accusatory instrument has been filed, courts have consistently denied defendants' motions to dismiss indictments due to the People's refusal to provide pre-indictment discovery.

In *People v Sawyer*, *supra*, the defendant asserted that his right to testify before the Grand Jury had been denied by the prosecutor's refusal to comply with his pre-Grand Jury testimony demand for, *inter alia,* a copy of his videotaped statement to the police. Both the trial and appellate courts rejected his argument, holding that he was not entitled to his own statement prior to testifying before the Grand Jury. Similarly, in *People v Taylor*, 2001 WL 914241 (Sup Ct, NY County, 2001), a capital case, the defendant argued that his right to testify before the Grand Jury was denied due to the prosecutor's refusal to provide, *inter alia,* copies of his and his co-defendant's statements. The court rejected this argument, holding that the defendant had no right to such materials prior to indictment. See also People v Melville, 2001 WL 1356362 (Suffolk County Ct, 2001).

Perhaps most analogous is *People v Gudz*, 18 AD3d 11 (3rd Dept 2005). In Gudz, as in the instant case, law enforcement officers had obtained the defendant's computer. Similarly to the instant case, the defendant moved to dismiss his indictment arguing that he was denied his right to testify before the Grand Jury due to the prosecutor's refusal to grant him access to his own computer hard drive in advance of his testimony. The Appellate Division affirmed denial of his motion, finding his claims "unpersuasive." *Id.*, at 13.

Clearly, Defendant's arguments must fail because he has no

right to discovery prior to testifying in the Grand Jury. It is of no moment that the defendant asserted a need to "refresh his recollection." As the court held in *People v Sawyer, supra,* "[s]urely, defendant required little or no preparation in order to render a truthful account...." This rationale was applied in *People v Cuoco*, 2006 WL 7137226 (Sup Ct, NY County, 2006) where the court reasoned "[s]ince a defendant gives testimony in a narrative form, in the usual case, little or no preparation is required to render a truthful account of the events of which he has personal knowledge." Thus, the People's refusal to comply with Defendant's demand for the recovered materials did not infringe upon his right to testify. Therefore, his failure to testify before the Grand Jury is not grounds for dismissing the indictment.

In sum, the People clearly and unequivocally notified the defendant of his opportunity to testify before the Grand Jury prior to submission of the charges for a vote. In doing so, they properly complied with their statutory notice obligations as set forth in CPL § 190.50.

Lastly, the court also notes that, notwithstanding the above, in correspondence dated August 11, 2014, the defendant affirmatively waived his right to testify before the Grand Jury. While it is true that such waiver must be made knowingly, *People v Moskowitz*, 192 AD2d 317 (1st Dept 1993) *lv denied* 81 NY2d 1077 (1993), there is no suggestion that such was not the case here. Of

course, the instant defendant being an experienced criminal defense attorney suggests that such decision was made knowingly. Accordingly, Defendant's motion to dismiss the indictment due to the prosecution's failure to afford him an opportunity to testify before the Grand Jury is denied.

3. MOTION TO DISMISS FOR FAILURE TO PRESENT CERTAIN EVIDENCE TO THE GRAND JURY.

Defendant moves for an Order dismissing the Indictment due to the People's failure to call certain witnesses to testify before the Grand Jury as well as their refusal to provide certain additional information to that body. The witnesses and information are detailed in two letters from defense counsel to the prosecutor.

On August 12, 2014, defense counsel forwarded correspondence to the District Attorney requesting that five named witnesses be called before the Grand Jury. On August 18, 2014, defense counsel forwarded additional correspondence to the District Attorney requesting that three additional witnesses be called before the Grand Jury:

1. A named Assistant United States Attorney,

2. A named New York State Trooper, and

3. A named Westchester County Assistant District Attorney.

In the correspondence, defense counsel wrote that the three witnesses should be called because they could provide exculpatory testimony. More specifically, counsel indicated that the

> "witnesses and requested testimony will tend to demonstrate that Mr. Galgano's actions were taken in furtherance of his lawful investigation, rather than as part of any conspiracy to intimidate, bribe, or tamper with any witness."

In addition to the specified witnesses, defense counsel also requested that the prosecutor present to the Grand Jury any evidence showing that the defendant was engaged in a lawful investigation into misconduct by the Putnam County District Attorney and/or other law enforcement authorities.

The People respond as follows:

The Grand Jury was informed of each of the five witnesses named in the defendant's August 12, 2014, correspondence and voted to hear from only one. Thereafter, that witness testified before the Grand Jury.[8]

As to the three additional witnesses in the defendant's August 18, 2014, correspondence:

1. The named Assistant United States Attorney - the Grand Jury was not asked to consider this witness,

[8]Review of the transcript of the Grand Jury presentment confirms the accuracy of the prosecutor's response.

2. The named New York State Trooper - the Grand Jury was not asked to consider this witness because, upon investigation, no such person is employed by the New York State Police, and

3. The named Westchester County Assistant District Attorney - the Grand Jury was not asked to consider this witness.

The People add that they presented some evidence in connection with Defendant's claims that he was lawfully investigating prosecutorial and/or law enforcement authority misconduct. The People posit, however, that much of the evidence that the defendant requested to be presented to the Grand Jury is self-serving and/or otherwise inadmissible. Lastly, they argue that the defendant had an opportunity to present his claims by testifying before the Grand Jury and elected not to do so.

With respect to the witnesses requested by the defendant, since the prosecutor complied with most of the defendant's requests, the motion to dismiss only applies to the named Assistant United States Attorney and the named Westchester County Assistant District Attorney (hereinafter "the two remaining witnesses"); the named New York State Trooper being either a fictitious name or a person unable to be located with the information provided by the defendant.

Defendant asserts that the prosecutor was required to ask the

Grand Jury whether it wished to hear from every one of the listed witnesses. He argues that, once the Putnam County District Attorney received such request, he is "merely a conduit, performing the ministerial function of relaying such request to the Grand Jury." Defendant's Memorandum of Law, p. 14. Thus, the gravamen of Defendant's motion is that the indictment must be dismissed because the prosecutor unilaterally determined not to ask the Grand Jury whether it wanted to hear testimony from the two remaining witnesses.

The People counter that members of the Putnam County District Attorney's Office interviewed the two remaining witnesses and determined that neither could provide any relevant admissible testimony. Since it would be improper for them to be called to testify, the prosecutor was not required to ask the Grand Jury whether it wanted to hear from them.

Analysis.

A proceeding before the Grand Jury is not intended to be adversarial. *People v Brewster*, 63 NY2d 419 (1984). To the contrary, the Grand Jury is primarily an investigative body whose function is to determine whether a person should be accused of a crime. CPL § 190.05; *People v Calbud, Inc, supra*. Unlike a trial, the accused's rights in the Grand Jury are severely limited and defined by statute. Thus, the rights of the accused to call witnesses before the Grand Jury are much narrower than those at a

trial. *People v Thompson*, *supra*.

Analysis of the issues raised by Defendant's motion to dismiss begins with examination of CPL § 190.50. Subsection six provides

> "A defendant or a person against whom a criminal charge is being or is about to be brought in a Grand Jury proceeding may request the Grand Jury, orally or in writing, to cause a person designated by him to be called as a witness in such proceeding. The Grand Jury may as a matter of discretion grant such request and cause such witness to be called pursuant to subdivision three."

The statute provides the only mechanism whereby the accused may present evidence, other than his or her own testimony, to the Grand Jury. In essence, the accused must first request that a designated person be called to testify. The prosecutor must then notify the Grand Jury of the request. *See* Relin v Maloy, 182 AD2d 1142 (4th Dept 1992). The Grand Jury, however, has the ultimate authority to determine whether to hear the witness. *People v Stanton*, 241 AD2d 687 (3rd Dept 1997)(prosecutor does not have total discretion to determine who testifies before the Grand Jury).

Pursuant to the statute, the prosecutor's role is somewhat ministerial; limited to presenting the defendant's request to the Grand Jury and abiding by their decision. Thus, for example, the District Attorney must inquire of the Grand Jury whether it wishes

to hear the defendant's witnesses even though the witnesses did not timely appear. *People v Andino*, 183 Misc2d 290 (Sup Ct, Bronx County 2000). Likewise, the prosecutor's obligation to inquire of the Grand Jury is not obviated when the defendant testifies before the Grand Jury and does not personally request that it consider certain witnesses. *People v Freeman*, 24 Misc3d 1212(A)(Sup Ct, NY County 2009).

Here, however, the People assert that the two remaining witnesses could not provide any relevant admissible testimony. Thus, they argue, asking the Grand Jury to consider whether to call them to testify was not required because they could not have properly given any testimony. In support of their argument, they cite *People v Martucci*, 153 AD2d 866 (2nd Dept 1989). In Martucci, the defendant requested that the Grand Jury hear two witnesses.[9] During the Grand Jury proceedings, the prosecutor severely limited their testimony, asserting that the omitted portion was irrelevant. The motion court dismissed the indictment and the Appellate Division reversed, holding that "the prosecutor properly exercised her discretion in limiting the testimony of the two witnesses designated by the [defendant]." *Id.*, at 867. The People argue that, since the Martucci court clearly acknowledged that the prosecutor has "discretion" to preclude portions of a witness's

[9]The decision does not indicate whether the prosecutor asked the Grand Jury to decide whether it wished to hear from the witnesses or if the prosecutor unilaterally called them to testify.

testimony, they also have discretion to totally preclude the testimony of the two remaining witnesses who have no relevant testimony at all. Therefore, they need not even inquire of the Grand Jury whether it wishes to hear them.

Contrary to the prosecutor's position, Martucci is not controlling. First, it is distinguishable on its facts. Unlike the instant case, in Martucci, the defense witness actually testified before the Grand Jury. Second, the ruling merely upholds the prosecutor's traditional gatekeeper role, as legal advisor to the Grand Jury, to determine the admissibility of evidence. CPL § 190.30(6). The authority to limit testimony does not, as the People argue, give the prosecutor total discretion regarding which defense witnesses the Grand Jury may hear. If that were so, CPL § 190.50(6) would have no meaning. In fact, this court has not found a single decision which confers that authority, despite a specific statutory provision to the contrary, upon the People. Every applicable decision found by this court holds that an indictment must be dismissed if the prosecutor fails to ask the Grand Jury whether it wishes to hear witnesses proffered by the defendant. One particularly applicable decision is *People v Montagnino*, 171 Misc2d 626 (St. Lawrence County Ct 1997), where the court dismissed an indictment for the prosecutor's failure to allow the Grand Jury to determine whether to hear the defendant's witness. The court specifically held that the prosecutor's obligation is not dependent

on the witness's proposed testimony. *See also People v Latorre*, 162 Misc2d 432 (Crim Ct, Kings County 1994) (indictment dismissed due to prosecutor's refusal to call witness requested by Grand Jury).

The only other case cited by the District Attorney is *People v Johnson*, 289 AD2d 1008 (4th Dept 2001). As the People correctly point out, in Johnson, an indictment was upheld notwithstanding that the prosecutor did not inquire of the Grand Jury whether it wished to hear the defendant's witness. The case is inapplicable, however, because it turned on the defendant's failure to give proper notice. More specifically, the court found that defense counsel's request that the prosecutor "speak" to his witness did not satisfy the notice provisions of CPL § 190.50(6). Therefore, the prosecutor was not required to ask the Grand Jury to consider the defendant's request.

In sum, the wording of the statute as well as numerous applicable decisions clearly show that the prosecutor must permit the Grand Jury to determine whether it wishes to hear from any witnesses proffered by the defendant.[10] Notwithstanding, the People's argument has some merit. There is no dispute that the District Attorney is the legal advisor to the Grand Jury. *People*

[10]One court has opined that failure to inform the Grand Jury of the defendant's request concerning proposed witnesses "wrongfully deprived *the Grand Jury* of its discretionary right to hear from those witnesses." *People v. Andino*, *supra* (emphasis added).

v DiFalco, 44 NY2d 482, 486-487 (1978). In that role, the prosecutor has significant discretion to determine what evidence may be presented. *People v. Adessa*, *supra.* If a witness has no relevant and/or admissible testimony, the prosecutor has the authority, if not the obligation, to preclude the witness from testifying. But what if the witness is a defense witness whom the Grand Jury wants called to testify? Must the prosecutor call such witness to testify before the Grand Jury and then state that, because all of the witness's testimony would be inadmissible, there are no proper questions?

In such instance, the prosecutor is not without recourse. The statute provides the People with a remedy should they disagree with the Grand Jury's decision to hear from the defendant's witness(es). CPL § 190.50(6) provides that when the Grand Jury decides to hear from a defense witness, "such witness" is called "pursuant to subdivision three." As relevant herein, CPL § 190.50(3) provides

> "[a]t any time after such a direction, however,...the people may apply to the court which impaneled the Grand Jury for an order vacating or modifying such direction...on the ground that such is in the public interest. Upon such application, the court may in its discretion vacate the direction..., attach reasonable conditions thereto, or make other appropriate qualification thereof."

In other words, a prosecutor who disagrees with the Grand Jury's determination to hear the defendant's witness(es) may apply to the court to negate that decision.[11] That was not done here. Thus, clearly, the first prong of the test set forth in CPL § 210.35(5), i.e., the proceeding failed to conform to the requirements of CPL § 190.50(6) to such degree that the integrity thereof is impaired, was satisfied. *People v Samuels*, 12 AD3d 695 (2nd Dept 2004)("dismissal requires a discretionary determination that the fundamental integrity of the Grand Jury process was impaired by the error").

As to the second prong of the CPL § 210.35(5) test, possible prejudice, Defendant asserts that no further analysis is necessary as the prosecutor's failure to follow the statutory mandate automatically created "obvious prejudice." Defendant's Memorandum of Law, p. 21. Indeed, there is some support for this position. In *People v Montagnino*, *supra,* the court dismissed an indictment finding the possibility of prejudice to the defendant solely from the prosecutor's failure to inform the Grand Jury of exculpatory defense witnesses. In *People v Andino*, *supra*, the court reached the same conclusion.

Further support for the defendant's position can be found in two cases which are on all fours with the instant case. In *People*

[11]In contrast, it has been suggested that the Grand Jury's refusal to call a witness is not reviewable by a court. *People v. Romero*, 171 Misc2d 722 (Sup Ct, Nassau County 1997).

v Tse, NYLJ, Nov. 12, 1989, at 22, col.5 (Sup Ct, NY County), the defendant requested that the Grand Jury hear certain witnesses. As here, the prosecutor determined that their testimony was inadmissible and irrelevant and, thus, did not ask the grand jurors whether they wished to hear any of the witnesses. The court dismissed the indictment, finding that the prosecutor not only violated the defendant's CPL § 190.50 statutory rights, "but also acted as an exclusive architect of the proceedings, a role which he may not take on (*See*: *US v Agurs*, 427 US 97 [1976])." The court did not, however, examine possible prejudice to the defendant. Similarly, in *People v Urbanik*, NYLJ, Apr. 10, 1990, at 29, col. 3 (Sup Ct, Queens County), the court dismissed an indictment for the prosecutor's failure to notify the Grand Jury of the defendant's witnesses. It determined that the prosecutor usurped "the Grand Jury's discretion in determining which witnesses should be heard." The Urbanik court likewise did not examine whether doing so possibly prejudiced the defendant. Also instructive is *People v Mendez*, NYLJ, Dec. 21, 1989, at 26, col.3 (Sup Ct, Bronx County). In Mendez, the District Attorney affirmatively asked the Grand Jury whether it wished to hear the defendant's exculpatory witness, but prefaced the request by stating "I know it is late in the hour." Despite the Grand Jury voting not to hear from the witness, the court dismissed the indictment finding that the comment "impermissibly tainted the proceedings." The court did so,

however, without reaching the issue of possible prejudice to the defendant.

Within the past decade, the Court of Appeals had two occasions to address the prosecutor's obligations pursuant to CPL § 190.50(6). The most recent is *People v Thompson*, *supra.* In Thompson, the defendant asked the Grand Jury to call a named eyewitness. The prosecutor stated to the Grand Jury that the witness had no relevant testimony to offer (the Court agreed that this was accurate). Thereafter, the Grand Jury voted not to hear the witness. In its decision upholding the indictment, the Court examined the "totality of the circumstances" of the Grand Jury proceeding and found that the prosecutor's statement did not impair the integrity of the Grand Jury. The court did not, however, reach the second prong of the CPL § 210.35(5) test: possible prejudice to the defendant. Moreover, as the defendant herein correctly points out, Thompson addressed a different factual scenario, i.e., a situation where the Grand Jury had voted whether to hear the defendant's witness.

Nine years earlier, in *People v Hill*, *supra,* the Court found possible prejudice when the prosecutor informed the Grand Jury of the defendant's witnesses but did not indicate the nature of their proposed testimony (alibi). Thereafter, the Grand Jury voted not to hear them. The Court affirmed dismissal of the indictment. Here, too, the case is not controlling in that the grand jurors

ultimately voted upon the request. Unlike in Thompson, however, the court based its decision on a finding of possible prejudice to the defendant.

Contrary to Defendant's position is *People v Williams*, 73 NY2d 84 (1989). In Williams, the Court held that where, as here, the defendant seeks dismissal pursuant to CPL § 210.35(5), the clear intent of the legislature is that such relief is only available upon a showing of possible prejudice to the defendant. Notwithstanding the numerous contrary opinions cited in the paragraphs above, this court will follow the holding in Williams and examine whether the prosecutor's omission possibly prejudiced the defendant.

CPL § 210.35(5) does not require a showing of actual prejudice to the defendant. *People v Sayavong*, 83 NY2d 702 (1994). On the other hand, the potential for prejudice must be articulable. *Id.* And, overall, analysis must be tempered by the admonition in numerous decisions that "dismissal of an indictment is a drastic and exceptional remedy." *E.g., People v Read*, 71 AD3d 1167, 1168 (2nd Dept 2010). Or, as the Court of Appeals has held, "isolated instances of misconduct will not necessarily ... lead to the possibility of prejudice." *People v Huston*, *supra*, at 409. Thus, a determination of the possibility of prejudice turns on the facts of each particular case. *Id.* *Compare People v DiFalco, supra* (indictment dismissed due to the presence of an unauthorized

prosecutor in the Grand Jury - prejudice presumed).[12]

Here, the two remaining witnesses arguably could have provided exculpatory testimony in support of the defendant's assertion that he was merely involved in a legitimate investigation into wrongdoing by prosecutorial and law enforcement authorities. If so, their testimony would go to the heart of the defense in this case.

Certainly, better practice would have been for the prosecutor to follow the provisions of CPL § 190.50(6). That failure impaired the integrity of the Grand Jury leading to possible prejudice to the defendant. Thus, this is such a case where the error compels the "exceptional remedy" of dismissal of the indictment. *People v Darby*, supra. Therefore, the defendant's motion to dismiss for the prosecutor's failure to ask the Grand Jury to consider hearing the testimony of the two remaining witnesses is granted.

Lastly, the defendant also made a general request that the prosecutor present evidence showing that he was engaged in a lawful investigation of prosecutorial and law enforcement misconduct. While the District Attorney was not obligated to do so (see discussion below), the court finds that, to their credit, the People more than sufficiently presented evidence of same.

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[12]Interestingly, although the DiFalco Court affirmed dismissal, the Appellate Division did not reach the issue of possible prejudice. *People v DiFalco*, 54 AD2d 218 (1st Dept 1976).

4. MOTION TO DISMISS FOR THE PEOPLE'S FAILURE TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY.

This portion of Defendant's motion requires the court to explore a long-time unsettled area of New York criminal jurisprudence. Defendant moves, pursuant to CPL § 210.35(5), for an Order dismissing the Indictment due to the People's failure to present certain allegedly exculpatory evidence to the Grand Jury.[13] More specifically, Defendant argues that the prosecutor was required to present to the Grand Jury:

1. Text messages sent by Defendant to Co-Defendant Quincy McQuaid (hereinafter "McQuaid"), between May 8, 2014 and May 11, 2014, indicating that he was only seeking to use Kim LoRusso, the Complainant under Putnam County Indictment No. 0024-2014, as a source of information, adding that McQuaid should "fix" any suggestion that he had offered a bribe; and

2. Recorded telephone conversations from June 7, 2014 and June 8, 2014, between McQuaid and Kim LoRusso, wherein McQuaid indicates that his prior offer of compensation was not a bribe.

[13]On July 30, 2014, defense counsel forwarded correspondence to the prosecution requesting that exculpatory evidence be presented to the Grand Jury.

The People oppose the motion. They argue that, while they presented much of the requested information to the Grand Jury, the defendant is not entitled to have all exculpatory evidence presented to that body.

Analysis.

The Grand Jury is primarily an investigative/accusatory body. *People v Calbud, Inc., supra*. Its traditional role is to "prevent prosecutorial excess." *People v Lancaster, supra,* at 25. Or, as the Court held over four decades ago, "[t]he Grand Jury is part of the investigatory process and not the prosecution." *People v Waters*, 27 NY2d 553, 556 (1970); *People v Isla*, 96 AD2d 789 (1st Dept 1983).

Nonetheless, the prosecutor "need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused." *People v Mitchell, supra*, at 515; *People v Lancaster, supra*. As one commentator categorically concluded, "[a] prosecutor is not obliged to present evidence favorable to the defendant to the grand jury." Muldoon, Handling a Criminal Case in New York § 6:115. This is because the "Grand Jury proceeding is not a mini trial." *People v Lancaster, supra*, at 30; *People v Sergeant*, 193 AD2d 417 (1st Dept 1993). Moreover, prosecutors "enjoy wide discretion in presenting their case to the Grand Jury."

People v Lancaster, *supra*, at 25.

While on its face, Mitchell seems to clearly hold that a prosecutor is not required to present exculpatory evidence to the Grand Jury, the court has discovered numerous decisions which evince a remarkable lack of consistency in applying the rule. In fact, contrary to what appears to be the unambiguous language of Mitchell, courts have dismissed indictments solely because the prosecutor withheld exculpatory evidence from the Grand Jury. Unfortunately, there is very little consistency amongst the courts which have addressed this issue.

For example, courts have dismissed indictments due to the prosecutor's failure to present evidence suggesting significant witness error. In *People v Lee*, 178 Misc2d 24 (Sup Ct, Nassau County 1998), the court dismissed a murder indictment where the prosecution did not inform the Grand Jury that a key witness identified another person as the perpetrator. In *Lee*, the court reasoned that "fairness" mandated the dismissal. *Id.*, at 29. Similarly, in *People v Scott*, 150 Misc2d 297 (Sup Ct, Queens County 1991), the prosecutor did not introduce into evidence correspondence from the complainant indicating that the line-up identification "was a mistake," adding that the witness had since seen the actual perpetrator on the street. The court dismissed the indictment reasoning that it balanced "the prosecutor's right to exercise his discretion as to what material should be presented

with the Grand Jury's right to hear the full story and make an independent decision." *Id.,* at 298. In sharp contrast to Lee and Scott, however, is *People v Dillard*, 214 AD2d 1028 (4th Dept 1995). In Dillard, the court held that it was error to dismiss an indictment for the prosecutor's failure to inform the Grand Jury that the lone eyewitness not only failed to identify the defendant from a photo array, but also affirmatively recanted his earlier statements.

Similarly inconsistent are decisions regarding a prosecutor's obligation to introduce the defendant's post-arrest exculpatory statements. In *People v Falcon*, 204 AD2d 181 (1st Dept 1994), the court affirmed dismissal of an indictment for the prosecutor's failure to introduce the defendant's videotaped statement to the police - notwithstanding that it was wholly consistent with his signed statement previously introduced as evidence. In a Second Department case, *People v Black*, 220 AD2d 604 (2nd Dept 1995), the court reached the opposite result. In Black, the court upheld an indictment even though, after introducing the defendant's written statement, the People omitted his arguably more exculpatory videotaped one. Likewise, in *People v Jimenez*, 175 Misc2d 714 (Sup Ct, Bronx County 1998), the court affirmatively disregarded the holding in Falcon and refused to dismiss an indictment for the prosecutor's failure to introduce the defendant's videotaped exculpatory statement.

Further inconsistency is found when examining decisions which address the propriety of withholding statements by third parties who admit to committing the crime(s) charged. In *People v Darrisaw*, 206 AD2d 661 (3rd Dept 1994), the court sanctioned non-presentation of an affidavit in which the affiant confessed to the crime and fully exonerated the defendant. In *People v Joseph Steed, et al.*, NYLJ, June 12, 1990, at 23, col. 3 (Sup Ct, Bronx County, Donnino, J.), however, the court reached the opposite conclusion. In Steed, four occupants of a van were charged with possession of the two pistols recovered therein. The driver, also the owner of the van, told the arresting officers that he had recently purchased both pistols. The prosecutor did not present this statement to the Grand Jury. The court dismissed the indictment holding that the omission impaired the integrity of the grand jury and prejudiced the passenger co-defendants.

Thus, it appears that, contrary to the plain wording of Mitchell, there is no hard-and-fast rule excusing a prosecutor from presenting all exculpatory evidence to the Grand Jury. Decisions by courts addressing the issue suggest that the rule is more nuanced.

For decades, courts have struggled to establish a consistent standard to address this issue. Over 20 years ago, in *People v Cerda*, NYLJ, Nov. 15, 1993, at 26, col. 4 (Sup Ct, NY County), the court lamented the lack of a consistent guiding principle regarding

a prosecutor's duty, if any, to introduce exculpatory evidence in the Grand Jury. Noting a general reluctance to dismiss on those grounds, the court concluded that relief was granted only in "particularly compelling cases." The Cerda court then dismissed the indictment for the People's failure to introduce testimony of a civilian witness who claimed to have seen another person in possession of the pistol which the defendant was accused of possessing. See also *People v Christopher Raimo*, NYLJ, Feb. 2, 1996, at 34, col. 3 (Westchester County Ct)(indictment dismissed for failure to present exculpatory witnesses).

The Second Department, in two cases decided five years apart, applied a single standard. In *People v Suarez*, 122 AD2d 861 (2nd Dept 1986), *lv denied* 68 NY2d 817 (1986), a murder case, the prosecutor did not introduce prior inconsistent statements made by a Grand Jury witness. The motion court dismissed the indictment finding that the information should have been provided to the Grand Jury. On appeal, the court reversed, holding that "an indictment will not be dismissed provided that the prosecutor did not withhold any information from the Grand Jury which would have *materially influenced* its investigation. *Id.*, at 862 (emphasis added).

In *People v Golon*, 174 AD2d 630 (2nd Dept 1991), the court applied an almost identical test but reached the opposite result. In Golon, the defendant was indicted for Grand Larceny and related offenses in connection with a certain automobile. The prosecutor

was in possession of evidence, including a Certificate of Title, indicating that the defendant was the true owner of the vehicle he was alleged to have stolen. The prosecutor did not, however, present any of it to the Grand Jury. The court held it improper for the People to withhold such evidence which "went to the very heart of the charge" and "would have *materially influenced* the Grand Jury's investigation and findings." *Id.*, at 632 (emphasis added).

Taken together, these two decisions show that the Second Department has endorsed the "materially influenced" standard for reviewing deficiencies in Grand Jury presentation; perhaps with the added requirement in Golon that the omitted evidence go to "the very heart" of a charged crime. The standard was first reported in *People v Filis*, 87 Misc2d 1067 (Sup Ct, NY County 1976). In Filis, the court formulated the test as follows:

> "Is the exculpatory matter in this case so important as to *materially influence* the Grand Jury's investigation or would its introduction possibly cause the Grand Jury to change its findings?"

Id., at 1069 (emphasis added). See also *People v. Monroe*, 125 Misc2d 550 (Sup Ct, Bronx County 1984).

Another approach adopted by some courts is similar to the one used to determine which defenses must be submitted to the Grand

Jury. In *People v Valles*, *supra*, the Court held that a prosecutor need only instruct the Grand Jury as to exculpatory defenses, not mitigating ones. In other words, the Grand Jury need only be legally instructed regarding complete or whole defenses. In *People v Curry*, 153 Misc2d 61, 65 (Sup Ct, Queens County 1992), the court analogized Valles' holding regarding which defenses must be charged to which exculpatory evidence must be presented. The court concluded that the prosecutor must present evidence which would "wholly exculpate" the accused, but need not present evidence which might mitigate the proof. Another court defined the test as follows:

> "Only when there exists exculpatory evidence that might obviate a prosecution altogether is it the duty of the People to present such evidence to the Grand Jury...."

People v Davis, 184 Misc2d 680, 687-688 (Sup Ct, NY County 2000).

Or, put still another way,

> "[w]hether or not a prosecutor must present evidence in its possession which supports a defense or affirmative defense ... depends on whether the defense is exculpatory or merely mitigating."

People v Rivera, 179 Misc2d 710, 713 (Sup Ct, Bronx County 1999).

Using a similar approach, still other courts have

distinguished between "Brady material[14]" and "Giglio material[15];" dismissing indictments for failure to present the former but not the latter.[16] See generally Abramovsky, "Does the Brady Doctrine Apply to New York Grand Juries?" NYLJ, Aug. 30, 2001, at 3, col. 1. Thus, in *People v Morris*, 204 AD2d 973 (4th Dept 1994), *lv denied* 83 NY2d 1005 (1994), the court found that the withheld evidence only went to the credibility of a witness. Therefore, it reversed the lower court's dismissal of the indictment, reasoning that "[c]redibility is a collateral matter that generally does not materially influence a Grand Jury investigation." *Id.*, at 974. Likewise, in *People v Hansen*, 290 AD2d 736 (3rd Dept 2002), *aff'd* 99 NY2d 339, 346, fn. 6 (2003), the court sanctioned an indictment where the prosecutor withheld from the Grand Jury that a witness had entered into a cooperation agreement. Compare *People v Sorenson*, NYLJ, Oct. 2, 1991, at 29 (Sup Ct, Richmond County)(Indictment dismissed where witness untruthfully testified that he had no leniency agreement).

On the other hand, in their standards for criminal practice, the American Bar Association (hereinafter "ABA") takes the position

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[14]*Brady v. Maryland*, 373 US 83 (1963), mandates that prosecutors disclose all evidence in their possession that is favorable to the defendant.

[15]*Giglio v. U.S.*, 405 US 150 (1972), applies to evidence relevant to witness credibility.

[16]Interestingly, although both *Brady* and *Giglio* are United States Supreme Court decisions, that same court has held that, in federal cases, the Government has no obligation to present exculpatory evidence to the Grand Jury. *U.S. v. Williams*, 504 US 36 (1992).

that there should not be a Brady/Giglio distinction. Rather, these standards provide:

> "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense."

ABA Standards for Criminal Justice, Prosecution Function, Standard 3-3.6(b)(3d ed. 1993). Thus, under the sweeping ABA standards, a prosecutor would be required to present all Brady material and Giglio material to the Grand Jury.

Lastly, one might conclude that some decisions simply turn on the compelling quality of the exculpatory evidence. For example, in *People v Livingston*, 175 Misc2d 322 (Broome County Ct 1997), a DWI prosecution, the prosecutor did not show to the Grand Jury a videotape of the defendant performing field sobriety and breath analysis tests. After viewing it, the court declared that "any objective review of the videotape clearly indicates that the defendant's performance on those tests was far from failing," *Id.*, at 324, and dismissed the indictment.

The survey of the above selected decisions demonstrates how difficult it has been for courts to articulate a consistent objective standard to determine whether the People's omission of exculpatory evidence impaired the integrity of the Grand Jury. CPL § 210.35(5). Various, sometimes inconsistent, standards have been

applied. They include, but are not limited to, analysis of whether the omitted evidence:

-could possibly cause the Grand Jury to change its mind. *People v Filis*, *supra;*

-could materially influence the Grand Jury. *People v Suarez*, *supra*; *People v Golon*, *supra*;

-goes to the very heart of a charged crime. *People v Golon*, *supra;*

-balances the prosecutor's right to exercise discretion in the Grand Jury with the Grand Jury's right to hear the full story. *People v Scott*, *supra*;

-caused the Grand Jury presentation not to be fair. *People v Lee*, *supra*;

-wholly exculpates the accused. *People v Curry*, *supra*;

-obviates the prosecution altogether. *People v Davis*, *supra*;

-occurs in a particularly compelling case. *People v Cerda*, *supra*;

-tends to negate guilt or mitigate the offense. ABA Standards for Criminal Justice;

-is favorable to the defendant. Abramovsky, "Does the Brady Doctrine Apply to New York Grand Juries?"

-is of compelling quality. *People v Livingston*, *supra*.

Defendant, in his Memorandum of Law, relies heavily on *People v Goldstein*, 73 AD3d 946 (2nd Dept 2010), to support his argument that the indictment must be dismissed due to the People's failure to introduce the above-described exculpatory evidence. In Goldstein, the Appellate Division affirmed dismissal of an indictment charging Attempted Grand Larceny and related charges in connection with a sale of real property. Dismissal was mandated by the prosecutor's failure to inform the Grand Jury that the matter had previously been litigated as a civil action wherein the defendant had not only prevailed, but the court had made a credibility determination in favor of the defendant - specifically finding that the complainant had not met her preponderance of the evidence burden. Factually, it is inapplicable to the instant case. Moreover, the holding set forth by the Goldstein court is, essentially, to view Grand Jury presentations on a case-by-case basis. Thus, it is not helpful in deciding the instant motion.

With this pea soup of case law as the backdrop, the court wades into analysis of Defendant's motion to dismiss the Indictment. Arguably, the proffered evidence, if believed, is exculpatory. While it consists primarily of recorded communications, it is not, however, of compelling quality. *People v. Livingston*, *supra*. Rather, the evidence could easily be viewed as "backfilling" statements made by persons who, perhaps,

discovered that they were being investigated for attempting to influence a witness. Thus, withholding such evidence did not materially influence the Grand Jury. *People v Suarez*, *supra*; *People v Golon*, *supra*. On the contrary, the evidence consists of self-serving statements (text or telephonic) made after completion of the alleged bribery offer. While they, arguably, could show the defendant's state of mind at the time made, they are not so particularly compelling to mandate dismissal. *People v Cerda*, *supra*. Put another way, withholding the evidence did not meet the "very precise and very high," *(People v. Darby*, *supra)*, standard for impairing the Grand Jury process. In addition, commendably, the District Attorney presented a large amount of the exculpatory evidence to the Grand Jury. Therefore, the defendant's motion to dismiss the Indictment for the prosecutor's failure to present exculpatory evidence to the Grand Jury is denied.

5. MOTION TO DISMISS BECAUSE THE INDICTMENT IS THE PRODUCT OF TAINTED AND INADMISSIBLE EVIDENCE.

Defendant moves to dismiss the Indictment on the grounds that it was obtained, in part, by the District Attorney improperly examining the recovered materials. More specifically, the defendant alleges that the People disregarded Judge Rooney's September 5, 2014 Order mandating that the recovered materials not

be reviewed until further court order.[17] Of course, there is no factual basis set forth in the defendant's moving papers other than reference to somewhat related statements made by the prosecutor during an appearance before Judge Rooney.

The People oppose the motion. They respond that they have complied with Judge Rooney's order in all respects.

Ordinarily, the lack of sworn allegations of fact in support of the defendant's motion, coupled with the prosecutor's sworn allegations in opposition thereto, would be sufficient to summarily deny the motion. Nonetheless, in an exercise of extreme caution, the court has scoured the Grand Jury transcript, along with the exhibits which were admitted into evidence, in search of any reference to the recovered materials. There is none. Therefore, the defendant's motion to dismiss the Indictment as the product of tainted evidence is denied.

6. MOTION TO DISMISS FOR FAILURE TO INSTRUCT THE GRAND JURY THAT KIM LORUSSO AND MCQUAID WERE ACCOMPLICES AS WELL AS INFORMING THE GRAND JURY REGARDING MCQUAID'S COOPERATION AGREEMENT.

Defendant moves to dismiss the Indictment, asserting that the prosecutor did not instruct the Grand Jury that McQuaid and Kim LoRusso were accomplices as a matter of law. He also moves to dismiss for the People's failure to inform the Grand Jury that

[17]The District Attorney has cross-moved for such an order. That application is addressed below.

McQuaid had testified pursuant to a cooperation agreement. The People oppose the motion, arguing that Kim LoRusso was not an accomplice.

With respect to the defendant's argument that McQuaid and Kim LoRusso were accomplices, the court finds that the instructions given to the Grand Jury were sufficient. Regarding the defendant's motion to dismiss for failure to inform the Grand Jury that McQuaid had entered into a cooperation agreement, the information provided to the Grand Jury was sufficient. Therefore, the defendant's motion to dismiss for failure to instruct the Grand Jury that Kim LoRusso and McQuaid were accomplices as well as informing the Grand Jury regarding McQuaid's cooperation agreement is denied.

7. MOTION TO DISMISS FOR PREJUDICE CAUSED BY IMPROPER JOINDER OF COUNTS CHARGING SHARP WITH PERJURY AND WEAPONS CRIMES.

Defendant moves to dismiss the Indictment due to presentation to the Grand Jury of prejudicial evidence in support of improperly joined counts nine through thirteen. More specifically, Defendant argues that the evidence underlying those counts shows him to be addicted to controlled substances. Since the counts were improperly joined, he argues, the evidence should not have been presented. Defendant adds that this evidence is so prejudicial that it impaired the integrity of the Grand Jury requiring dismissal of the indictment.

While the court more fully addresses this issue in connection with Defendant's motion to dismiss for improprieties during the Grand Jury presentation, *supra,* and again in connection with his motion to dismiss for misjoinder of certain counts in the indictment, *infra*, the court feels constrained to comment on one aspect of Defendant's argument. In support of his motion to dismiss, Defendant cites a single trial level case, *People v Hall*, 150 Misc2d 551 (Sup Ct, Queens County 1991). Hall, however, is wholly inapplicable. In Hall, the court dismissed an indictment for failure to afford the defendant an opportunity to testify before the Grand Jury; not for presentation of prejudicial evidence. It has never been cited for authority in any appellate decision. Moreover, two years later, in an unrelated case, another justice of the same court held that the remedy applied in Hall, dismissal of the entire indictment, was inappropriate. *People v Choi*, 160 Misc2d 479 (Sup Ct, Queens County 1993).

8. MOTION TO DISMISS FOR FEWER THAN TWELVE GRAND JURORS CONCURRING IN THE INDICTMENT.

Defendant moves for dismissal of the Indictment on the grounds that twelve members of the Grand Jury were not present when the evidence was presented and the vote was taken. The People oppose the motion asserting that the proper number of grand jurors were present when the Grand Jury voted a true bill against the defendant.

Pursuant to CPL § 190.25(1),

> "[p]roceedings of a Grand Jury are not valid unless at least sixteen of its members are present. The finding of an indictment...and every other official action or decision requires the concurrence of at least twelve members thereof."

In addition, CPL § 210.35(3) provides that a Grand Jury proceeding is defective when "fewer than twelve grand jurors concur in the finding of the indictment."

Notwithstanding the unambiguous language in the statute, in *People v Collier*, 72 NY2d 298, 299 (1988), the Court held that

> "A vote to indict by 12 jurors, each of whom has heard all the critical and essential evidence presented and the charge, satisfies statutory requirements for a valid indictment. The full 16-juror quorum need not deliberate and vote."

Thus, at the time that the Grand Jury votes a true bill, there must be at least twelve members present who heard all of the evidence presented in the case and concur in the result. *Id.* In addition, the transcript of the Grand Jury proceedings must contain evidence that a proper quorum was present and voted. *People v Cade*, 140 AD2d 99 (2nd Dept 1988).

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. The minutes further reflect that the grand jurors who voted to indict heard all the "essential and critical evidence," *People v Collier*, *supra*, and the legal instructions. *People v Calbud Inc.*, *supra*; *People v Valles*, *supra*. Therefore, Defendant's motion to dismiss for fewer than twelve members concurring in the indictment is denied.

9. MOTION TO DISMISS FOR IMPROPERLY EXTENDING THE TERM OF THE GRAND JURY.

Defendant moves to dismiss the Indictment due to presentation of evidence to an improperly extended Grand Jury. The People oppose the motion asserting that, although the original term of the Grand Jury expired on August 14, 2014, it was properly extended by court order through August 21, 2014.[18]

Pursuant to CPL § 210.35(1), a Grand Jury proceeding is defective when

"[t]he Grand Jury was illegally constituted."

CPL § 190.15(1) provides authority for the impaneling court to extend the term of the Grand Jury

"upon declaration of both the Grand Jury and the district

[18]The Grand Jury voted a true bill on August 20, 2014.

attorney that such Grand Jury has not yet completed or will be unable to complete certain business before it..."

It has been held that the statutory requirements are mandatory. Thus, any violation compels the court to dismiss the indictment regardless of whether there is a showing of prejudice to the defendant. *People v Williams*, 73 NY2d 84 (1989) (indictment dismissed because the Grand Jury considered a completely new matter after it had been extended).

Pursuant to an Order, dated July 7, 2014, a judge of this court was authorized to impanel an additional Grand Jury in Putnam County. The Order specified that the term of the Grand Jury would continue through and including August 14, 2014. Pursuant to a second Order, dated August 12, 2014, based upon proper application, the impaneling judge extended the Grand Jury to August 21, 2014. The Grand Jury completed all of its business prior to its expiration. Therefore, the defendant's motion to dismiss the indictment for improperly extending the term of the Grand Jury is denied.

10. MOTION TO DISMISS FOR VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS BY PROSECUTORIAL MISCONDUCT.

Defendant moves for dismissal of the Indictment on the grounds that egregious prosecutorial and/or law enforcement misconduct

violated his due process rights. The People oppose the motion.

In *People v. Issacson*, 44 NY2d 511, 521 (1978), the Court held that "certain types of police action manifest a disregard for cherished principles of law and order." The Court went on to list four factors to consider, none of which by itself is dispositive:

1. Whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity,
2. Whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice,
3. Whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness, and
4. Whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

Applying the four factors to the allegations in the defendant's motion, the court finds that they do not rise to the level of egregious or reprehensible prosecutorial or police misconduct or deprivation of fundamental fairness. *People v.*

Archer, 68 AD2d 441 (1979), *aff'd* 49 NY2d 978 (1980), *cert denied* 449 US 839 (1980). Therefore, the defendant' motion to dismiss for violation of his due process rights by prosecutorial misconduct is denied.

11. MOTION TO DISMISS FOR FAILURE OF THE GRAND JURY FOREPERSON TO SIGN THE INDICTMENT.

Defendant moves for dismissal of the Indictment on the grounds that it does not bear the signature of the Grand Jury foreperson. The People oppose the motion, stating that the Grand Jury foreperson signed the indictment after the true bill was voted.

Pursuant to CPL § 200.50(8), an indictment must contain

"[t]he signature of the foreman or acting foreman of the Grand Jury...."

Thus, Defendant is correct that it is a statutory requirement that the foreperson sign the indictment. The statute does not, however, provide that the signature be made in any particular location on the instrument.

In the instant case, the original indictment bears the foreperson's signature on the backing page. Adjacent thereto is the court stamp indicating that it was filed in the office of the Putnam County Clerk on August 21, 2014. This satisfies the requirement set forth in CPL § 200.50(8). Therefore, Defendant's motion to dismiss for failure of the Grand Jury foreperson to sign

it is denied.

12. MOTION TO DISMISS FOR MISJOINDER OF COUNTS CHARGING SHARP WITH PERJURY AND WEAPONS CRIMES.

Defendant moves for dismissal or severance of the perjury and weapons charges against Sharp. He argues that they are not joinable pursuant to CPL § 200.20(2). In the alternative, he argues that the court should, in its discretion, sever them pursuant to CPL § 200.20(3)(b). The defendant's arguments are misplaced.

As relevant herein,

> "[t]wo offenses are 'joinable' when even though based upon different criminal transactions, such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first."
>
> CPL § 200.20(2)(b).

In addition, a court, may "in the interest of justice and for good cause shown," sever offenses due to a substantial risk of prejudice caused by the defendant's need to testify regarding one or more counts and a genuine need to refrain from testifying on another. CPL § 200.20(3)(b).

These two statutes, cited by the defendant, do not apply to the relief sought. As the practice commentaries clearly provide,

> "This section provides the guidelines for determining whether separate charges against a defendant may be joined for prosecution in a single trial. It deals only with multiple charges against a single defendant. Guidelines for determining whether two or more defendants can be joined for prosecution in the same trial are set forth in CPL § 200.40."

Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 200.20.

Likewise, the sole case cited in support by Defendant, *People v Lane*, 56 NY2d 1 (1982), is not applicable to the relief sought here. Lane addressed consolidation of two robbery indictments arising from separate incidents. The defendants, however, were each charged with every count. In the instant motion, Defendant seeks dismissal or severance because he is not charged in the weapons and perjury counts against Sharp.

The applicable statutory language is found in CPL § 200.40. Pursuant thereto, separate defendants may not have their charges joined in a single indictment unless, as applicable herein,

> "(a) all such defendants are jointly charged with every offense alleged therein; or
>
> (b) all the offenses charged are based upon a common scheme or

plan; or

(c) all the offenses charged are based upon the same criminal transaction..."

CPL § 200.40(1).

Thus, for example, a defendant cannot be jointly indicted with a co-defendant who is charged with additional unrelated drug sales. *People v Potter*, 52 AD2d 544 (1st Dept 1976); *People v Banks*, 45 AD2d 1024 (2nd Dept 1974). Likewise, it has been held improper to consolidate indictments wherein the defendant is charged with weapon possession and the co-defendants are charged with running a "drug mill." *People v Valle*, 70 AD2d 544 (1st Dept 1979); but see *People v Lopez*, 59 AD2d 767 (2nd Dept 1977)(conviction after joinder of co-defendant's weapons possession charge with defendant's drug charge affirmed as they arose from a single criminal transaction, CPL § 200.40(1)(c)). The statutory criteria are not rigidly applied. Thus, in *People v Ranjit*, 203 AD2d 488 (2nd Dept 1994), the court approved a single indictment for a father, charged with rape, and his sons, charged with threatening the complainant after their father's arrest. The court viewed the events as so closely related and connected in time and circumstance as to constitute a single criminal transaction. Similarly, in *People v Biltsted*, 151 Misc2d 620 (Crim Ct, NY County 1991), eight defendants were charged in a single accusatory instrument with riot. They were not charged

as acting in concert and the alleged offenses were committed at different times. There was no agreement, scheme or plan. Nonetheless, the court held that all eight could be joined based upon a single criminal transaction.

In the instant Indictment, charges nine through thirteen charge Sharp, acting alone, with Criminal Purchase or Disposal of a Weapon and various perjury counts. Neither Defendant Galgano nor any of the other co-defendants are so charged. These charges are based upon allegations that Sharp swore falsely to obtain a firearm for Defendant Galgano. All of the other charges in the indictment relate to an attempt to bribe and/or influence a witness in an unrelated sexual abuse case. Clearly, the counts are not based upon a common scheme nor the same criminal transaction. See *People v Kaatsiz*, 156 Misc2d 898 (Sup Ct, Kings County 1992). Therefore, they clearly are not joinable in a single indictment.

Typically, when co-defendants are improperly joined in a single indictment, the remedy is to sever the indictment to ensure that each receives a fair trial. In the instant indictment, however, there are additional counts wherein Defendant Galgano and Sharp were properly joined as co-defendants acting in concert. These are counts two and four charging Conspiracy in the Fifth Degree and count six charging Conspiracy in the Sixth Degree. Thus, in the event that both defendants are again indicted, severance would be limited to counts nine through thirteen where

Sharp is the sole defendant.

The court's analysis, however, does not end here. If the court finds that joint presentation created the potential for prejudice of the Grand Jury's decision, the indictment must be dismissed. *People v Kennedy*, 272 AD2d 627 (2nd Dept 2000); compare *People v Kaatsiz*, *supra* (once the court finds improper joinder of defendants, analysis of prejudice not required; remedy is severance); *People v Riley*, 81 Misc2d 761 (Albany County Ct 1975)(dismissal of indictment for violation of CPL § 200.40 is an improper remedy as it would have "the net effect of creating work for overburdened prosecutors"). To prevail, the defendant need only show "an articulable likelihood of or at least potential for prejudice." *People v Adessa*, *supra,* at 686 (citation omitted). On the other hand, the *Adessa* Court also held that the showing of prejudice cannot rest "on a speculative assumption that is neither self-evidently valid nor pragmatically viable." *Id.,* at 682.

The court finds that the evidence presented in connection with charges nine through thirteen charging Sharp, acting alone, with Criminal Purchase or Disposal of a Weapon and various perjury counts did create "an articulable likelihood of or at least potential for prejudice." *People v Adessa*, *supra.* The evidence related to Sharp allegedly falsifying certain documents to obtain a firearm. In support of the charges, the prosecutor presented evidence suggesting that Defendant Galgano had illegally possessed

and was addicted to drugs. Clearly, the defendant was prejudiced by introduction of this evidence.

B. MOTIONS AS TO THE SEARCH WARRANTS

Since the court is constrained to dismiss the indictment for the reasons set forth above, it will not address Defendant's motion to controvert the search warrants. In the event that the People obtain a new indictment, the defendant may, if he be so advised, renew his motion to controvert.

C. THE PEOPLE'S CROSS-MOTION TO APPOINT AN "IRON WALL ASSISTANT DISTRICT ATTORNEY."

The People move for the court to issue an order unsealing the recovered materials[19] and simultaneously appointing an "iron wall Assistant District Attorney" to review the contents for privileged information. The People assert that a named Putnam County Assistant District Attorney who would have no role in the instant prosecution could perform the task while maintaining an "iron wall" between himself and the prosecution team.

The defendant opposes the motion claiming that none of the eight full time Putnam County Assistant District Attorneys could possibly maintain such "iron wall." Instead, he asks the court to

[19]The defendant has already been provided with digital copies of the recovered materials.

appoint a "special master" to oversee review of the recovered materials. In addition, both sides assert that they should not be compelled to shoulder the cost in the event the court appoints a special master.

The recovered materials include assorted devices which could hold digitally recorded legal files and related materials. Both parties acknowledge that some, if not all, of the files contain privileged materials. Of particular concern is the possibility that the recovered materials contain legal files from cases in which Defendant, a criminal defense attorney, represents a client being prosecuted by the same District Attorney involved here.

In 2014, this issue was raised before Judge Rooney in connection with the continued prosecution of Lani Zaimi. On September 5, 2014, he issued a decision noting that "[t]he search warrant applications provide that the materials shall be provided to [the issuing magistrate] for an '*in camera* review of the evidence to verify that NO privileged information is seized and retained by law enforcement.'" Judge Rooney went on to order "that law enforcement shall not review the material seized pursuant to the July 2, 2014 search warrants until authorized to do so by Court Order." The People now move this court to issue such order.[20]

Analysis.

[20]The judge who issued the search warrants has since retired.

To be sure, there is no specific statutory authority for the court to appoint an "iron wall assistant district attorney" or a special master for criminal discovery. There is, however, regulatory reference to a special master for discovery set forth in 22 NYCRR § 202.70(g), Rule 11-b(c). This provision, however, is limited to the commercial parts of New York State Supreme Court. Moreover, as one commentator has noted, even when limited to civil litigation, "the use of special masters in New York is, at best, an uncommon event." Kuntz, 3 NY Practice, Com. Litig. in NY State Courts, § 32:4 (3d ed).

A number of federal courts have addressed this issue. Typically, these courts decided whether a United States Department of Justice "taint team" or its equivalent was appropriate to review arguably privileged materials. The prosecution cites one of these decisions, *US v Kaplan*, 2003 WL 22880914 (SDNY 2003) in support of their motion. In Kaplan, federal agents executed a search warrant at the attorney-defendant's law office and removed boxes of legal files. The defendant moved for appointment of a special master to review the documents and the Government countered that their "iron wall" prosecutor would be sufficient. In addressing the issue, the court wrote "[c]ertainly this Opinion should be counted among those *disapproving* the Government's use of an ethical wall team to 'protect' the attorney-client and work-product privileges or to determine whether the crime-fraud exception applies..."

Perhaps more support for the District Attorney's position can be found in *US v Taylor*, 764 FSupp2d 230 (D Maine 2011). There, the court permitted an Assistant United States Attorney to act as a "filter agent" to review the defendant's e-mail communications to identify any privileged communications. Nonetheless, the court in Taylor added

> "there is a healthy skepticism about the reliability of a filter agent or Chinese or ethical wall within a prosecutor's office, a skepticism perhaps prompted by the famous failures of such a procedure in *United States v. Noriega,* 764 F.Supp.1480 (S.D. Fla.1991). Courts exhibit particular concern over use of filter agents or taint teams in searches of lawyers' offices, where privileged materials of many clients could be compromised. There, judges have sometimes required alternatives such as appointment of a special master, a wholly independent third party."

Id., at 234.

Most reported Federal court decisions found by this court tend to support the defendant's position. In *US v Stewart*, 2002 WL 1300059 (SDNY), prosecutors obtained files from the attorney-defendant's law office. The court granted the defendant's request for appointment of a special master to review the materials.

Similarly, in *In re Search Warrant*, 153 FRD 55 (SDNY 1994), Judge Breiant noted that

> "reliance on the implementation of a Chinese Wall, especially in the context of a criminal prosecution, is highly questionable, and should be discouraged. The appearance of Justice must be served, as well as the interests of Justice. It is a great leap of faith to expect that members of the general public would believe any such Chinese wall would be impenetrable; this notwithstanding our own trust in the honor of (a prosecutor)."

At least one Federal appellate level court has taken the same view. In *Klitzman, Klitzman & Gallagher v Krut*, 744 F2d 955 (3d Cir 1984), Plaintiff law firm's office had been searched by federal agents. Not only did the court direct return of any seized files, it went on to suggest that, in the event that law enforcement authorities sought to obtain them again, a special master be appointed to review the documents.

With respect to New York State, this court has found only two reported decisions wherein a special master was appointed in a criminal action. In *People v Wein*, 294 AD2d 78 (1st Dept 2002), the trial court, without indicating the source of its authority, appointed a special master to distribute restitution funds paid by the defendant. The First Department reversed, holding that it was inappropriate to appoint a special master because the Criminal

Procedure Law already provides for a specific agency to handle restitution. In *People v. Goldstein*, 14 AD3d 32 (1st Dept 2004), there is reference to a court appointed special master examining test results used for determining the defendant's schizophrenia. Here, too, the opinion does not indicate the source of the court's authority to appoint a special master for that purpose.

Of course, the instant case does not involve restitution or review of scientific tests. Rather, the special master is needed to review possibly privileged materials obtained from the attorney-defendant's law office and home. Since there is no statutorily created agency to perform this function, Wein does not preclude appointment of a special master.

Though not specifically articulated, support for such appointment can be found in CPL § 240.50(1) which provides

> "[t]he court in which the criminal action is pending may, ... upon its own initiative, issue a protective order ...regulating discovery ... for good cause, including constitutional limitations...."

In elaborating on the statutory language, Professor Preiser writes that this provision "gives the court broad discretion to limit the scope of information to be disclosed...." Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL § 240.50. Here, since both parties affirmatively request appointment

of someone to review the recovered materials, they implicitly concede that the court has authority to do so[21]. They merely disagree regarding who should be appointed.

At least one commentator, after reviewing numerous decisions, has suggested that, under the circumstances here, it is better practice to appoint a special master. McArthur, The Search and Seizure of Privileged Attorney-Client Communications, 72 U Chi L Rev 729 (2005). This court agrees. For the same reasons cited by numerous federal courts, use of an "iron wall Assistant District Attorney" or the like, especially in an office consisting of only eight full-time prosecutors, would be inappropriate. Better practice under these circumstances is use of a special master to review the recovered materials for the presence of privileged information. This practice would also be consistent with the search warrant orders which directed that the materials be provided to the court for in camera review. Moreover, this procedure is appropriate notwithstanding the instant decision dismissing the Indictment because the recovered materials may contain corroborative evidence which the District Attorney may wish to use if the matter is re-presented to a new Grand Jury.

Based upon the foregoing, it is hereby

ORDERED, that the instant Indictment is dismissed, with leave

[21]It appears that both parties also agree that neither wishes to pay for such services.

to the People to re-present to another Grand Jury; and it is further

ORDERED, that any prior order sealing the recovered materials be and hereby is vacated for the limited purpose of allowing access thereto by the Special Master and/or his designee; and it is further

ORDERED, that Defendant shall, within 15 days of this Order, provide to the Special Master and the District Attorney, a privilege log containing a list of all files in the recovered materials that he deems contain privileged material. Said log shall also set forth appropriate search words and/or phrases to enable the Special Master, and/or his designee, to more expeditiously review the recovered materials for privileged information; and it is further

ORDERED, that the Hon. Nicholas Collabella, J.H.O, is hereby appointed as Special Master, to review the recovered materials and report to the court regarding whether they contain any privileged information[22] and to identify same. Said report shall delineate which portion, if any, of the recovered materials is privileged, arguably privileged or unprivileged (*see* US v Taylor, supra); and

[22]Including but not limited to attorney-client privilege and work product privilege, as well as whether any such materials fall within the "crime-fraud exception." *US v. Zolin*, 491 US 554, 556 (1989); *Matter of Grand Jury Subpoena of Stewart*, 144 Misc2d 1012 (Sup Ct, NY County 1989) *aff'd as modified* 156 AD2d 294 (1st Dept 1989).

it is further

ORDERED, that The Special Master and/or his designee shall have the authority to work with the New York State Police Computer Crimes Unit to access and review the materials; and it is further

ORDERED, that the parties shall cooperate with the Special Master in the course of his performance of his duties as set forth herein.

Dated: White Plains, New York

January 28, 2015

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

Brafman & Associates, P.C.
Attorneys for Defendant Galgano
767 Third Avenue
New York, NY 10022

Hon. Adam Levy
District Attorney, Putnam County
County Office Building
40 Gleneida Avenue
Carmel, NY 10512