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 and STEFANIE CAPOLONGO, Ind. No.: 15-0015

Defendants.
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ZUCKERMAN, J.

Defendants move for an Order dismissing the Indictment and other relief. The People oppose the motions.

THE INDICTMENT

In the instant Indictment, Defendant George Galgano is accused of "acting in concert with others" to commit:

1. Bribing a Witness [P.L. §215.00(b)],
2. Attempted Bribing a Witness [P.L. §110/215.00(b)],
3. Tampering with a Witness in the Fourth Degree [P.L. §215.10(a)] - two counts,
4. Conspiracy in the Fifth Degree [P.L. §105.05(1)], and
5. Conspiracy in the Sixth Degree [P.L. §105.00].

In addition, both Defendants are charged, acting in concert, with Criminal Impersonation in the Second Degree [P.L. §190.25(4)].

THE INSTANT MOTION

Defendants move for dismissal of the Indictment alleging improprieties during the Grand Jury presentation. In the event that the motion to dismiss is denied, Defendants also move for suppression of eavesdropping and electronically seized evidence, suppression of evidence and/or information obtained upon execution of certain search warrants, disclosure, preclusion of unnoticed statements and identification testimony, preclusion of certain bad acts evidence, preservation of witness records, and for a Bill of Particulars. The People oppose Defendants' motions to dismiss, arguing, *inter alia,* that the Grand Jury presentation was, in all respects, appropriate. 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. Since the court finds that the Grand Jury presentation was deficient, this decision will only address that portion of Defendants' motions.

FACTS

Defendant Galgano is an attorney. At all times relevant to the charge against her, Defendant Capolongo was Galagano's law office manager.

Galgano represented Defendant Lani Zaimi in *People v. Lani Zaimi*, two unrelated Putnam County criminal actions denominated

Indictment Nos. 0047-2013 and 0024-2014. In essence, the instant Indictment alleges that Defendant Galgano attempted to improperly influence Kimberly LoRusso (also known as Kim LoRusso), the Complainant under Putnam County Indictment No. 0024-2014. The Indictment also alleges that both defendants impersonated a private investigator by posting messages on his Facebook page. Galgano counters that he was merely investigating wrongdoing by the Putnam County District Attorney and other law enforcement authorities.

PROCEDURAL HISTORY

On or about August 20, 2014, the Putnam County Grand Jury voted a true bill charging Galgano, along with three others, with Bribing a Witness and related charges ("the first Indictment").[1] On August 21, 2014, in Putnam County Court, he was arraigned on the first Indictment and pled not guilty.

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

In a Decision and Order dated January 26, 2015, this court granted Galgano's motion to dismiss the first Indictment for failure to present sufficient evidence to support the charges,

[1]Defendant Capolongo was not charged in the first Indictment.

numerous evidentiary errors which occurred during the Grand Jury presentation, failure to ask the Grand Jury whether it wished to hear the testimony of two witnesses identified by Defendant, and misjoinder of counts. The court did, however, grant the People leave to represent the matter to a new Grand Jury.

On or about July 10, 2015, the Putnam County Grand Jury voted a true bill charging Defendants as described above. On July 20, 2015, Defendants were arraigned on the instant Indictment. On August 31, 2015, Defendant Galgano filed an omnibus motion with Exhibits and Memorandum of Law. On September 1, 2015, Defendant Capolongo filed an omnibus motion with attached exhibit. On September 14, 2015, the People filed Affirmations in Opposition with Exhibits and a Memorandum of Law. On September 21, 2015, Defendant Galgano filed a Reply Memorandum of Law and on October 1, 2015, the People filed a "Sur Reply." These, along with the transcript of the Grand Jury proceedings and the Exhibits admitted into evidence during the presentation, were the only papers considered in determining the instant motion.

DISCUSSION

The Grand Jury Process.

The lion's share of Defendants' motions concerns their application to dismiss the Indictment due to numerous

improprieties which they allege occurred during presentation of the case to the Grand Jury. This decision will only address those which led the court to grant the relief requested. Surprisingly, some of them are the identical grounds which compelled this court to dismiss the first Indictment.

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 Defendants are found in 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 defendants' arguments in support of their 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.

Defendants move, pursuant to CPL §§210.20(1)(b) and 210.30, to dismiss the instant 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 supported by legally sufficient evidence and the Grand Jury process was, in all respects proper. This court respectfully disagrees.

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 of Appeals 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 not establish every element of any of the offenses charged. *See* CPL §210.30(2). In addition, the presentation was defective 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.

A. Insufficient Evidence to Establish Every Element of Each Offense Charged

The Indictment charges Defendant Galgano (acting in concert with others) with Bribing a Witness (Penal Law §215.00); Attempted Bribing a Witness (Penal Law §110/215.00); Tampering with a Witness in the Fourth Degree (2 Counts--Penal Law §215.10); and Conspiracy in the Fifth Degree (2 Counts--Penal Law §105.05). He is also charged, with Stefanie Capolongo, with Criminal Impersonation in the Second Degree (Penal Law § 190.25). The charges relating solely to Defendant Galgano are:

§215.00 Bribing a witness

A person is guilty of bribing a witness when he confers, or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness in any action or proceeding upon an agreement or understanding that (a) the testimony of such witness will thereby be influenced, or (b) such witness will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

§ 110.00 Attempt to commit a crime

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

§ 215.10 Tampering with a witness in the fourth degree

A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or

practices any fraud or deceit with intent to affect the testimony of such person

§ 105.05 Conspiracy in the fifth degree

A person is guilty of conspiracy in the fifth degree when, with intent that conduct constituting:

a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct;

§ 105.00. Conspiracy in the sixth degree

A person is guilty of conspiracy in the sixth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

1. The Bribery and Tampering Counts

The elements of the crime of Bribing a Witness, as set forth by the People in their charge to the Grand Jury, are that Defendant Galgano, while aiding and abetting and acting in concert with others, on or about and between May 21, 2014 and June 12, 2014, conferred or offered or agreed to confer a benefit upon a witness, namely Kim LoRusso, upon an agreement or understanding that she would absent herself from, or otherwise avoid or seek to avoid appearing or testifying at, an action or proceeding. The crime of Attempt to Bribe a Witness, as set

forth by the People in their Grand Jury charge, alleges that Defendant Galgano, while aiding and abetting and acting in concert with others, on or about and between April 29, 2014 and May 21, 2014, attempted to confer, offer, or to agree to confer, a benefit upon a witness, namely Kim LoRusso, upon an agreement or understanding that she would absent herself from, or otherwise avoid or seek to avoid appearing or testifying at, an action or proceeding.

As charged by the People, the counts of Tampering With a Witness in the Fourth Degree, allege that Defendant Galgano, while aiding and abetting and acting in concert with others, induced or attempted to induce a witness, namely Kim LoRusso, to absent herself from, or otherwise avoid or seek to avoid appearing or testifying at, an action or proceeding. With regard to Count 3, that allegation relates to Kim LoRusso's prospective appearance as a Grand Jury witness on or about and between February 9, 2014 and May 21, 2014. As to Count 4, it relates to Kim LoRusso's prospective appearance as a trial witness on or about and between May 21, 2014 and June 12, 2014.

The Conspiracy count under Count Five of the Indictment alleges that on or about and between February 24, 2014, and June 12, 2014, George Galgano agreed with one or more persons to bribe a witness (Kim LoRusso). The overt acts of this conspiracy are

alleged to be telephone calls between Quincy McQuaid ("McQuaid") and Kim LoRusso's mother, Donna Cianflone ("Cianflone"); telephone calls between McQuaid and Kim LoRusso; a Facebook posting by Lia LoRusso requesting Kim's telephone number[2]; meetings between Galgano and McQuaid and telephone calls made by McQuaid after receiving instructions from Galgano during those meetings; and text messages confirming those meetings. The Conspiracy charge under Count Six of the Indictment alleges that on or about and between February 9, 2014, and June 12, 2014, George Galgano agreed with one or more persons to tamper with a witness (Kim LoRusso). The overt acts of this conspiracy are alleged to be telephone calls between McQuaid and Cianflone; telephone calls between McQuaid and Kim LoRusso; and visits by Private Investigator Andrew Kuchta ("Kuchta") to Kim's home on February 9, 2014 and February 11, 2014.

A detailed review of the entire Grand Jury presentation clearly shows that there is no evidence that the Defendants or any accomplice(s) intended to confer a benefit, intended to offer a benefit, or intended to agree to confer a benefit upon Kim LoRusso. The testimony, taped conversations and text messages presented to the Grand Jury simply fail to contain either a clear offer to Kim; an agreement by Kim that she would not appear; or

[2] Lia LoRusso, a co-conspirator who pled guilty under the first Indictment, and Kim LoRusso, a Complainiant in an unrelated prosecution, are sisters.

an agreement between Kim, a Defendant, an accomplice or anyone else, that she would receive a benefit for her failure to testify. At best, there are a number of consent telephone calls and text messages wherein an accomplice indicated he was merely asking (on behalf of someone else) **if** Kim wanted a benefit, and that, if so, he would simply inquire **whether** a benefit might be offered to her. The communications as a whole show that it was **not** this accomplice's intent to offer or confer a benefit or to agree to do either.

The lack of intent is also evinced in numerous texts from Galgano to McQuaid sent the day after the former received recordings of certain taped conversations. In the texts, Galgano writes that the taped conversations erroneously make it seem that money has been offered to Kim LoRusso to induce her not to appear in the Grand Jury. According to Galgano's texts, this is incorrect and should not have been done.

Similarly, there is a complete absence of evidence that the accomplice intended to "wrongfully induce or attempted to induce" Kim LoRusso to absent herself from either the Grand Jury or trial. The concerns raised in the conversations predominantly address the real possibility of Kim being cross-examined at trial as to how she had been victimized and the possibly legitimate question as to whether she was prepared for that difficult

eventuality. The accomplice specifically testified that he did not intend to suggest to Kim that she would be harmed in any way if she testified. Finally, on numerous occasions during the Grand Jury proceedings, the accomplice explained that the taped conversations give the false impression that he had threatened or offered compensation to Kim LoRusso not to appear in the Grand Jury or at trial. The testimony reveals that this was not the case.

2. The Conspiracy Counts

Likewise, there was inadequate evidence of a conspiracy to bribe or tamper with Kim LoRusso. Conspiracy requires, in the first instance, that the conspirator have the intent that conduct constituting a felony (in the case of Conspiracy in the Fifth Degree) or, at the least, a crime (in the case of Conspiracy in the Sixth Degree) be performed. In this case, the applicable felony counts are the alleged Bribing and Attempted Bribing of Kim LoRusso, while the applicable misdemeanor counts are the alleged Tampering by intimidation of Kim Lorusso. As described in greater detail above, however, there is no evidence that an accomplice intended to confer, intended to offer to confer, or intended to agree to confer, a benefit upon Kim LoRusso for her failure to testify. Nor is there any evidence that an accomplice intended to tamper with Kim LoRusso by intimidating or attempting

to intimidate her. The accomplice's statements directly to Kim, or to a non-accomplice to be conveyed to Kim, are, at best, equivocal. They evince the mere possibility of an offer of money by someone, at some non-specified time, under undetermined circumstances, to be made by an unnamed third party.

In addition, there is specific evidence that belies any inference that there was an offer, by an accomplice, to pay Kim LoRusso not to appear in the Grand Jury. Thus, there is an absence of proof that the conspirators, whomever they might be, intended to bribe Kim Lorusso. Similarly, while an accomplice did state that Kim might put herself "in harm's way" by testifying, that statement was in the context of expected hostile cross-examination by an aggressive defense attorney. In contrast, the accomplice later affirmatively testified that the statement was not meant to imply a threat to Kim to induce her not to testify.

Notably, while statements by a co-conspirator during the course of and in furtherance of the conspiracy are admissible as a hearsay exception (*People v Rastelli*, 37 NY2d 240, 244 (1975), the declarations of an alleged conspirator may not be admitted to establish a *prima facie* case of conspiracy. *People v Caban*, 5 NY3d 143 (2005); *People v Tran*, 80 NY2d 170, 179 (1992); *People v Portis*, 129 AD3d 1300 (2nd Dept 2015). Here, there was simply no

non-conspirator's proof as to the existence of a conspiracy; rather, all of the proof that there was a conspiracy, if any, came from co-conspirators. As properly charged by the People in the Grand Jury, the failure of *prima facie* proof as to the Conspiracy counts means that all evidence admitted pursuant to the Hearsay Exception for statements made by co-conspirators in furtherance of the conspiracy should not, in fact, have been admitted[3].

In any event, there is also an absence of proof that George Galgano was a co-conspirator or in any way involved in any wrongdoing. The hallmark of a conspiracy is an agreement to engage in criminal conduct. The Grand Jury presentation does not show any such agreement by Defendant Galgano. Rather, there is considerable evidence that he was concerned and upset upon learning that certain taped conversations appeared to erroneously suggest that the accomplice had offered money to Kim LoRusso not to appear in the Grand Jury. The evidence also evinces a determined effort on Galgano's part to correct what he describes as that falsehood of the offer of a bribe. In sum, there is no

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[3] In many instances the People also admitted such testimony as party admissions. However, the court's dismissal of the Indictment based on its finding that there was a lack of proof as to some or all of the elements of the counts charged, and the lack of corroboration with regard to George Galgano's status as an alleged accomplice in those counts, obviates the necessity of the court examining whether the statements were proper party admissions.

evidence whatsoever that George Galgano intended to confer, intended to offer to confer, or intended to agree to confer a benefit upon Kim LoRusso for her failure to testify. Thus, there is a complete lack of proof that, even if others had agreed to bribe Kim LoRusso, George Galgano was a member of that conspiracy. Moreover, as noted above, the failure of *prima facie* proof as to the existence of a conspiracy means that all evidence admitted pursuant to the Hearsay Exception regarding statements made by co-conspirators in furtherance of the conspiracy should not have been admitted.

3. Criminal Impersonation in the Second Degree [P.L. §190.25(4)].

"A person is guilty of Criminal Impersonation in the Second Degree when he impersonates another by communication by internet website or electronic means with intent to obtain a benefit or injure or defraud another."[4]

The Indictment alleges that the defendants, acting in concert, on or about September 24, 2013, impersonated Andrew Kutchka ("Kutchka") by communication by internet website or electronic means. The evidence presented to the Grand Jury in

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[4] While the minutes and the Indictment reflect that the Grand Jury voted a true bill charging Defendants with violating subdivision four of P.L. Section 190.25, the People argue that the evidence establishes the elements of subdivision one.

support of this charge included testimony that Kutchka, a private investigator, was working with Defendant Galgano in his defense of Lani Zaimi. On September 19, 2013, Kutchka affirmatively gave Defendants permission and authority to use his Facebook account to post a message soliciting information regarding one of the witnesses in the Zaimi cases. In addition, the investigator gave Defendants his password to access his account. That same day, Defendants composed and posted a message on the investigator's Facebook account. This occurred in Kutchka's presence and with his consent.

On September 24, 2013, two additional messages appeared on that Facebook account. They appear to be in response to a message received on the Facebook account the previous day. The investigator testified that he did not post either one.

The evidence is insufficient to support the charged crime in three respects: it fails to establish that Defendants did not have permission or authority to post messages on the investigator's Facebook account, it does not provide reasonable cause to believe either Defendant posted the messages, and it does not establish that the messages were posted with intent to obtain a benefit or injure or defraud another.

It is axiomatic that the crime of Criminal Impersonation in the Second Degree requires that the actor impersonate another

without that person's consent. The Grand Jury testimony is clear that, on September 19, 2013, Kutchka gave Defendants permission and authority to post on his Facebook account. There is no evidence that the authority to post was limited to that day. On the contrary, he provided Defendants with his password, indicating permission and authority to continue using the account. Moreover, he never testified that he, in any way, had limited Defendants' access to the account. Certainly, there is no evidence that Defendants did not have permission and authority to post on the Facebook account after September 19, 2014. In sum, there is no evidence that the subject Facebook messages were posted without Kutchka's consent.

In addition, there is absolutely no evidence to indicate who posted the two Facebook messages. At the very least, there is no evidence that either of the Defendants charged in the instant Indictment did so. Rather than delineating who committed the *actus rea*, the Indictment simply charges both Defendants as acting in concert. In the absence of any evidence regarding who posted the two Facebook messages, it is impermissible to simply cast a wide net to charge *everyone* who *might* have committed the offense by merely asserting that they were "acting in concert."

Lastly, there is insufficient evidence to satisfy the *mens rea* element of the charge. Last year, the Court of Appeals

decided *People v Golb,* 23 NY3d 455 (2014), *rearg denied* 24 NY2d 932 (2014), *cert denied* __US__, 135 SCt 1009 (2015), a case where the defendant assumed the identity of a number of persons, real and fictitious, by using internet messages. The defendant was found guilty of numerous counts of Criminal Impersonation in the Second Degree. In reversing the defendant's conviction of one of the counts, the Court held that an e-mail sent by the Defendant impersonating a known person but merely soliciting information was insufficient to support the charge because it did not show "the requisite intent to cause injury." *Id.*, at 466. The same is true here, where the Facebook messages were merely requests for information. In sum, there was insufficient evidence before the Grand Jury to support every element of Criminal Impersonation in the Second Degree.

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

Even if the People had presented sufficient evidence to establish every element of each offense charged, most, if not all, of the relevant testimonial evidence came from accomplices.

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). Here, even if the Grand Jury testimony, standing alone, had made out a *prima facie* case against Galgano, the testimony was largely received from one or another accomplice. Therefore, to satisfy the statutory mandates for Grand Jury presentment, the prosecution was required to

introduce corroboration of the accomplice testimony. Examining the evidence presented to the Grand Jury in the light most favorable to the People, the court finds an almost complete lack of corroborating evidence.

The People properly recognized the accomplice corroboration requirement and, on numerous occasions, so charged the Grand Jury. To their credit, the People also specifically charged the Grand Jury that certain witnesses were accomplices as a matter of law. Together, these charges properly delineated the Penal Law corroboration requirement for accomplice testimony.

What, then, was the corroborative evidence which tends to connect Defendant Galgano with the commission of the offenses 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. None of those intercepts, however, included Galgano as a party or provided even minimal corroboration of an agreement by him to engage in criminal conduct. The only other testimony which attempts to link Galagno to a conspiracy to bribe (and, to some degree, to tamper with) Kim LoRusso comes entirely from one non-accomplice, who, in response to questioning, improperly offered her "understanding"

(in the form of an opinion) that Galgano was the unidentified "friend" who might consider conferring a benefit upon Kim for her failure to testify. 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. Even if admissible, the testimony regarding her "understanding" was so equivocal that it mooted its corroborative value.

In *People v Reome, supra,* one of the corroborative areas 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. In the instant matter, certain text messages were introduced to substantiate the arrangement of meetings between Galgano and one and/or another accomplice. The meetings themselves, however, fail in any way to corroborate the accomplice's description of the crime. And the text messages, insofar as they relate to the meetings, are completely silent with regard to any alleged communications from Galgano in furtherance of the conspiracy.

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. Not only were these communications limited to other accomplices, they added nothing to the proof regarding the general conspiracy and accessorial conduct of any party. *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 above-cited improper opinion testimony, there is no non-accomplice evidence

to corroborate that Defendant Galgano conspired to tamper with and/or 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 Galgano intended to bribe or tamper with Kim LoRusso. Indeed, to the contrary, they suggest not only that he was not the genesis of the conspiracy to tamper with and/or bribe Kim, but that, once provided with taped evidence that someone seemed to have committed those acts, he not only did not support them but affirmatively directed that any misunderstanding of those acts be corrected immediately.

And, while *Roeme* did turn, in part, on corroboration from telephone call patterns, there were no calls here to which Galgano was a party, hence there was no call pattern to support the accomplice testimony. In addition, in *Roeme*, the defendant's connection to the crime was amply supported by non-accomplice victim testimony, something completely absent here with respect to Galgano. Instead, the evidence presented to the Grand Jury suggests that Galgano merely participated in arguably proper conduct for a criminal defense attorney, such as, contact with a witness to: discuss what happened in a criminal incident; glean

information about alleged investigatory errors by police or the prosecutor's office; or make clear that no threat had been made, and no compensation offered, to secure a witness' non-appearance. In sum, not only is there no corroborative information in any of the text messages, some of them, such as those noted and others, arguably are exculpatory.

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."

The meetings here, alleged by the People to be indicative of a conspiracy to bribe and tamper, instead are proof of nothing more than familiarity. 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 Conspiracy counts in the Indictment.

In any event, 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 Galgano was involved in the conspiracy alleged herein. The only other evidence presented by the People which could arguably connect Galgano to the actions alleged here are the two visits by private investigator Kutchka to a witness' home to question her regarding a pending criminal action. Putting aside for a moment whether or not the testimony of an investigator employed by an attorney to investigate a criminal case might be barred by principles of Attorney Work Product and Attorney-Client privilege (CPLR §4503)[5], employment of an investigator to speak to a witness in a criminal case is not only within the bounds of the law for defense counsel, it arguably is mandated by counsel's ethical obligation to represent his client zealously by investigating the charges against him.

No other testimony, no calls or text messages, nothing else presented to the Grand Jury demonstrates that Galgano conspired with McQuaid, Lia LoRusso, or anyone else, to bribe and/or tamper with Kim LoRusso. For this reason too, the Conspiracy counts must be dismissed.

C. Evidentiary Errors During the Grand Jury Presentation.

In the course of presenting the case to the Grand Jury,

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[5] *People v Kimes*, 37 AD3d 1 (1st Dept 2006); *In re Application of Connecticut*, 179 Misc2d 623 (County Court, Nassau County, 1999).

there were a number of instances in which the People improperly introduced evidence. These improprieties included improper admission of hearsay testimony and opinion testimony by non-expert witnesses.

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.
>
> 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). In the first Indictment, the court cited many instances in which hearsay testimony was admitted without curative instruction. In the instant Indictment, in a similar number of instances, the People again improperly elicited hearsay statements from witnesses. To their credit, in a number

of those instances, the People promptly issued curative instructions to the Grand Jury. Nevertheless, judging by the sheer volume of impermissible hearsay, it is likely that the evidence, rather than the curative instruction, was retained by the panel. Certainly, the better course would have been to limit the testimony before it occurred, obviating the need for curative instructions. Overall, the overwhelming volume of inadmissible hearsay presented to the Grand Jury compels dismissal.

2. Opinion Evidence

A significant portion of the testimony, although actually inadmissible opinion evidence, was characterized as a witness' "understanding." "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, as in the First Indictment, a witness was asked by the prosecutor to interpret a particular conversation involving an accomplice. The witness proceeded to provide an opinion as to what the accomplice'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[6] upon facts that are already in evidence. As stated by the Court in *Cassano v Hagstrom*, 5 NY2d 643, 646 (1959),

> "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 10 different occasions, police or civilian witness were permitted to give answers which were matters of opinion outside of any area of expertise, or gave an opinion as to the mental thought processes of other persons, couched as their "understanding." These numerous instances of a witness offering improper opinion evidence, as their "understanding," typically were not based on facts in the record.

One particularly egregious example, noted above, was

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

testimony from a non-accomplice that it was her "understanding" that the unnamed "friend" referred to by another participant in a certain recorded conversation was Defendant Galgano. This opinion testimony was wholly without any foundation. In fact, it appears that most, if not all, of the information that is described as coming from the "understanding" of witnesses was not based upon first-hand knowledge, but instead was solely improperly-elicited opinion testimony.

2. DISMISSAL OF THE CONSPIRACY COUNTS FOR FACIAL INSUFFICIENCY.

In addition to the failure to present sufficient evidence to support the charges and improprieties which occurred during the Grand Jury process, the court would be compelled to dismiss the fifth and sixth counts charging Conspiracy in the Fifth Degree [P.L. §105.05(1)] and Conspiracy in the Sixth Degree [P.L. §105.00] for facially insufficiency. More specifically, neither count contains an allegation of an overt act committed in furtherance of the conspiracy.

Pursuant to Criminal Procedure Law §200.50(7)(a), an indictment must contain a "plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged..." With respect to any count charging conspiracy, Penal Law §105.20

adds the requirement that

"A person shall not be convicted of conspiracy unless an overt act *is alleged* and proved to have been committed by one of the conspirators in furtherance of the conspiracy."

(Emphasis added).

An indictment which fails to allege an overt act fails to allege the crime of conspiracy. *People v Russo*, 57 AD2d 578 (2d Dept 1977). Moreover, [a]n indictment charging conspiracy is jurisdictionally defective unless it is alleged that an overt act was committed." *People v Menache*, 98 AD2d 335 (2d Dept 1983). Thus, "this is a jurisdictional defect which defendant cannot waive." *People v Russo, supra*.

Typically, for jurisdictional purposes, a count in an indictment need only set forth the crime charged paralleling the language of the statute. *People v D'Angelo*, 98 NY2d 733 (2002); *People v Cohen*, 52 NY2d 584 (1981). The overt act pleading requirements set forth in Penal Law §105.20 are an exception to the general rule.

Review of the two conspiracy counts in the Indictment clearly show that there are no overt acts alleged in either one. In their Affirmation in Opposition, the People do not contest that the conspiracy counts lack any allegations of even a single

overt act. Rather, they rely upon *People v Ribowski*, 77 NY2d 284 (1991), to argue that the conspiracy counts are facially sufficient because overt acts are alleged in other counts in the same indictment. This argument has no merit.

First, while the Court in *Ribowski* held that "[a]n indictment for conspiracy need not allege every overt act," *Id.*, at 292, it was merely addressing whether overt act evidence introduced at trial established venue. It did not address the facial sufficiency of the conspiracy counts. In contrast, the conspiracy counts in the instant indictment do not allege *any* overt acts.

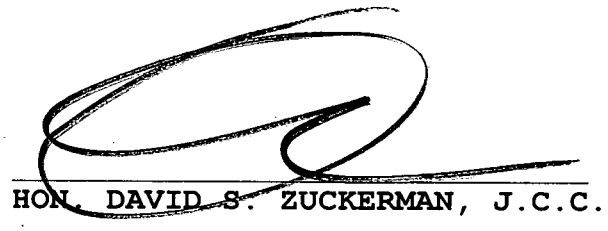
Moreover, the People's argument flies in the face of the clear wording of Criminal Procedure Law §200.50(7)(a) that an indictment must contain a "plain and concise factual statement in each count...." Thus, the factual allegations, or lack of same, in each count must stand on their own.

Here, the two conspiracy counts do not allege any overt acts. Therefore, even if the court were not compelled to dismiss the Indictment due to insufficient evidence and improprieties during the Grand Jury presentation, it would dismiss the two conspiracy counts for facial insufficiency.

Based upon the foregoing, it is hereby

ORDERED, that the instant Indictment is dismissed.

Dated: White Plains, New York
October 26, 2015



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