BROOME COUNTY COURT
STATE OF NEW YORK
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THE PEOPLE OF THE STATE OF NEW YORK

DEFENSE OMNIBUS MOTION
- v - NOTICE OF MOTION

JORDAN RINDGEN,
YARON KWELLER,
LEOR KWELLER Indictment 70185-22
Defendants.
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PLEASE TAKE NOTICE that upon the annexed affirmation of ELENA FAST, ESQ., and ANDREA ZELLAN, ESQ., attorneys for the defendant, Leor Kweller, the undersigned counsel for Jordan Rindgen, Yaron Kweller and Leor Kweller will move this Honorable Court at 65 Hawley Street, Binghamton, New York 13901, at 9:30 AM on the 5th day of June 2023, or as soon thereafter as counsel may be heard, for the following relief:

(1) Inspection of Grand Jury Minutes pursuant to Criminal Procedure Law §§210.20[1][b] and [1-a]; §210.30; §210.35 to determine if evidence presented to the Grand Jury was legally sufficient, and

(a) Dismissal of Count 9, Rape in the First Degree (PL §130.35(1)), and Dismisal of Count 10, Criminal Sexual Act in the First Degree (PL §130.50(1)), as to Defendant Yaron Kweller as evidence presented to the Grand Jury was legally insufficient,

(b) Dismissal of Count 11, Rape in the First Degree (PL §130.35(2)), and Dismisal of Count 12, Sexual Abuse in the First Degree (PL §130.65 (2)) as to Defendant Leor Kweller as evidence presented to the Grand Jury was legally insufficient,

(c) Dismissal of Count 4, Sexual Abuse in the First Degree (PL §130.65 (1)), Count 5, Criminal Sexual Act in the First Degree (PL §130.50(1)) Count

6, Criminal Facilitation in the Fourth Degree (PL §115.00(1)) and Count 7 Criminal Facilitation in the Fourth Degree (PL §115.00(1)) as to Defendant Jordan Rindgen as evidence presented to the Grand Jury was legally insufficient.

(d) Identifications of Leor Kweller and Yaron Kweller in the Grand Jury Were Misleading to the Grand Jury and Did Not Establish Reasonable Cause to Believe that Defendants Were Properly Identified as the Perpetrators.

(e) Failure to Present to the Grand Jury Text Messages between S.H. and H.D. from the late morning and early afternoon of November 27, 2021 Withheld Brady material and Withheld a Part of the Story from the Grand Jury and Thus Impaired the Integrity of the Grand Jury Proceedings Requiring Dismissal.

(f) Dismissal of Count 1, Criminal Sale of Controlled Substance in the Third Degree (PL §220.39(1)), Count 2 (Criminal Sale of a Controlled Substance (PL §220.39(1)), and Count 3 Criminal Possession of Controlled Substance (PL §220.16(1)) as to Defendant Jordan Rindgen as evidence presented to the Grand Jury was legally deficient.

(2) Dismissal of the Indictment due to failure to present the matter to an impartial Grand Jury,

(3) Dismissal of the Indictment Due to Improper Instructions to the Grand Jury,

(4) Order finding the prosecution's certificate of compliance invalid and directing full compliance with Criminal Procedure Law §245.20,

(5) Preclusion of Unnoticed Identifications and Statements,

(6) Dismissal of the Indictment in the Interests of Justice Pursuant to CPL §210.40 and *People v. Clayton*, 41 A.D.2d 204, 208 (N.Y. App. Div. 2d Dep't 1973),

(7) Preclusion of Prior Bad Acts and *Molineux* Material or Hearings Pursuant to *People v. Sandoval*, 34 NY2d 371 (1974) and *People v. Ventimiglia*, 52 NY2d 350 (1981),

(8) An Order compelling the People to obtain a forensic image of S.H. cellular phone through data retained in whatever iCloud was used by S.H. from November 26, 2021 through March 2022, and

(9) Such other relief as this Court may deem proper.

PLEASE TAKE FURTHER NOTICE, that Defendants reserve the right to make such further motions pursuant to C.P.L. §§255.20 (2) and (3) as may be necessitated by the Court's decision on the within motions and by further developments which, even by due diligence, Defendants could not presently be aware of.

Dated: February 24, 2023
New York New York

Respectfully Submitted,

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cc: Hon. Judge Carol Cocchiola
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Broome County Court Clerk's Office
Assistant District Attorney Alyssa Congdon
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BROOME COUNTY COURT
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION IN SUPPORT OF
DEFENSE OMNIBUS MOTION

- v -

JORDAN RINDGEN, YARON KWELLER,
LEOR KWELLER

Indictment 70185-22

Defendant(s).

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ELENA FAST, ESQ. and ANDREA ZELLAN, ESQ. attorneys duly admitted to practice law before the courts of New York and attorneys of record for LEOR KWELLER affirm the following under penalties of perjury:

1. We are the attorneys of record for LEOR KWELLER on the above-captioned matter.
2. We are familiar with the facts of the case based on our review of the discovery provided by the Broome County District Attorney's Office, review of the court records, investigation conducted by the Defense team and conversations with Assistant District Attorney Alyssa Congdon, co-defendants' counsel and a DNA consultant.
3. We make this affirmation in support of the instant motion seeking: (1) Inspection of Grand Jury Minutes pursuant to Criminal Procedure Law §210.30 and an order dismissing Counts 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12 as legally deficient, (2) Dismissal of the Indictment due to failure to present the matter to an impartial Grand Jury, (3) Dismissal of the Indictment Due to Improper Instructions to the Grand Jury, (4) Order finding the prosecution's certificate of compliance invalid and directing full compliance with Criminal Procedure Law §245.20, (5) Preclusion of unnoticed statements and identifications, (6) Dismissal of the Indictment in the Interests of Justice pursuant to

Criminal Procedure Law §210.40 and *People v. Clayton*, 41 A.D.2d 204, 208 (N.Y. App. Div. 2d Dep't 1973), (7) Preclusion of Prior Bad Acts and *Molineux* Material or Hearings Pursuant to *People v. Sandoval*, 34 NY2d 371 (1974) and *People v. Ventimiglia*, 52 NY2d 350 (1981), (8) an Order compelling the People to obtain a forensic image of S.H. cellular phone through data retained in whatever iCloud was used by S.H. from November 26, 2021 through March 2022 and (9) Such other relief as this Court may deem proper.

ALLEGATIONS

4. Under the Instant Indictment, Jordan Rindgen is charged with Criminal Sale of a Controlled Substance in the Third Degree in violation of New York Penal Law §220.39(1) (Count 1 and Count 2), Criminal Possession of a Controlled Substance in the Third Degree in violation of New York Penal Law §220.16(1) (Count 3) and Criminal Sexual Act in the First Degree in violation of New York Penal Law §130.50(1) (Count 4), Criminal Sexual Act in the First Degree (PL §130.50(1) (Count 5), Criminal Facilitation in the Fourth Degree (PL §115.00(1) (Count 6), Criminal Facilitation in the Fourth Degree (PL §115.00(1) (Count 7), and Criminal Facilitation in the Fourth Degree (PL §115.00(1) (Count 8); Yaron Kweller is charged with Rape in the First Degree in violation of New York Penal Law §130.35(1) (Count 9) and Sexual Abuse in the First Degree (Counts 10), and Leor Kweller is charged with Rape in the First Degree in violation of New York Penal Law §130.35(2) (Count 11) and Sexual Abuse in the First Degree PL §130.50(1) (Count 12).

5. It is alleged that on November 27, 2021, in the City of Binghamton, County of Broome, State of New York the Defendants encountered the complainants, S.H. (DOB [redacted]) and H.D. (DOB [redacted])[1] at Dillinger's, a local bar.
6. It is further alleged that the Defendants invited the complainants to a nearby office building, where Mr. Rindgen allegedly shared cocaine with S.H. and H.D. and the Defendants engaged in sexual conduct with the complainants.
7. Specifically, it is alleged that Mr. Rindgen digitally penetrated H.D.'s vagina and H.D. performed oral sex on Yaron Kweller.
8. It is further alleged that H.D. observed S.H. [redacted]. GJ Minutes Tr. p. 106, l. 8-20. There is no testimony that S.H.'s vagina was penetrated or that there was any physically intimate contact between S.H. and any other individual.
9. Rather, S.H. testified [redacted]. GJ Minutes Tr. p. 28-29, l. 20-1.
10. Further, there was no evidence before the Grand Jury that Leor Kweller's pants, underwear or any other item of clothing was off.
11. Specifically, H.D. testified that:
    a. [redacted] GJ Minutes Tr. p. 92, l. 11-17. [redacted] GJ Minutes Tr. p. 92, 1. 22-24.

[1] Defense is identifying the complainants by the initials and dates of birth, as the Indictment identifies the complainants by dates of birth only.

b. [redacted] GJ Minutes Tr. p. 92 l. 17 and [redacted]. GJ Minutes Tr. p. 92 l. 18-21.

c. [redacted] GJ Minutes Tr. p. 96 l. 14-16. [redacted] GJ Minutes Tr. p. 97 l. 2-4. [redacted] GJ Minutes Tr. p. 97 l. 5-7.

d. [redacted] GJ Minutes Tr. p. 102 l. 7 - 13. [redacted] GJ Minutes Tr. p. 102 l. 14-16.

e. [redacted] GJ Minutes Tr. p. 103 l. 16-19. [redacted] GJ Minutes Tr. p. 103 l. 20-22. [redacted] GJ Minutes Tr. p. 104 l. 5-6.

f. [redacted] GJ Minutes Tr. p. 104, l. 7-12. [redacted] GJ Minutes Tr. p. 104, l. 13 - 15.

g. [redacted] GJ Minutes Tr. p. 104, l. 15 -

21. [redacted]. GJ Minutes Tr. p. 105, l. 11 - 19.

h. [redacted] GJ Minutes Tr. p. 107, 1. 11-24 - 108 1. 1-12.

i. [redacted] GJ Minutes Tr. p. 107, l. 11-15.

j. [redacted]. GJ Minutes Tr. p. 107, 1. 19-23.

k. [redacted] GJ Minutes Tr. p. 108, 1. 9-12.

FORENSIC EVIDENCE

12. On November 27, 2021, S.H. and H.D. submitted to SANE examinations at Lourdes Hospital.
13. As part of the SANE examinations, DNA swabs were taken from S.H''s and H.D.'s vagina and cervix (hereinafter "swabs").
14. Testing of S.H.'s swabs revealed the presence of two male-donor DNA profiles.
15. On June 29, 2022, Leor Kweller voluntarily submitted to a buccal swab to obtain his DNA for comparison to the two DNA profiles identified on S.H.'s swabs.
16. On July 22, 2022 Mr. Kweller's DNA profile was excluded as a contributor to the DNA recovered during SANE exams performed on S.H. *See* Defense Exhibit A - Lab Report Dated July 21, 2022, for Lab Case No. 21SL-00990.

17. The Broome County District Attorney's Office then requested that Mr. Leor Kweller's DNA profile be compared to DNA recovered from H.D. Testing of H.D.'s swabs did not produce any testable DNA, and the two DNA samples recovered from her underwear were unsuitable for testing.

18. Because the New York State Police Crime Lab - Port Crane used Y-STR testing method to enhance the DNA profiles recovered from S.H.'s swabs, Yaron Kweller is also excluded as a match to DNA recovered from S.H. because Yaron and Leor are biological brothers on the paternal side.

PROCEDURAL HISTORY

19. On or about November 28, 2021, Defendants learned that the complainants reported criminal allegations to law enforcement.

20. Defendants learned that their conduct on November 27, 2021 was the subject of the allegations and law enforcement investigation. Each Defendant retained Counsel.

21. Defendant Yaron Kweller, through his counsel Paul Battisti, Esq. provided Binghamton Police Department with a digital recording from the inside of the The Colonial Bar/Restaurant of the early morning of November 27, 2021. This digital recording included video images of the complainants and the Defendants at The Colonial Bar/Restaurant in Binghamton (hereinafter "The Colonial video.")

22. The digital recording is approximately 15 minutes long. It memorializes the Defendants' arrival at The Colonial with the Complainants from the office space on Washington Street, and the time spent at the Colonial before the Complainants voluntarily leave the Colonial to accompany the Defendants back to the office.

23. S.H. and H.D. can be seen in the digital recording seated at the bar with the Defendants nearby the bar. H.D. and S.H. appear to speak with the bartender and order drinks at approximately the 5:07 minute mark. The drinks arrive and S.H. taps Defendant Rindgen on the shoulder, who then appears to have a conversation with the bartender. At the 7:03 minute mark on the recording, the Defendants walk away and engage with other patrons in The Colonial while S.H. and H.D. sit next to one another, engaging in physically intimate contact (kissing mouth to mouth and touching). They sit at the bar together, undisturbed several times between the 5:55 and 8:34 minute marks of the recordings. At minute 9:05 H.D. and S.H. get up from the bar and approach Defendants and begin dancing and touching the Defendants' bodies with their bodies.
24. Upon information and belief Binghamton Police Department and the Broome County District Attorney's office investigated the allegations of the complainants during December 2021 and early January 2022.
25. On February 24, 2022, Yaron Kweller was charged through a felony complaint with Rape in the Third Degree in violation of New York Penal Law §130.05(1).
26. On February 24, 2022, Jordan Rindgen was charged through a felony complaint with Criminal Sale of a Controlled Substance in the Third Degree, in violation of New York Penal Law §220.39 and Criminal Sale of Controlled Substance in the Fifth Degree in violation of New York Penal Law §220.31.
27. On February 28, 2022 Leor Kweller was charged through a felony complaint with Rape in the Third Degree in violation of New York Penal Law §130.05(2).
28. Upon information and belief, in March of 2022 this matter was presented to a Broome County Grand Jury.

29. On March 23, 2022 Defense Counsel submitted a request to the Broome County District Attorney's Office requesting that the entire Colonial video provided to the Binghamton Police Department of the complainants and Defendants on November 27, 2021 at the Colonial Bar/Restaurant be introduced into evidence in the Grand Jury. [redacted] See Defense Exhibit B - Two (2) Letters dated March 23, 2022 addressed to ADA Alyssa Congdon from Defense Counsel.
30. [redacted]
31. The Broome County Grand Jury returned an indictment charging the Defendants with 12-counts of sexual and drug-related criminal conduct, with the top charge being Rape in the First Degree for Leor and Yaron Kweller, and Criminal Sexual Act in the First Degree for Jordan Rindgen.
32. Although the Defense is not in possession of the charging instructions on the Grand Jury presentation, it is the Defense's understanding that Mr. Yaron Kweller and Mr. Rindgen were indicted on a forcible compulsion theory of rape/criminal sexual act based on testimony that the Defendants were [redacted] than H.D.and S.H. (GJ Minutes Tr. p. 92 - 94)
33. [redacted]
34. The People also did not [redacted] nor did they reach out to the Defense team for clarification [redacted]. (GJ Minutes Tr. p. 46, l. 4 - 21 and p. 50 l. 4 - 11).

35. Similarly, [redacted]

36. To date, the Defense has not received any SANE examination reports or medical records from the Broome County District Attorney's Office that identify sexual activity, or forcible sexual activity. Absent are the images or drawings depicting tears, scratches, bruising that Defense is accustomed to seeing in sexual assault cases. The only probative information in the SANE reports is the complainants self-reporting of what they allege happened to them.

37. Once again, Leor Kweller and therefore his brother, Yaron Kweller are excluded from any testable DNA material recovered from the swabs of the complainants's vagina and cervix.

LACK OF POLICE ARRANGED IDENTIFICATION OF DEFENDANTS

38. The discovery provided by the Broome County District Attorney's Office indicates that S.H. and H.D. did not know Yaron Kweller or Leor Kweller prior to the November 27, 2021 incident.

39. S.H. was familiar with Jordan Rindgen by virtue of briefly working at one of his establishments.

40. The defense believes that there was no law enforcement-arranged identification procedure conducted with regard to Yaron Kweller or Leor Kweller, either pre-arrest or post-arrest.

41. Upon information and belief, neither H.D. nor S.H. have met or interacted with Leor Kweller previously, thus making the parties literal strangers to one another.

42. Upon information and belief, neither H.D. nor S.H. knew Yaron Kweller's name prior to getting it from the State Trooper Brege after the incident.

43. Instead, both the complainants [redacted], thus obliterating the People's burden to show that these defendants were properly identified as the perpetrators.

44. There was [redacted].

45. These are excerpts from the Grand Jury testimony:

S.H. - GJ Minutes Tr. p. 15, l. 19-21

Q: [redacted]

A: [redacted]

H.D. - GJ Minutes Tr. p. 80, l. 8-13

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

46. Detective Amanda Miller, the lead detective on this investigation, did not testify in the Grand Jury.

47. There was no testimony before the Grand Jury about Detective Miller arresting Yaron Kweller or Leor Kweller as a result of her investigation and conducting either a pre-arrest or a post-arrest identification procedure with the complainants.

48. Similarly, although a witness by the name of Eric [last name withheld pursuant to the People's protective order application] [redacted] GJ Minutes Tr. pp. 39-40, l. 21-1.

49. The Defense respectfully submits that in an alleged stranger-on-stranger crime, as is the case here, without establishing the basis of knowledge or introducing a law-enforcement arranged identification procedure, there is insufficient evidence to return an indictment against Yaron Kweller or Leor Kweller.

PUBLICITY SURROUNDING THE CASE

50. Numerous Facebook groups, such as "Binghamton Believes Survivors of Sexual Assault" and "Boycotting Colonial, Dos Rios, Stone Fox, etc." spewed unsubstantiated false claims about the Defendants and/or owners of The Colonial, accusing them of serially raping and drugging multiple women in the basement of the establishment.

51. These social media claims resulted in a 400+ person protest of the businesses owned by Mr. Yaron Kweller and Mr. Jordan Rindgen with their names held high on cardboard and posterboard accusing them of rape.

52. Many of the local media outlets covered the case, the arrest, the protest and the indictments. Specifically, Pressconnects.com[2], BU Pipedream[3], WSKG.org[4], Wicz.com[5],

[2] New charges for Colonial owners, brother in Binghamton restaurant drug, sex assault case
https://www.pressconnects.com/story/news/local/2022/03/31/colonial-binghamton-ny-stone-fox-dos-rios-new-charges-jordan-rindgen-leor-yaron-kweller/7238018001/

[3] Following arrests of owners, two Downtown restaurants vote to close permanently
https://www.bupipedream.com/news/127407/following-arrests-of-owners-two-downtown-restaurants-vote-to-close-permanently/

[4] Grand jury raises charges in case tied to The Colonial owners
https://wskg.org/grand-jury-raises-charges-in-case-tied-to-the-colonial-owners/

[5] Rindgen and Kweller Brothers Plead Not Guilty to Colonial Related Charges
https://www.wicz.com/story/46199170/rindgen-and-kweller-brothers-plead-not-guilty-to-colonial-related-charges

WWLP.com[6], TVGUIDETIME.com[7], WNBF.com[8], 44bars.com[9], LirikLagu.id[10], TheAncestory.com[11], CBSNews.com[12], Mytwintiers.com[13], Spectrumlocalnews.com[14], Fulcrumnewspaper.com[15], Darik.news[16], finance.yahoo.com[17]

53. Binghamton Reddit (r/Binghamton) became populated with several threads related to these allegations, such as "Downtown Binghamton Sexual Assault Megathread - The Colonial / Dos Rios / Stone Fox," and "BC Voice Downtown Binghamton Rape."

54. The restaurants owned in part by Mr. Yaron Kweller and Mr. Rindgen (The Colonial, Dos Rios Cantina and The Stone Fox) were subject to numerous instances of vandalism.

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[6] Two co-owners of the Colonial arrested in sexual assault case
https://www.wwlp.com/news/two-co-owners-of-the-colonial-arrested-in-sexual-assault-case/
[7] Leor Kweller Binghamton, What To Know About Colonial Bar Owner And Pending Rape Charges
https://www.tvguidetime.com/people/leor-kweller-binghamton-what-to-know-about-colonial-bar-owner-and-pending-rape-charges-240392.html
[8] Suspects in Binghamton "Colonial" rape investigation arraigned
https://wnbf.com/binghamton-colonial-rape-investigation-suspects/
[9] Leor Kweller Binghamton, What To Know About Colonial Bar Owner And Pending Rape Charges
https://44bars.com/leor-kweller-binghamton-what-to-know-about-colonial-bar-owner-and-pending-rape-charges/
[10] Colonial Restaurant Co Owner Jordan Ringden Arrested In Binghamton What Are The Charges
https://www.liriklagu.id/colonial-restaurant-co-owner-jordan-ringden-arrested-in-binghamton-what-are-the-charges.html
[11] Yaron Kweller Colonial Binghamton Arrested On Assault Charges Along With He Co-Owner
https://theancestory.com/yaron-kweller-colonial-binghamton-arrested/
[12] Owners of popular Binghamton restaurant facing felony charges, including rape
https://www.cbsnews.com/newyork/news/binghamton-colonial-bar-and-restaurant-owners-rape/
[13] Co-owners of Binghamton restaurant arrested in sexual assault case
https://www.mytwintiers.com/news-cat/regional-news-news/two-co-owners-of-the-colonial-arrested-in-sexual-assault-case/
[14] Binghamton police charge 2 owners of The Colonial restaurant after investigation into November incident
https://spectrumlocalnews.com/nys/binghamton/public-safety/2022/02/23/binghamton-police-arrest--charge-2-owners-of-the-colonial
[15] Allegations about owners of downtown bars causes closure and police investigation
https://fulcrumnewspaper.com/2021/12/10/allegations-about-owners-of-downtown-bars-causes-closure-and-police-investigation/
[16] Colonial, Dos Rios restaurants closed, citing financial issues
https://darik.news/northdakota/colonial-dos-rios-restaurants-closed-citing-financial-issues/526453.html
[17] Colonial restaurant owner's brother charged in Binghamton rape, drug investigation
https://finance.yahoo.com/news/colonial-restaurant-owners-brother-charged-224529538.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAG5xi0ifU4TV506KgL_tjXFCv9pIuN5DU0V2VwWp0VexJJ93pr5BQ5CPz4XBpU-HDncB1Kz6uZ2jJzNRiS4n-0346774b0KVximm_C3x9_ZGbR8BzDa3HWGnWPLkZmyTb4it_3i3TGQ4weaFZGT5RmjYgjZ7BOKwG9SBKgQvnvD9
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55. Specifically, in early December 2021 the word "Rapist" was scrawled across the front door of The Colonial restaurant with a Christmas tree knocked over and shoved up against the door.

56. On or about December 10, 2021 someone threw a brick through the window of Dos Rios, resulting in thousands of dollars in damage.

57. On two separate occasions - December 10, 2021 and January 13, 2022 someone left a dead turkey outside the entrance to The Colonial.

58. On January 13, 2022, the display window of The Colonial was also egged.

59. On another occasion, around April 7, 2022 someone spray-painted "RAPIST" over the display windows of 58 Court Street, the location of The Colonial, and at 15 Hawley Street, the location of the Stone Fox.

DEFICIENCIES IN THE GOVERNMENT'S CERTIFICATE OF COMPLIANCE

60. On March 31, 2022, Assistant District Attorney Alyssa Congdon served and filed a Certificate of Compliance.

61. Upon Counsel's review, there were numerous deficiencies in the Prosecution's compliance with discovery requirements under Criminal Procedure Law Article 245. Numerous items that the defense is entitled to have not been disclosed. Pursuant to CPL § 245.50(4), the defense moves for an Order deeming the Prosecution's March 31, 2022 Certificate of Compliance invalid and directing the prosecution to disclose all material subject to initial discovery under C.P.L. § 245.20(1) and submit a valid certificate.

62. On February 23, 2023, the People disclosed another tranche of discovery that the Defense is still indexing and reviewing.

63. In this case, items that had not been disclosed as of February 22, 2023, which are subject to initial discovery and must be disclosed before the Prosecution can certify compliance, include:[18]

a. Memo book and any other *Rosario* material of Binghamton Police Officer David Goetz from November 27, 2021 relating to Case Numbers 2021-00054410 (SH) and 2021-00054406 (HD);

b. Memo book and any other *Rosario* material of Binghamton Police Officer David Coon from November 27, 2021 relating to Case Numbers 2021-00054410 (SH) and 2021-00054406 (HD);

c. Memo book and any other *Rosario* material of Binghamton Police Officer Caleb Scepaniak from November 27, 2021 relating to Case Numbers 2021-00054410 (SH) and 2021-00054406 (HD);

d. Memo book, and any other Rosario Material of State Trooper Brege (Badge # 917);

e. Personnel files of Detective Amanda Miller and any and all other law enforcement involved in the instant investigation pursuant to CPL §245.20(k);

f. Emails, notes, memorandums and any and all associated paperwork for any investigation conducted within the Broome County District Attorney's Office by any prosecutor, investigator or support staff;

[18] On February 23, 2023, the People disclosed another tranche of material. We are still reviewing that discovery to determine what remains missing. Regardless, the failure to disclose the list of material that follows invalidates the March 31, 2022 Certificate of Compliance and vitiates any purported statement of readiness for trial.

g. Binghamton Police Department's and Prosecutors' handwritten notes of witness interviews, including the complainants[19] pursuant to CPL §245.20 (e));

h. Emails, notes of meetings or other written materials between Binghamton Police Department and Broome County District Attorney's Office discussing the matter, including meetings regarding charging decisions and evidence;

i. Identifications of Defendants including photo arrays, and confirmatory post-arrest identifications;

j. Affidavit or sworn testimony to support the issuance of the search warrant for electronic data mentioned by Assistant District Attorney Congdon on January 13, 2023, and the result/evidence obtained in any such duly authorized search;

k. Affidavit or sworn testimony submitted in support of the rejected search applications for a buccal (presumably the affidavit or sworn testimony would contain statements of relevant fact witnesses);

l. Paperwork associated with the imaging of S.H.'s cellular phone and H.D.'s cellular phone;

m. Information identified as *Brady* material in the Prosecutor's protective order application that had not been disclosed to the Defense as of February 22, 2022;[20]

[19] As we now understand from the conference on February 16, 2023 that the complainants are represented by counsel - Tom Seida, Esq., we are seeking communications between Your Office and Mr. Seida regarding the instant matter.

[20] Defense believes that this *Brady* disclosure relates to something other than the forensic images of the complainants' cellular phones, as those materials were not in existence on March 30 - March 31, 2022.

n. Photographs and screenshots in native format or printed in color;[21]

o. Information and communications regarding S.H. obtaining a new phone and creating a new iCloud;

p. A working forensic image of S.H.'s cellular phone for the period of November 26, 2021 through March 2022; (On February 23, 2023 a forensic image of a phone belonging to S.H. was turned over to the Defense. Preliminary review of the image shows that the data begins in March 2022, well after the alleged encounter with the defendants. We request that the People take steps to obtain a forensic image of the records retained in Cloud storage for the S.H. cell phone from November 26, 2021 through March 2022).

q. Copies of communications between Complainants and the Broome County District Attorney's Office.

64. As our review of the February 23, 2023 disclosures is ongoing, the Defense reserves all rights to amend or supplement this Section of our omnibus motions pursuant to C.P.L. §§255.20 (2) and (3).

COMPLAINANTS' COMMUNICATIONS CONTAINED IN FORENSIC IMAGES OF THEIR CELLULAR PHONES

65. On December 22, 2021, Defendants were aware that Binghamton Police and the Broome County District Attorney's Office were investigating allegations related to their conduct on November 26 and November 27, 2021. In order to ensure that evidence was not lost or destroyed, pursuant to C.P.L. §245.50(3), the Defendants through counsel filed and

[21] We have black and white copies of these materials in poor quality that prevent us from examining these materials.

served an Order to Show Cause why the prosecution should not be compelled to preserve forensic images of the complainants' smartphones.

66. Said application was done on notice to the Broome County District Attorney's Office.

67. On January 21, 2022, the Honorable Judge Cawley denied the Defendants' motion by written decision.

68. On March 10, 2022, following the Defendants' arrest on the Criminal Court Complaints, Defendants filed a motion pursuant to C.P.L. §245.50(3) seeking to compel preservation and disclosure of forensic images of the complaints' smartphones.

69. On March 15, 2022, the Honorable Judge Cawley denied the Defendants' motion based in part on the speculative nature of the Defendants' arguments that the phones would contain relevant, material, admissible evidence and due in part to the lack of jurisdiction over what was at that time a Local Court matter.

70. The motion was once again done on notice to the Broome County District Attorney's Office.

71. On March 31, 2022, the Prosecution filed a Certificate of Compliance and announced ready for trial. Then on April 8, 2022 the Prosecution filed a Supplemental Certificate of Compliance.

72. In late July 2022, after more litigation efforts by the Defense, including a motion to compel production of the Complainants' smartphones and several subpoenas to cell phone carriers and social media platforms, the Prosecution agreed to make efforts to obtain the smart phones' communications from the complainants.

73. In early August 2022, the Prosecution reported to the Court and Defendants that they had requested and obtained the complainants' consent to forensically image their smartphones and that they would be turning over copies of those images to Defendants.

74. On November 17, 2022, after signing a temporary non-disclosure agreement with the Government and while in the presence of Assistant District Attorney Amanda Chafee, the Broome County District Attorney permitted Defense Counsel to review communications and data recovered from complainant H.D.'s smartphone.

75. As the Court is aware, that five (5) hour session was not an efficient way to review the massive volume of data recovered from the H.D.'s smartphone.

76. In January 2023, the prosecution finally agreed to put the data onto drives for the Defense to review. Still, it required an Order from this Court to actually have the data loaded onto drives and made available to the Defense.

77. On February 13, 2023, the People provided Cellebrite downloads of the contents of S.H. and H.D.'s cellular phones.[22]

78. Defense review of H.D.'s cellular data reveal relevant, material and admissible communications between S.H. and H.D. The communications occurred in the hours immediately after the alleged incident, the days and hours before the allegations were reported to law enforcement and the days and hours after the allegations were reported to law enforcement. Our review is ongoing. The *Brady* material uncovered so far includes but is not limited to:

[22] The download of S.H.'s forensic image failed failed. The folders disclosed to the Defense do not contain a Cellebrite report. On February 23, 2023 the Prosecution provided a working forensic image of S.H's cellular phone that appears to only contain communications from March 22, 2022 onward. The Defense's review of these communications is ongoing.

1. **November 27, 2021 – H.D. to a Third Party:**

   "I don't want anyone to know…."

   "And it was consensual. I knew what was happening. But those guys should be fucking disgusted with themselves."

2. **November 27, 2021 – H.D. to S.H.:**

   "And I remember saying to Jordan I was like I better not get denied at any of ur bars."

3. **November 27, 2021 - S.H. to H.D.:**

   "Like I can't have this get out…"

4. **November 28, 2021 at 12:22:54 - Exchange between H.D. and S.H.:** - (we believe that the "her" referenced in this exchange may be Detective Amanda Miller)

   HD: "I am not gonna show her those"
   SH: "I don't think you should"
   HD: "I am 100% not going to"
   SH: "I am worried about her calling stupid f**king Bianca"

5. **November 29, 2021 – S. H. to H. D. and Third Party:**

   "I'm settling for nothing Less then a million"

6. **November 29, 2021 – S. H. to H. D. and Third Party:**
   (referring to defendants Yaron Kweller and Jordan Rindgen)

   "I want the Benz and the Beamer"
   "And both their houses"

7. **November 29, 2021 – H. D. to S. H. and Third Party:**
   (referring to defendants Yaron Kweller and Jordan Rindgen)

   "I want all their bars . . ."

8. **November 29, 2021 - S.H. to H.D.:**

"Yup 100% but i do remember being at Alisha's and when she said we were at Jordan's i was like wtf we were w them? And she was like yeah haikey said u guys got raped and obviously I'm still drunk I'm like whattt no way **it doesn't even feel like I've had sex** i don't think anything happened and Alisha was like exactly"

9. **November 30, 2021 - H.D. to S.H. and Third Parties:**

"the reason i had to call 911 is because when i told my parents my dad literally got in the car and was headed straight to downtown"

10. **December 3, 2021 - H.D. instant messages to S.H. and Third Parties:**

"if you guys have any photos of us drinking if u could delete them that would be good"
"we can't erase everything but minimize it as much as possible"
"Danayah maybe archive ur disposals of them on insta"
"i might just delete any risky pics"
"i need to go on my computer to delete my vsco"

11. **December 3, 2021- S.H. instant message to H.D.:**

"I've deleted all my posts and changed my user name to no lastnight and trying to delete all my republishes"

12. **December 3, 2021 from a Third Party to H.D., S.H., and Third Parties:**

"i already deleted everything w [S.H.] in it and everything hailet sent me to delete"

13. **December 7, 2021 from a Third Party ("T.P.") to H.D.:**

T.P.: "it da took me 5 mins of silence to go all the way back up to the messages that night"
H.D.: "mad far and i don't even have them bc i think i accidentally deleted them that night"
T.P.: "yeah i deleted them all out of your phone bc u were going to dylan's [H.D.'s then boyfriend]"

14. **December 7, 2021 from a Third Party to H.D.:**

"and then i told her that when [S.H.] came over she told me she didn't have sex but she turned the corner and saw you but thats all she could remember"

"bro yeah she [S.H.] was like that whole night i would know if i got fucked i don't feel anything in my vagina but it was prob bc bitch was numb af"

15. **December 8, 2021 - H.D. to S.H.:**

"okay so i'm slightly panicking at work because i was just reading my texts from the day after the incident and i said to danayah that it was consensual and that i knew what was happening. but the whole day after the incident i was questioning if i got raped and i thought it might be classified as consensual because i didn't say no."

16. **December 8, 2021 - S.H. to H.D.:**

"Trust me i was panicking too [about the text messages] Bc i said in the groupchat that night "I'd fuck"

17. **December 8, 2021 - S.H. to H.D.:**

"I don't think you have anything to worry about. Bc if she did get the subpoena [for the phone messages] I'm sure she only got it from the times of like 1-4am"

18. **December 8, 2021 from S.H. to H.D. and Third Parties:**

"Yes i deleted everything then made it private and changed everything"

19. **December 27, 2021 H.D. to H.D.'s mother - After Defense Counsel Served and Filed Order to Show Cause on December 22, 2021, requesting preservation of the complainants' smartphones - H.D. to her mother:**

"i told you i have a message of me saying it was consensual the day after, because i was confused and not in the right head space if the defense sees it, i'm done"

20. **December 27, 2021 - H.D. to S.H.:**

"and i have a message of me saying it's consensual"
"the day after"

21. **December 27, 2021 - S.H. to H.D.:**

"I have messages w Alisha saying I'd fuck ring ding [Jordan Rindgen]"

22. **December 27, 2021 - H.D. to S.H.:**

"yeah they will take the message of me saying it's consensual and i'm done"
"the lawyer tom needs to make it so they can't get our phones period"

23. **December 28, 2021 – H.D. to her mother:**

"I told them (DA) the next day I was questioning if what happened to me was actually rape . . . "

24. **December 28, 2021 - H.D. to H.D.'s mother:**

"i accidentally deleted one text it was in the group text"

25. **December 28, 2021 - text message from H.D. to S.H.:**

"i told him i said it was consensual"
"i'm just worried that I said more than once it was consensual"
"i said something about it being consensual"

26. **January 13, 2022 - H.D. to H.D.'s mother:**

"I just don't want [S.H.'s] parents to judge me for saying it was consensual"

27. **January 14, 2022 H.D. to S.H.:**

"i really don't see why they'd still want to supoena our phones after i've provided all of That"
"so fingers crossed"

28. **March 7, 2022 S.H. to H.D.:**

"My parents wanted us to press charges because why tf would we not if the cops are called and we're getting fucking rape kits done. I told my mom the second i told her i didn't want the cops involved. I didn't have a choice in that matter. Whoever is telling you what you're doing is okay is enabling bad behavior that is literally gonna take a shit on you in the future, again you've already said it was consensual and now you're acting essentially like nothing happened which is exactly what the defense is gonna say. So good luck w that, trying to get you to understand is like talking to a brick wall. Maybe 30 days now hailey they have to turn in every last bit of evidence if you think they aren't watching you right now more then ever you'd be fucking dumb. I've said what i had to say to you now three times and I'm sure you'll go right behind my back and disrespect me a fourth. What you do reflects you, not me so idk what i give a fuck anyway."

29. **June 6, 2022 - H.D. to H.D.'s mother:**

"and the text messages i sent really fuck me up"
"i didn't know because i didn't say no"

30. **July 25, 2022 - H.D. to H.D.'s mother:**

H.D.: "i wanna drop the charges"

H.D. mom: "[S.H.] got a new phone…"
"No access to her old cloud"

H.D. "and i texted [S.H.] and she got a new phone so they didn't subpoena hers"

79. Defense counsel understands, based on the last exchange, that S.H got a new iPhone and created a brand new iCloud.

80. On February 23, 2023, the People disclosed a forensic image of S.H.'s cellular phone. It appears that there is no data from November 2021 through March 2022.

81. Review of S.H.'s cellular phone has revealed the following communications:

a. June 15, 2022 S.H. to a Third Party:

"She [H.D.] told Bianca on FaceTime on her walk to "save me" that she wanted to fuck Jordan, she wanted to go because she wanted to sleep w Jordan. Not to come save me"

. . .

"And she came for what she thought was going to be a good time"

. . .

"I don't remember anything from that night"

"Everything I know is from hee [HD.]"

b. June 13, 2022 S.H. to H.D.:

". . . Fuck you hailey you're a piece of shit. You think you sit in a high horse bc you "came looking for me" that night "only one who cared" no you didn't. If you thought I was in such danger like you say then you would've called the cops you would've brought everyone there w you to get me out. You came for what you thought was gonna be a good time. You're a garbage human who see nothing wrong w their actions."

82. Law enforcement lost an opportunity to preserve additional communication relevant to the investigation despite being on notice from the Defense about the probative value of these communications.

83. On November 27, 2021, law enforcement was notified of the allegations. There is no indication in any of the discovery turned over thus far that any law enforcement agency took any immediate steps to preserve data on the complainants' smartphones but for the screenshots.

84. To date, no Snapchat,[23] Instagram, Facebook Messenger, TikTok, VSCO or any other instant messaging service communications have been provided to the defense, leaving the defense to surmise that these communications have been erased, destroyed or deleted.

85. Worse, discovery indicates that no law enforcement effort was made until July 2022 to preserve data held on the complainants' smartphones, a year and a half since the alleged incident.

86. The fact is that law enforcement sat on their hands and potentially lost evidence in this case despite efforts by Defendants to prevent loss of evidence and numerous attempts to preserve the communications and put the District Attorney's Office on notice as early as December 2021 regarding the importance of preservation and imaging of the complainants' smart phones.

87. On February 21, 2023, Defense counsel through letter notified the Broome County District Attorney's Office of the exculpatory information on the Complainants' phones including evidence of deleting and altering relevant communications with a copy given to the Court. *See* Letter to DA Korchak dated February 21, 2023 previously provided to the Court and filed with the Clerk under seal, incorporated herein by reference.

88. To date, the Broome County District Attorney's Office is yet to dismiss the charges against the Defendants, despite the existence of considerable exculpatory information and evidence of deletion and tampering by the Complainants.

[23] Snapchat communication is widely used and is known as a secretive method to communicate because nothing is preserved without a deliberate action (like taking a screenshot) to preserve it.

RELIEF REQUESTED

89. As such, Defense respectfully requests the following relief:

(1) Inspection of Grand Jury Minutes pursuant to Criminal Procedure Law §§210.20[1][b] and [1-a]; §210.30; §210.35 to determine if evidence presented to the Grand Jury was legally sufficient, and,

(a) Dismissal of Count 9, Rape in the First Degree (PL §130.35(1)), and Dismisal of Count 10, Criminal Sexual Act in the First Degree (PL §130.50(1)), as to Defendant Yaron Kweller as evidence presented to the Grand Jury was legally insufficient,

(b) Dismissal of Count 11, Rape in the First Degree (PL §130.35(2)), and Dismisal of Count 12, Sexual Abuse in the First Degree (PL §130.65 (2)) as to Defendant Leor Kweller as evidence presented to the Grand Jury was legally insufficient,

(c) Dismissal of Count 4, Sexual Abuse in the First Degree (PL §130.65 (1)), Count 5, Criminal Sexual Act in the First Degree (PL §130.50(1)) Count 6, Criminal Facilitation in the Fourth Degree (PL §115.00(1)) and Count 7 Criminal Facilitation in the Fourth Degree (PL §115.00(1)) as to Defendant Jordan Rindgen as evidence presented to the Grand Jury was legally insufficient.

(d) Identifications of Leor Kweller and Yaron Kweller in the Grand Jury Were Misleading to the Grand Jury and Did Not Establish Reasonable Cause to Believe that Defendants Were Properly Identified as the Perpetrators.

(e) Dismissal of Count 1, Criminal Sale of Controlled Substance in the Third Degree (PL §220.39(1)), Count 2 (Criminal Sale of a Controlled Substance (PL §220.39(1)), and Count 3 Criminal Possession of Controlled Substance (PL §220.16(1)) as to Defendant Jordan Rindgen as evidence presented to the Grand Jury was legally deficient.

(f) Failure to Present to the Grand Jury Text Messages between S.H. and H.D. from the late morning and early afternoon of November 27, 2021 Withheld Brady material and Withheld a Part of the Story from the Grand Jury and

Thus Impaired the Integrity of the Grand Jury Proceedings Requiring Dismissal.

(2) Dismissal of the Indictment due to failure to present the matter to an impartial Grand Jury,

(3) Dismissal of the Indictment Due to Improper Instructions to the Grand Jury,

(4) Order finding the prosecution's certificate of compliance invalid and directing full compliance with Criminal Procedure Law §245.20,

(5) Preclusion of Unnoticed Statements and Identifications,

(6) Dismissal of the Indictment in the Interests of Justice pursuant to CPL §170.40 and *People v. Clayton*, 41 A.D.2d 204, 208 (N.Y. App. Div. 2d Dep't 1973),

(7) Preclusion of Prior Bad Acts and *Molineux* Material or Hearings Pursuant to *People v. Sandoval*, 34 NY2d 371 (1974) and *People v. Ventimiglia*, 52 NY2d 350 (1981), and

(8) an Order compelling the People to obtain a forensic image of S.H. cellular phone through data retained in whatever iCloud was used by S.H. from November 26, 2021 through March 2022.

(9) Such other relief as this Court may deem proper.

Respectfully submitted,

Dated: New York, New York
February 24, 2023

s/ Elena Fast
Elena Fast, Esq.
Counsel for Leor Kweller

s/Andrea Zellan
Andrea Zellan, Esq.
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MEMORANDUM OF LAW

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BROOME COUNTY COURT
STATE OF NEW YORK
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THE PEOPLE OF THE STATE OF NEW YORK

Indictment 70185-22

- v -

JORDAN RINDGEN,
YARON KWELLER,
LEOR KWELLER

Defendant(s)
----------X

Through this Omnibus motion, Defendants JORDAN RINDGEN, YARON KWELLER, LEOR KWELLER respectfully seek the following relief: ((1) Inspection of Grand Jury Minutes pursuant to Criminal Procedure Law §§210.20[1][b] and [1-a]; §210.30; §210.35 to determine if evidence presented to the Grand Jury was legally sufficient, and (a) Dismissal of Count 9, Rape in the First Degree (PL §130.35(1)), and Dismisal of Count 10, Criminal Sexual Act in the First Degree (PL §130.50(1)), as to Defendant Yaron Kweller as evidence presented to the Grand Jury was legally insufficient, (b) Dismissal of Count 11, Rape in the First Degree (PL §130.35(2)), and Dismisal of Count 12, Sexual Abuse in the First Degree (PL §130.65 (2)) as to Defendant Leor Kweller as evidence presented to the Grand Jury was legally insufficient, (c) Dismissal of Count 4, Sexual Abuse in the First Degree (PL §130.65 (1)), Count 5, Criminal Sexual Act in the First Degree (PL §130.50(1)) Count 6, Criminal Facilitation in the Fourth Degree (PL §115.00(1)) and Count 7 Criminal Facilitation in the Fourth Degree (PL §115.00(1)) as to Defendant Jordan Rindgen as evidence presented to the Grand Jury was legally insufficient; Dismissal of Counts 1, 2, and 3 charging Jordan Rindgen with two counts of Criminal Sale of a Controlled Substance and one count of Criminal Possession of a Controlled Substance relating to

the People failing to instruct the grand jury on Accomplice Corroboration and failing to offer anf accomplice corroboation of the drug counts ((2) Dismissal of the Indictment due to failure to present the matter to an impartial Grand Jury; (3) Dismissal of the Indictment Due to Improper Instructions to the Grand Jury; (4) Order finding the prosecution's certificate of compliance invalid and directing full compliance with Criminal Procedure Law §245.20; (5) Preclusion of unnoticed statements and identifications; (6) Dismissal of the Indictment in the Interests of Justice Pursuant to CPL §170.40 and *People v. Clayton*, 41 A.D.2d 204, 208 (N.Y. App. Div. 2d Dep't 1973); (7) Preclusion of Prior Bad Acts and *Molineux* Material or Hearings Pursuant to *People v. Sandoval*, 34 NY2d 371 (1974) and *People v. Ventimiglia*, 52 NY2d 350 (1981), (8) an Order compelling the People to obtain a forensic image of S.H. cellular phone through data retained in whatever iCloud was used by S.H. from November 26, 2021 through March 2022, and (9) Such other relief as this Court may deem proper.

Although these motions are individual motions, they are combined for the purposes of efficiency into a single Omnibus Motion filed on behalf of all three defendants.

STATEMENT OF FACTS

The facts of this case, insofar as pertinent to the within motion, are contained in the accompanying affirmation of Elena Fast Esq., and Andrea Zellan Esq. duly affirmed on February 24, 2023 ("Affirmation") and all the exhibits appended thereto, all of which are incorporated herein and made a part hereof. The Defense is also incorporating a letter submitted to District Attorney Korchak dated February 21, 2023 with a courtesy copy provided to the Court by reference.

ARGUMENT

I. MOTION TO DISMISS THE INDICTMENT AS UNSUPPORTED BY LEGALLY SUFFICIENT EVIDENCE UNDER C.P.L. §210.20(1)(b), C.P.L. §210.20 (1)(a) and AS LEGALLY DEFECTIVE UNDER C.P.L. §210.20 (1) (c) and C.P.L. §210.35 (5).

The Defendants respectfully move this Court for an inspection of the stenographic minutes of the Grand Jury proceedings pursuant to CPL §210.30. Such inspection is necessary for the Court to be in position to determine whether the Grand Jury proceedings were valid, within the meaning of C.P.L. §190.25, and to further determine whether indictment herein is defective, within the meaning of C.P.L. §210.20. Moreover, C.P.L. §210.30(3) provides that the Defendants' motion for inspection of Grand Jury minutes *must* be granted in the absence of good cause shown to deny the same. The statute goes on to direct that the Court must release the minutes, or portions thereof, to defense counsel if such release is deemed "necessary to assist the Court in making its determination" on a motion to dismiss the indictment pursuant to C.P.L. §210.20.

Defendants further move the Court to dismiss the Indictment pursuant to C.P.L. §210.20(1)(b), or in the alternative, dismissing or reducing counts therein, on the grounds that the "evidence before the grand jury was not legally sufficient to establish the offense[s] charged or any lesser included offense[s]." In addition, the Defendants respectfully request that the Court closely examine the Grand Jury minutes and determine whether the Grand Jury proceedings complied with all the procedural and other requirements set forth in Article 190 of the New York Criminal Procedure Law, including but not limited to the following:

a. Whether the People introduced legally sufficient evidence to satisfy the elements of the crimes charged;

b. Whether the People's instructions adequately and accurately set forth the elements of the offenses of the crimes charged;

c. Whether the indictment was properly filed pursuant to CPL §§200.10 and 200.50(8) prior to the Defendants' Supreme Court Arraignment;

d. Whether the People summarized the Grand Jury testimony in a misleading or improper manner;

e. Whether the legal instructions given to the Grand Jurors by the People were recorded as required by CPL §190.25(6); whether they were consistent with the law including, but not limited to, the burden of proof and the presumption of innocence;

f. If the legal instructions of the Grand Jury were recorded;

g. Whether the People engaged in any prosecutorial misconduct before the Grand Jury;

h. Whether the Grand Jury received any hearsay testimony before voting on the indictment, and if so, the name and address of the person to whom such testimony is attributed;

i. Whether the People's instructions to the Grand Jury were sufficiently clear to enable the Grand Jury to properly perform its function;

j. Whether the Grand Jury Proceedings were inherently infirm, in that the Grand Jury was illegally constituted, had a quorum of fewer than 16 jurors, or less than 12 jurors concurred in the finding of the indictment.

It is respectfully submitted that if the evidence before the Grand Jury was not legally sufficient to establish the offenses charged, said proceedings were invalid, and the Indictment returned by this Grand Jury is defective and must be dismissed. Further, and in the alternative, the Defendants move for the reduction of charges contained in the Indictment to such lesser included offenses whose elements are found, upon inspection of the minutes, to have been

established by credible and legally sufficient evidence presented to the Grand Jury, pursuant to C.P.L. §210.20(1)(a).

A. Counts 4, 5, 6, 7, 9, 10, 11, and 12 Must be Dismissed as Legally Defective As a Matter of Law Due to Absence of Legally Sufficient Evidence to Establish Forcible Compulsion, Physical Helplessness or even Sexual Physical Contact of any kind between S.H. and Defendant Leor Kweller.

1. Applicable Legal Standard for Securing an Indictment and Prosecution's Duty of Fair Dealing in the Grand Jury.

It is axiomatic that "[l]egally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of the offense and the defendant's commission of it. *People v Pelchat*, 62 N.Y.2d 97, 105, 464 N.E.2d 447, 451, 476 N.Y.S.2d 79, 83 (1984) (emphasis added). But the Grand Jury is also meant to act "as a buffer between the State and its citizens, protecting the latter from unfounded and arbitrary accusations" and to serve as a "shield against prosecutorial excesses." *People v. Huston*, 88 N.Y.2d 400, 405 (1996). Under C.P.L. §210.35, a Grand Jury proceeding is defective when "the integrity thereof is impaired and prejudice to the defendant may result." C.P.L. § 210.35(5) (emphasis added). Although the standard is precise and high, the standard does not require actual prejudice. *See Huston*, 88 N.Y.2d at 409. Dismissal of the indictment is limited to instances where there was repeated prosecutorial wrongdoing, fraudulent conduct or errors that potentially prejudiced the ultimate decision reached by the Grand Jury. *Id*. (emphasis added). Dismissal may be found even where there is no finding of bad faith by the prosecutor. *See People v. Pelchat*, 62 N.Y.2d 97, 103-104 (1984).

When examining a Grand Jury proceeding, a reviewing court must examine not only the sufficiency of the evidence presented, but also the prosecutors discharge of their responsibilities and their duty of fair dealing. *See People v. Pelchat*, 62 N.Y.2d at 105. As the Court of Appeals admonished in *People v. Huston*, 88 N.Y.2d 400 (1996), a motion court must be mindful that:

> [t]he prosecutor's discretion during Grand Jury proceedings, however, is not absolute. As legal advisor to the Grand Jury, the prosecutor performs dual functions: that of public officer and that of advocate. The prosecutor is thus charged with the duty not only to secure indictments but also to see that justice is done. With this potent authority, moreover, comes responsibility, including the prosecutor's duty of fair dealing. As this Court has explained, [t]hese duties and powers, bestowed upon the District Attorney by law, vest that official with substantial control over the Grand Jury proceedings, requiring the exercise of completely impartial judgment and discretion. 88 N.Y.2d 400, 406 (*quoting People v. Lancaster*, 69 N.Y.2d 20, 26 (1986); *People v. Pelchat*, 62 N.Y.2d 97, 105 (1984); and *People v. DiFalco*, 44 N.Y.2d 482, 487 (1978)) (internal quotation marks omitted)).

People v. Thompson, 22 N.Y.3d 687, 697 (2014), *rearg. den*. 23 N.Y.3d 948 (2014), reiterated that the obligation of "fair dealing to the accused and candor to the courts" means:

> [t]he prosecutor also cannot provide an inaccurate and misleading answer to the grand jury's legitimate inquiry, nor can the prosecutor accept an indictment that he or she knows to be based on false, misleading or legally insufficient evidence. 22 N.Y.3d at 697 (quoting *Pelchat,* 62 N.Y.2d at 105 and *People v. Hill,* 5 N.Y.3d 772, 773 (2005) and citing *People v. Lancaster*, *supra*) (internal quotation marks omitted).

In determining whether a flaw in a Grand Jury presentation creates a risk of prejudice that necessitates dismissal of the indictment, the *Huston* court stated:

> Dismissal of indictments under CPL §210.35(5) should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury. *The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias.* 88 N.Y.2d at 409. (emphasis added).

Given the purpose of a Grand Jury, the prosecution is not under any obligation to search out and thereupon present evidence of an exculpatory nature. On the other hand, since the prosecution is ". . . charged with the duty not only to secure indictments but also to see that justice is done," *Huston*, 88 N.Y2d at 406; *Lancaster; Pelchat*, then where the prosecution is already in possession of "materially influencing" and admissible proof, which implicates more than issues of mere credibility, it has been held that such a responsibility does in fact exist in certain circumstances. *See People v. Williams,* 298 A.D.2d 535 (2d Dept. 2002); *People v. Suarez*, 122 A.D.2d 861 (2d Dept. 1986). Put another way, the prosecutor's wide exercise of discretion in presenting evidence to the Grand Jury, which may include the decision not to present exculpatory material, must be balanced by the Grand Jury's right to hear the "full story so that it [can] make an independent decision that probable cause [exists] to support an indictment." *People v. Isla*, 96 A.D.2d 789, 790 (1st Dept. 1983).

As discussed below, in this case, the prosecution failed to meet the most basic requirements. This Grand Jury proceeding against Leor Kweller, Yaron Kweller and Jordan Rindgen leaves no doubt that the People's presentation caused prejudice and led to Indictment based on misleading and legally insufficient evidence. Indeed, the presentation failed to establish core elements of the crimes alleged and yet, somehow, the Grand Jury's power to "guard . . . the liberties of the people against the encroachments of unfounded accusations from any source." was rendered impotent. *Thompson* at 696 citing *People v. Sayavong*, 83 N.Y. 2d 702, at 706 (1974), (citing *People v. Minet*, 296 N.Y. 315 at 323 (1947)).

2. The Grand Jury presentation lacked legally sufficient Evidence of Forcible Compulsion. Forcible Compulsion is a Critical element of Count 4 (Sexual Abuse in the First Degree in Violation of P.L. § 130.65 as to Defendant Rindgen), Count 5 (Criminal Sexual Act in the First Degree, in Violation of P.L. § 130.50(1) as to Defendant Rindgen), Count 6 (Criminal Facilitation in Violation of P.L. §115.00(1) as to Defendant Rindgen), Count 9 (Rape in the First Degree in violation of P.L. § 130.35(1) as to Defendant Yaron Kweller) and Count 10 (Criminal Sexual Act in the First Degree in violation of P.L. § 130.50(1) as to Defendant Yaron Kweller). Accordingly, Counts 4, 5, 6, 9 and 10 must be Dismissed.

The core element of Rape in the First Degree in violation of P.L. § 130.35(1) and of Criminal Sexual Act in the First Degree in violation of P.L. § 130.50(1) is "forcible compulsion." Penal Law § 130.00(8) defines "forcible compulsion" as "to compel by either: (a) use of physical force; or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." Physical injury means, "impairment of physical condition or substantial pain." Penal Law § 10.00(9). The Grand Jury presentation in this case is devoid of a scintilla of evidence of forcible compulsion.

The Court of Appeals explained that the Court's inquiry is "not what the defendant would or could have done, but rather what the victim, observing the defendant's conduct, feared he would or might do if the victim did not comply with his demands." *People v. Thompson*, 72 N.Y.2d 410, 415-16 (1988). The Court further explained that "the proper focus is on the state of mind produced in the victim by the defendant's conduct." *Id.* at 416. Forcible compulsion is examined "through the state of mind produced in the victim, and relevant factors include the age of the victim, the relative size and strength of the defendant and victim, and the nature of the defendant's relationship to the victim." *People v. Val*, 38 A.D.3d 928, 929 (3d Dept 2007). The Defense respectfully submits that prior to getting to the analysis of the age and relevant size and

strength of the parties, the People must first establish that defendant either utilized physical force or made an express or implied threat of harm to the complainant.

In *People v. Urso*, the Third Department found that there was forcible compulsion where the defendant dragged the victim from a sidewalk to an isolated wooded location where he threw her to the ground on her back. 132 A.D.2d 769, 771 (3d Dept 1987). Similarly, forcible compulsion was found where a victim testified that the defendant parked the car in which she was a passenger in a deserted lot and forcibly prevented her from leaving the car. *People v. Ayala*, 236 A.D.2d 802, 802 (4th Dept 1997). The victim testified that she complied with the defendant's demands because, based upon the look in his eyes and the fact that he raised his hand in a threatening manner, she feared that he would harm her. *Id.* Here, there is no testimony that any of the Defendants did anything to suggest physical harm would befall H.D. or S.H. if they chose not to participate in sexual activity.

In *People v. Chapman*, 54 A.D.3d 507, 513 (3d Dept 2008), the Third Department found that there was insufficient evidence of forcible compulsion. In that case, the Defendant was charged with Rape in the First Degree pursuant to Penal Law § 130.35 (1) and Criminal Sexual Act in the First Degree pursuant to Penal Law § 130.50 (1). Specifically, the indictment alleged that the Defendant engaged in sexual intercourse with the victim by forcible compulsion and that he engaged in oral sexual conduct with the victim by forcibly placing his mouth on her vagina. As is relevant here, forcible compulsion is established by proof of actual physical force or by proof of a threat, either express or implied, that causes a person to fear "immediate death or physical injury to himself, herself or another person" (Penal Law § 130.00 [8] [b]). The complainant's testimony in *Chapman*, did not establish that the defendant used actual physical force during the alleged incident. She testified on direct examination that she was lying down in

defendant's bed when he began to "touch[] [her] over or under [her] clothes." *Id*. at 509. "According to the complainant, she initially ignored the Defendant, but eventually performed consensual oral sex on him in the hope that he would leave her alone." *Id*.

> However, Defendant Chapman then said that he wanted to perform oral sex on her. The victim testified that the defendant did so despite her verbal protest. On cross-examination, the victim added that, after defendant performed oral sex on her, he inserted his penis into her vagina without her consent. Although this testimony was sufficient to establish that the sexual conduct occurred without the victim's consent, it did not establish that defendant used physical force.
>
> Nor was there evidence that the sexual contact was compelled by threat or fear. Defendant's statement to the victim to "put out or get out," by which defendant apparently meant that the victim had to leave his residence if she did not comply with his demands, was not made at the time of the incident in question and, in any event, does not constitute a threat that would cause the victim to fear immediate death or injury. Indeed, the victim admitted that, after defendant made that statement, she actually left the residence three or four times but willingly returned. Likewise, although the victim testified that defendant could be "mean"; and "loud"; and had a bad temper when he drank alcohol, she stated that, on those occasions, she would "just sit[] there listening to him"; and that "[h]e wouldn't actually say too much but he would like to complain about everything." Again, this testimony is insufficient to establish that defendant used the threat of imminent death or injury to compel the victim to engage in sexual conduct with him. Accordingly, viewing the evidence in the light most favorable to the prosecution, the Defense respectfully submits that evidence presented to the Grand Juy was not legally sufficient to support an indictment for Rape in the First Degree. (see People v. Fuller, 50 AD3d 1171, 1175, 854 NYS2d 594 [2008]; compare People v. Val, 38 AD3d 928, 929, 830 NYS2d 391 [2007], lv denied 9 NY3d 852, 872 NE2d 892, 840 NYS2d 779 [2007]; People v. Black, 304 AD2d 905, 906-908, 757 NYS2d 635 [2003], lv denied 100 NY2d 578, 796 NE2d 480, 764 NYS2d 388 [2003]). *People v. Chapman*, 54 A.D.2d 507, 509, 862 N.Y.S2d 660 (3d Dep't 2008).

Similarly, in *People v. Graham*, 200 A.D.3d 705, 159 N.Y.S.3d 87 (2d Dep't 2021), the Court dismissed charges of Rape in the First Degree and Criminal Sexual Act in the First Degree, under the forcible compulsion theory because there was no use of physical force by the defendant, no explicit or implicit threats by the defendant and complainant's testimony that she felt "uncomfortable" was not enough to support the charges. The Court wrote:

> Although the statutes defining sex offenses are silent on the subject, intent is implicitly an element of these crimes. The intent required is the intent to perform the prohibited act

-i.e. The intent to forcibly compel another to engage in intercourse or sodomy…" *Id.* at 90.

The Second Department went on to hold that:

> "...[S]ince the complainant had never spoken with the defendant prior to the alleged sexual assault, there was no reason, even from her subjective point of view, to fear that he would physically harm her if she did not do what Franiqua and Franesia were pressuring her to do…Further, the complainant's trial testimony regarding the incident itself, as well as the emotions she recounted experiencing during it, did not support a finding of forcible compulsion. The complainant said repeatedly during her testimony that she was uncomfortable throughout the incident, that she felt like she had no control over what was happening, and that there was nothing she could do to stop it. But she never connected those feelings to a fear of being physically injured or some other similarly serious consequence… Nor for that matter did the complainant articulate what she feared any of the alleged perpetrators would or might do if she did not comply with Franiqua and Franeisha's demands. The absence of such testimony might not be fatal to a finding of forcible compulsion under different circumstances. Here however, as mentioned, there was no testimony that the complainant had been physically abused by Franiqua prior to this incident, and no evidence that the defendant was aware that Franiqua was acting abusively towards the complainant…" *Id*. at 91.

As in *Graham*, neither H.D. nor S.H. ever "articulated" what they thought the Defendants may do if they said they wanted to leave or if they refused to engage in sexual activity with them.

Under the relevant case law, the circumstances testified to by H.D. do not constitute forcible compulsion. In fact, H.D.'s testimony before the Grand Jury provided even less evidence of any "forcible compulsion" than was provided by the complainants in *Chapman* or in *Graham*. There is no evidence in the Grand Jury of the use of physical force or express threats that could place H.D. in fear of immediate death or physical injury to herself or to S.H. or in fear that she or S.H. would be immediately kidnapped. The mere taking of her phone and speculation that if she had tried to leave, they would have blocked her way is not enough to establish an implied threat of immediate death or physical injury.

On the contrary, there is strong evidence that H.D. and S.H. had no concerns about the Defendants retaining possession of their smartphones because both S.H. and H.D. remained in

The Colonial Bar/Restaurant of their own free will for approximately 12 minutes after their smartphones are allegedly taken. Neither H.D. or S.H. testified that they take any steps to leave the premises, or requested the assistance of any of the dozen or more patrons or half dozen employees in the establishment at that time. Before voluntarily departing from The Colonial restaurant, according to Grand Jury testimony, [redacted] H.D. did not take the opportunity to ask her friend to stay with her, or to remain with her and S.H. And then, H.D. and S.H. voluntarily depart The Colonial with the Defendants.

The evidence establishes that H.D. was free to exercise her will. In fact, when H.D. wanted to use the restroom, it was easily accessible and available to her and S.H. Likewise, when H.D. asked for her phone back upon getting dressed and went to leave, her phone was apparently returned to her and the men did not prevent her from leaving. Although H.D. testified that Rindgen took her phone before they went into The Colonial, there was a break in time. H.D never asked for it back, and when she did ask for it back he apparently gave it back to her.

While H.D. testified that she [redacted] She merely testified [redacted] However, she articulates no objective basis for thinking any of the men would cause harm or use violence other than that they were larger than her. She did not testify that they had any weapons, employed any instrument as a weapon, or made any attempt to use physical size or strength to overpower her or S.H.

Rather, H.D. testified [redacted]

H.D. further testified [redacted] And there is no evidence to support a reasonable inference that there was an implied threat of harm. [redacted]

H.D. testified [redacted] Although S.H. testified [redacted]

Most respectfully, it is critical to the Court's analysis that H.D. did not testify that she or S.H. had been physically held, pushed or restrained or that any of the Defendants spoke in a hostile, loud or threatening voice. According to the Grand Jury testimony, H.D. and S.H. [redacted]

Thus, there was no evidence presented to the Grand Jury of the use of physical force and no evidence of express or implied threats that placed H.D. in fear of immediate death or physical injury to herself or to S.H. or in fear that she or S.H. would be immediately kidnapped or physically harmed. Because the Grand Jury had no evidence before it to establish forcible compulsion, the critical element of Rape 1 and of Criminal Sexual Act 1, Counts 4, 5, 6, 9 and 10 must be dismissed as a matter of law.

3. Counts 7 (Criminal Facilitation in Violation P.L. §115.00(1) as to Defendant Rindgen) and Count 11 (Rape in the First Degree (P.L. § 130.35(2) as to Defendant Leor Kweller) and Count 12 Sexual Abuse in the First Degree (P.L. § 130.65(2) as to Defendant Leor Kweller) Must Be Dismissed Because The Grand Jury Presentation Lacked (1) Legally Sufficient Evidence That S.H. Was Physically Helpless and (2) Any Evidence of Physical Sexual Contact between S.H. and Defendant Leor Kweller.

a. Evidence presented in the Grand Jury that S.H. was Physically Helpless is Legally Deficient

Under New York Penal Law §130.05(d), a person is deemed incapable of consent when he or she is physically helpless. New York Penal Law PL § 130.00(7), defines "physically helpless" as a person who is "unconscious or for any other reason is *physically unable to communicate unwillingness* to an act." (emphasis added). The Donnino Practice Commentaries note that, "this definition would apply to a person who is in a deep sleep as a result of barbiturates or who is a total paralytic. To some extent, the definitions of mentally incapacitated and physically helpless overlap." (McKinney's Cons. Laws of NY, Book 39, Penal Law Art. 130, at 573).

In *People v. Clyburn*, the Fourth Department reversed a conviction for Rape in the First Degree under New York Penal Law § 130.35(2), because the evidence failed to establish that the

victim was either unconscious or physically unable to communicate her unwillingness to engage in sexual intercourse with the defendant. *Clyburn* involved a complainant who testified to having a conversation with the Defendant after he broke into her apartment, but before the forcible intercourse. The Court held that the evidence was insufficient to sustain a Rape 1 conviction as the evidence did not show that the Complainant was either unconscious or physically unable to communicate. 212 AD2d 1030, 1030 [4th Dept 1995]. Compare with People v. Sensourichanh, 290 AD2d 886, 886 [3d Dept 2002] (conviction for Rape in the First Degree under the physically helpless theory upheld where complainant testified to being asleep prior to penetration and immediately protesting once she realized what was happening).

The Court of Appeals addressed the definition of physically helpless in *People v. Cecunjanin*, 16 N.Y.3d 488 (2011). In *Cecunjanin*, the complainant and the defendant were acquaintances who encountered one another at a bar. The complainant and defendant hugged and the complainant allowed the defendant to put his arm around her. Evidence introduced at trial was that as the complainant continued to ingest alcohol and exhibit signs of intoxication, the defendant became more aggressive. *Id.* at 490. Defendant then held her by her wrist or waist and pulled her into a nearby storage room. Defendant and another man put their hands under her shirt and tried to kiss her. She tried to leave the room but was unable to open the door, even though it was unlocked. Witnesses described the complainant as "very kind of out of it", "her head was bobbing back and forth", and "she seemed very kind of lifeless." *Id*. at 491. There was no testimony to suggest that she was ever unconscious, or too weak to offer resistance during the encounter. *Id.*

The Court of Appeals found that the evidence could not establish physical helplessness. The Court highlighted the complainant's testimony that she remembered "holding my arms up

like this because he was trying to put like his hands under my shirt. I would hold my arms up close to me like to block putting his hands in my shirt." *Id.* at 492. The Court reasoned that the complainant could not be deemed physically helpless at the time of the physical contact because "at that very moment, she was moving her own body to prevent the defendant from fondling her (i.e., she was conscious and able to express her unwillingness or willingness to act.)." *Id. emphasis added*.[24]

People v. Bjork, 105 A.D.2d 1258 (3d Dep't 2013), is a leading case on physical helplessness in the Appellate Division, Third Department. In *Bjork*, the victim testified that she was intoxicated from the time she arrived in the bar where she met the defendant to the morning when she went to the hospital. She woke to find the defendant in her bed. *Id*. Witnesses testified that she "could not keep her head up while speaking and fell asleep upon being put to bed." *Id*. at 476-77 (emphasis added).

Other Appellate decisions from the Third Department comport with *Bjork* in that in each case where evidence of physical helplessness is sufficient, the victim is unconscious or wakes from a sleep to find the defendant in the midst of sexual contact with her. In *People v. Sposito* the victim was described as so intoxicated that she began "falling, stumbling and vomiting… friends needed to move her to different sleeping accommodations, one testified that the victim was 'basically carried' to that bedroom, where she was put to bed with her clothes on. Shortly thereafter, defendant sought out the victim and engaged in sexual acts with her…" 140 A.D.3d 1308, 1309 (3d Dep't 2016) (emphasis added). In *People v. Dunham* the victim testified that she had no control over her body and remembered "waking up in bed" to find the defendant next to

[24] Accord *People v. Chapman*, 54 A.D.3d 507, 510 (3d Dep't. 2008) (*holding* that where the complainant testified that she performed consensual oral sex on the defendant, that she initially did not protest when the defendant inserted a vibrator into her vagina, and that she did eventually tell him to stop but he did not stop, the complainant could not be found to be physically helpless because she was conscious at the time and did communicate to the defendant her unwillingness and willingness to act.)

her and inserting his fingers in his mouth, then in her vagina and then subjecting her to sexual intercourse. The testimony from an expert regarding alcoholic stupor explained "how an individual in an alcoholic stupor could be awakened by painful or frightening stimuli but would remain confused and without motor control." 172.A.D. 3d 1462, 1463 (3d Dep't 2019) (emphasis added).

Compare the above referenced cases, where the victims were asleep and/or unconscious when the defendants' initiate the sexual contact, to the testimony before the Grand Jury in this case. S.H. [redacted] GJ Minutes Tr. p. 83 l. 7-10. [redacted] GJ Minutes Tr. p. 85 l.7-10. S.H. [redacted] GJ Minutes Tr. p. 107 l. 12-23. S.H. [redacted] GJ Minutes Tr. p.108 l. 13-15. There is no testimony that S.H. ever vomited, went unconscious or to sleep while with the Defendants.

More importantly, at the time of the alleged sexual contact, according to H.D.'s Grand Jury testimony, [redacted] Just like the complainant in *Cecunjanin*, S.H. was upright, supporting her own weight, voluntarily moving her body on the couch. She was certainly not unconscious, and based on the Grand Jury testimony, [redacted] Accordingly, under *Cecunjanin*, S.H. cannot be deemed to have been physically helpless. On this basis alone the Rape in the First Degree Count and the Sexual

Abuse in the First Degree Count against Defendant Leor Kweller and the Criminal Facilitation Count against Defendant Jordan Rindgen are legally deficient and should be dismissed with prejudice.

b. The Evidence of Sexual Contact between S.H. and Leor Kweller is Legally Deficient.

Even if the Court were to find sufficient evidence in this presentation that S.H. was physically helpless, Counts 8, 11 and 12 are still legally deficient and must be dismissed due to the absence of any evidence that Defendant Leor Kweller had sexual contact or sexual intercourse with S.H.[25]

New York Penal Law Section § 130.00(3) defines sexual contact as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed." The Courts in New York have defined "intimate parts" to include genitalia as well as buttocks. *People v. Hatton*, 26 N.Y. 3d 364, 369 (2016).

Sexual contact is an element of Sexual Abuse in the First Degree (under all subdivisions), and Sexual Intercourse is an element of Rape in the First Degree (under all subdivisions). There is no testimony that any part of Leor Kweller's body penetrated any part of S.H.'s body. There is no testimony that Leor Kweller was observed placing a hand, foot or finger on any part of

[25] Following the Grand Jury Indictment, the People moved for and Mr. Leor Kweller consented to the submission of his buccal swab. His DNA profile was excluded as a source of the two contributor male DNA profiles recovered from S.H. during her SANE, performed less than 24 hours after the alleged Rape.

S.H.'s body. Without any evidence that there was any physical or sexual contact by Leor Kweller of S.H., Counts 8, 11 and 12 are legally deficient and must be dismissed.

The sole testimony describing any sort of proximity between S.H. and Leor Kweller is provided by H.D. As described in the Defense affirmation, H.D.'s narrative does not have a scintilla of truthfulness. Her testi-lies have been contradicted by the scientific DNA evidence and her own text message communications that she never thought would see the light of day.

4. **Identifications of Leor Kweller and Yaron Kweller in the Grand Jury Were Misleading to the Grand Jury and Did Not Establish Reasonable Cause to Believe that Defendants Were Properly Identified as the Perpetrators.**

CPL § 190.30(1) provides that, unless otherwise specified in that section, the rules of evidence set forth in CPL § 60.10 are applicable in Grand Jury proceedings, where appropriate. New York courts have held that the identification procedures specified in CPL § 60.25 and CPL § 60.30 are examples of rules of evidence that are not applicable to Grand Jury proceedings. *People v Falco*, 67 Misc 2d 520, 524 [Sup Ct, Bronx County 1971]; *see People v Ball*, 89 AD2d 353 [4th Dept 1982]. Though CPL § 60.25 and CPL § 60.30 are inapplicable in Grand Jury proceedings, the People still have the burden of demonstrating the witness' ability to identify the defendant in order to establish a *prima facie* case. *See People v Tanksley*, 122 Misc 2d 182, 183 [Sup Ct, Kings County 1983] ("When a defendant is not available for a corporeal identification before the convening of the grand jury, the People may have to rely on photographs to establish a prima facie case against the defendant.")

Conspicuously absent from both H.D.'s and S.H.'s Grand Jury testimony is any mention of the procedure by which the complainants identified Yaron Kweller and Leor Kweller as the perpetrators of Counts 9, 10, 11 and 12. As the People did not serve a notice pursuant to CPL § 710.30(1), the Defense surmises that no formal identification procedure was ever administered

by law enforcement. Nor was there any testimony from the complainants which established the extent to which they were acquainted with Yaron Kweller or Leor Kweller prior to November 27, 2021. In fact, H.D.'s identification of Yaron Kweller and Leor Kweller was elicited solely by leading questions posed by the prosecution:

GJ Minutes Tr. p. 80, l. 8-13

Q. [redacted]
A. [redacted]
Q. [redacted]
A. [redacted]

After receiving the above answers, the People did not inquire any further into how H.D. was able to make these determinations. The People's failure in this regard is in stark contrast with their success eliciting similar testimony from the complainants' which established their familiarity with Jordan Rindgen. GJ Minutes Tr. p. 14, l. 7 - p. 15, l. 18; p. 78, l. 18-21.

The Grand Jurors subsequently heard testimony from H.D., in which she recounts the conduct of all three co-defendants at various points during the events in question, without hearing that she had just met Yaron and Leor for the very first time a short while earlier. Such background was crucial for the Grand Jurors to accurately evaluate the reliability of H.D.'s identifications and its importance is amplified where S.H. testifies that she does not have any personal knowledge of the events that form the basis of Counts 9, 10, 11 and 12. For instance, H.D.'s testimony [redacted] GJ Minutes Tr. p. 106, l. 1-15. The Defense submits that the accuracy of such an identification is directly correlated with the witness' familiarity with the perpetrator's physical appearance. Yet, the People allowed H.D. to testify without eliciting such necessary background, effectively nullifying any inquiry from the Grand Jurors about H.D.'s ability to make such an identification.

S.H.'s identifications, while not the product of a leading question, were also made without the necessary context to apprise the Grand Jurors of her ability to accurately identify Yaron or Leor:

S.H. - GJ Minutes Tr. p. 15, l. 19-21

Q. [redacted]
A. [redacted]

Again, the People accepted these answers as sufficient and made no further attempt to establish S.H.'s familiarity with Yaron and Leor. Not a single witness in the Grand Jury testified to knowing, or ever having seen, Leor Kweller prior to November 27, 2021. Not a single witness in the Grand Jury testified to being personally acquainted with Yaron Kweller prior to November 27, 2021. As such, not a single witness in the Grand Jury testified to the complainants having any knowledge of Yaron and Leor's existence prior to November 27, 2021. The People's failure to properly establish the basis for the complainants' identifications of Yaron Kweller and Leor Kweller is such a fundamental defect that it cuts to the very heart of the Grand Jury's reasonable cause determination. The Defense submits that the evidence presented to the Grand Jury on Counts 9, 10, 11 and 12 is legally insufficient on these grounds and should be dismissed accordingly.

5. Counts 1, 2, And 3 Must Be Dismissed As Legally Defective As A Matter Of Law Due To The Fact The District Attorney's Office Failed To Instruct The Grand Jury On Accomplice Corroboration And Failed To Offer Proof Corroborating The Accomplice Testimony Of H.D And S.H As It Related To The Drug Counts In The Indictment

a. Requirement To Instruct The Grand Jury As To Accomplice Corroboration

The New York State Court of Appeals has ruled that the District Attorney's obligation to charge the grand jury on accomplice corroboration is the same as a trial court and a trial jury. In *People v. Cilento*, the Court of Appeals stated, " As an initial matter, the accomplice corroboration requirement applies with equal force to grand jury proceedings. *People v. Cilento*, 2 NY2d 55, 138 N.E.2d 137, 156 N.Y.S.2d 673 (1956); *Matter of Ethan S.*, 28 AD3d 1165, 816 N.Y.S.2d 248 (4th Dept. 2006); *People v. Amell*, 277 AD2d 1052, 716 N.Y.S.2d 176 (4th Dept. 2000). Defense respectfully submits that the People's failure to instruct on the law of accomplice corroboration fatally impaired the integrity of the proceedings and Counts 1, 2, and 3 should be dismissed.

b. S.H. And H.D. Were Accomplices

The District Attorney's Office failed to instruct the Grand Jury on accomplice corroboration as it related to Counts 1, 2, and 3 of the Indictment. S.H. and H.D. are accomplices, and the Grand Jury should have been instructed as such. Pursuant to C.P.L. § 60.22, an accomplice is a person who "may reasonably be considered to have participated in . . . [t]he offense charged; or . . . *[a]n offense based upon the same or some of the same facts or conduct which constitute the offense charged.*"

The law in New York's Third Department is clear. In *People v. Knighter*, the Court reasoned, "With respect to the conviction of criminal sale of a controlled substance, the only evidence of a sale was the testimony of the buyer who, "as a purchaser of cocaine, was an accomplice as a matter of law" (*People v Artis*, 182 A.D.2d 1011, 1013, 583 N.Y.S.2d 30 [1992]). The buyer's testimony had to be supported "by corroborative evidence tending to

connect the defendant with the commission of such offense," but here there was no corroboration of that testimony (CPL §60.22 [1]; *see People v Arnott*, 143 A.D.2d 761, 763, 533 N.Y.S.2d 470 [1988]; *People v Webster*, 123 A.D.2d 488, 506 N.Y.S.2d 498 [1986]; *People v Tune*, 103 A.D.2d 990, 991-992, 479 N.Y.S.2d 832 [1984]; *see also People v Gonzalez*, 201 A.D.2d 906, 607 N.Y.S.2d 805 [1994]). It is well established that "[t]he corroboration must be independent of, and may not draw its weight and probative value from, the accomplice's testimony" (*People v Steinberg*, 79 N.Y.2d 673, 683, 595 N.E.2d 845, 584 N.Y.S.2d 770 [1992]), and thus the testimony of the buyer that he allowed defendant to use his truck in exchange for the crack cocaine does not constitute the requisite corroboration (*see People v Wilson*, 213 A.D.2d 1037, 624 N.Y.S.2d 718 [1995], *lv denied* 86 N.Y.2d 743, 655 N.E.2d 721, 631 N.Y.S.2d 624 [1995])." *People v. Knightner*, 11 A.D. 3d 1002 (3d Dep't 2004).

c. There is No Independent Corroboration That Rindgen Sold Or Possessed Cocaine

The only evidence offered to the Grand Jury that Rindgen sold or possessed cocaine was the testimony of the accomplice, H.D. The Third Department has previously dealt with this type of testimony in the context of a drug sale and drug possession case. In *People v. Rosica*, 199 A.D. 2d 773 (3d Dep't 1993), the Court stated the following, "Two of the accomplices testified that the cocaine seized from them when they were arrested had been purchased from and possessed by defendant. Defendant contends that neither the cocaine itself nor any other evidence corroborates this testimony. Corroborative evidence need only tend to connect defendant to the commission of the crime so as to satisfy the jury that the accomplice is telling the truth (*People v Moses*, 63 NY2d 299, 306, 482 N.Y.S.2d 228, 472 N.E.2d 4), and such evidence may be considered cumulatively (*People v Glasper*, 52 NY2d 970, 438 N.Y.S.2d 282, 420 N.E.2d 80). The cocaine possessed by defendant's accomplices, however, does not tend to

connect defendant to the possession of that cocaine or its sale to the accomplices, despite the evidence of a conspiracy to sell cocaine (See *People v Malizia,* 4 NY2d 22, 26- 27, 171 N.Y.S.2d 844, 148 N.E.2d 897). The only evidence that the cocaine came from defendant was the accomplices' testimony." *Id*.

Here, the People may have attempted to corroborate the testimony of H.D. [redacted] The defense respectfully submits that the logic of the Court in *Rosica* should be controlling, that "the only evidence that the cocaine came from the defendant was the accomplice's testimony". *Id*. Here, the toxicology reports from S.H. and H.D. offers no evidence as to who sold them the cocaine, and there is no evidence before the Grand Jury that is sufficiently corroborated that connects Rindgen to the possession of cocaine.

The philosophy behind this ruling is apparent given how easy it would be for an accomplice to simply say drugs or guns or any other contraband were given to them by any member of the community. Given that the District Attorney failed to instruct the Grand Jury on the law as it relates to accomplice corroboration and given that there was no accomplice corroboration evidence offered to the Grand Jury Counts 1, 2, and 3 of the Indictment should be dismissed.

6. Failure to Present to the Grand Jury Text Messages between S.H. and H.D. from the late morning and early afternoon of November 27, 2021 Withheld *Brady* material and Withheld a Part of the Story from the Grand Jury and Thus Impaired the Integrity of the Grand Jury Proceedings Requiring Dismissal.

Discovery provided by the prosecution prior to February 13, 2023 included approximately twelve screenshots of text messages from the complainants' cell phones.[26] That was all the *Rosario* the Defense was led to believe was in existence on the complainants'

[26] In some instances, it is not clear who owns the cellular phone that generated some of the screenshots produced in discovery.

cellular phones. It is a fair assumption that the lead investigative agencies in this case, the Binghamton Police Department and the Broome County District Attorney's Office, requested and reviewed communication between the complainants from the night and morning when the alleged events transpired, as well as their communications from the hours of November 27, 2021 leading up to their report to law enforcement that afternoon/evening.

From the outset of the investigation, prior to arrest on a Criminal Court Complaints and prior to Indictment, Defense Counsel sought to preserve and obtain the forensic images of the complainants' smartphones so that the *entirety* of communication relevant to these allegations would not be lost. It was not until early August 2022 that the prosecution relented and decided to obtain the complainants' consent to image the complainants' smartphones. Thereafter, on November 17, 2022, Defense Counsel was provided an opportunity to review a very small percentage of the data obtained during the forensic imaging process. In order to have an opportunity to review that data, the prosecution required the Defense Counsel to agree to a temporary protective order that prevented any disclosure of the data outside of our law staff and specifically prevented disclosure to our clients.

Defense Counsel was stunned upon reviewing a small portion of communication between H.D. and S.H. from November 27, 2021. The communications reviewed were sent and received within hours of the alleged incident and presumably after the complainants had slept a bit. The content of the communications was not just exculpatory, it raises grave doubts about the propriety of filing criminal charges in this matter. It is hard to fathom that (1) Binghamton Police Department and Broome County District Attorney investigators had not previously requested and reviewed these communications as a basic investigative step (2) if they did review them, and advised prosecutors of their existence, and prosecutors did not turn them over

immediately it is a very serious *Brady* violation and (3) if the communications were not reviewed by prosecutors prior to arrest and Indictment then the prosecution was negligent in its investigative efforts and should be charged with constructive knowledge and it should be treated as a *Brady* violation.

The prosecution's broad responsibility to see that justice is done required that these communications (all present sense impression exceptions to the hearsay rule) be introduced to the Grand Jury together with the complainants' testimony. See *People v. Williams,* 298 A.D.2d 535 (2d Dept. 2002). The decision to submit only the complainants' testimony and not their statements made in the immediate aftermath of their alleged encounter may be technically permissible, but it is anathema to the duty of the prosecutor to seek justice and to not simply pursue indictment. The prosecutor should have made Grand Jurors aware of the complainants' communications and thereby aware of the complainants' driving motivation to rewrite the events of November 27, 2021 - that their reputations would be "ruined" if "this gets out" and that H.D. was awash in guilt due to cheating on her boyfriend. The Grand Jurors were deprived of information that is an essential part of the story and which demonstrates the true impetus behind their rewriting of the events of that night as non-consensual.[27]

The prosecution failure to present the complainants' text communications to one another on November 27, 2021, (detailed in the accompanying *Fast and Zellan Affirmation* ¶78 and ¶81),

[27] *But see People v. Moses*, where the Appellate Division 4th Dept. stated: "We also reject the contention that the People failed to provide the grand jury with certain exculpatory evidence. "[T]he People maintain broad discretion in presenting their case to the grand *953 jury and need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused" (*Mitchell*, 82 N.Y.2d at 515, 605 N.Y.S.2d 655, 626 N.E.2d 630). Thus, the People were not obligated to provide the grand jury with the exculpatory portions of defendant's statements to the police, especially because they did not provide the grand jury with any inculpatory portions of those statements—indeed, they provided the grand jury with no portion of those statements (*see People v. Morel*, 131 A.D.3d 855, 859-860, 17 N.Y.S.3d 102 [4th Dept. 2015], *lv denied* 26 N.Y.3d 1147, 32 N.Y.S.3d 61, 51 N.E.3d 572 [2016]; *Almeida*, 128 A.D.3d at 1451, 8 N.Y.S.3d 785; *People v. Falcon*, 204 A.D.2d 181, 181-182, 612 N.Y.S.2d 130 [1st Dept. 1994], *lv denied* 84 N.Y.2d 825, 617 N.Y.S.2d 145, 641 N.E.2d 166 [1994]). *People v Moses*, 153 N.Y.S.3d 373, 376, 2021 WL 3783004 (N.Y.A.D. 4 Dept., Aug. 26, 2021)

caused irreparable prejudice to the Defendants; had the text exchanges been presented to the Grand Jurors as part of what transpired on November 27, 2021, there is a strong likelihood that the Grand Jurors would not have indicted the Defendants.

II. THE INDICTMENT MUST BE DISMISSED FOR FAILURE TO PRESENT MATTER TO AN IMPARTIAL GRAND JURY.

As the Court is aware, the instant case was subject to extensive local media coverage, which covered the allegations made as early as December 2021, prior to the Defendants' arrest on the criminal court complaint. Much of the information conveyed by the media involved allegations of other horrific conduct, that was not charged in the Indictment and instead was uncovered to be pure rumor and speculation. See *Fast and Zellan Affirmation* ¶¶ 50-59, *supra*. These hyped up speculations resulted in mass hysteria and a 400+ person march on the establishments owned by Yaron Kweller and Jordan Rindgen. The Defense respectfully submits that in light of the media attention permeating these allegations, no impartial Grand Jury could have been convened from a jury pool consisting of Broome County residents.

The Defense is also in the dark about whether the prosecutor *voir dired* the sworn jurors on their bias or prejudice in light of the pervasive publicity surrounding this case. The Defense also respectfully relies on the Court to examine the Grand Jury presentation to see if any of the jurors were incapable of performing their duties "because of bias or prejudice . . . such as to impair the proper functioning of the grand jury" CPL § 190.20(2)(b). The prosecutor has the power to "excuse" a sworn grand juror from voting on an individual case. *See People v. La Duca* (172 AD2d 1054 (4th Dept 1991); *see also People v. Cipolla*, 163 Misc. 2d 144 (Westchester County Court 1994). Where a grand juror professes "knowledge" of a case (or of a witness or defendant), for the prosecutor not to excuse the Grand Juror from sitting on a case the record

must show that despite the professed knowledge, the Grand Juror is still able and willing to follow the law and render an impartial verdict based solely upon the evidence presented. *Cipolla*, 163 Misc. 2d at 147-48.

Specifically, in *Cipolla*, the Grand Jury professed knowing the Defendant "from the neighborhood" and knowing "what the case is about." The prosecutor did not notify the impaneling judge, excuse the juror or *voir dire* further, rather the juror was permitted to remain as part of the Grand Jury empaneled to hear the instant case. In *Cipolla,* the court granted the defendant's motion to dismiss the indictment, concluding that "the prosecutor's failure to have conducted a sufficiently probing *voir dire* of the grand juror so as to have allowed an intelligent determination to be made as to whether or not to excuse the grand juror from consideration of the case, or, alternatively, to have brought the matter to the impaneling Judge's attention for consideration, constitutes an impairment of the Grand Jury proceedings that may have prejudiced the defendant." *Id*. at 148.

III. DISMISSAL OF THE INDICTMENT DUE TO IMPROPER INSTRUCTIONS TO THE GRAND JURY

If the Court is not persuaded by the Defense argument about the composition and partiality of the Grand Jury, the Defense respectfully submits that the Indictment should be dismissed for improper legal instruction and failure to voir dire sworn jurors about their opinions on the case prior to hearing any evidence. Admittedly, the Defense is not in possession of any legal instructions given by the Broome County District Attorney's Office to the Grand Jury that returned the instant Indictment.

As the Defense has not been provided with the legal instructions presented by the District Attorney's Office, the Defense is in the dark about whether the Grand Jury received proper

cautionary instructions pertaining to social media exposure and publicity. However, the Defense respectfully submits that the Indictment for Rape in the First Degree (under both the forcible compulsion and the physically helpless theories of prosecution), is against the weight of the evidence in light of the current criminal law jurisprudence in the state of New York. If the Defense is correct, then the evidence presented to the Grand Jury does not satisfy the "reasonable cause to believe" standard required for a legally sufficient Indictment. Accordingly, Defense has a substantial basis for concern that the Grand Jurors were not properly instructed, and we respectfully request that the Court dismiss the Indictment for failure to properly instruct the Grand Jury. Alternatively, we respectfully request that the Court disclose the stenographic record of the instructions to the Defense for review and, if necessary, allow submission of supplemental legal arguments on the failure to properly instruct the Grand Jurors.

IV. THE PROSECUTION'S MARCH 31, 2022 CERTIFICATE OF COMPLIANCE IS INVALID AND SHOULD BE STRICKEN.

In the defense affirmation in support of the instant motion, Defense listed many of the discoverable items that are believed to be in existence, but have not been turned over to the Defense. Many of these items are at the very least in the actual possession of the Binghamton Police Department or the New York State Troopers, which, under C.P.L. § 245.20(2), are deemed to be in the possession of the Prosecution. CPL § 245.20(1) mandates disclosure of "*all* items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including *but not limited to*" the following subdivisions. Material does not have to be named to fall under this

mandate. Subdivisions (1)(a) through (u) are a general guide to what is considered initial discovery, not an exclusive list.

Courts and legal scholars have agreed on the non-exhaustive nature of the prosecution's initial discovery obligations. To be sure, the practice commentary to CPL § 245.10 specifies that "[i]f something is in the prosecutor's file (or that of the police investigating agency) that does not fall within one of the defined items of disclosure, it should invariably "relate to the subject matter of the case" and will need to be disclosed," unless the material constitutes work product or is subject to a protective order. Donnino, Practice Commentary, CPL § 245.10 (emphasis added) *see also People v. Lustig,* 2020 N.Y. Slip Op. 20096 (Qns Co. Sup. Ct. April 28, 2020).

Even evidence that is believed to have "minimal value" is subject to § 245.20(1), regardless of whether such material is explicitly enumerated in 245.20(1)(a) through (u). For example, in ordering the prosecution to disclose materials related to the NYPD's Domain Awareness System pursuant to their initial discovery obligations, the court in *Lustig* noted, "the Court is disinclined to hold that materials in a police investigative file are not related 'to the subject matter of the case' simply because, in the People's estimation, they appear to be of minimal value." 2020 N.Y. Slip Op. 20096. Therefore, regardless of the perceived value of the information, material relevant to the case is subject to automatic disclosure and must be supplied before the prosecution can certify compliance under CPL § 245.50.

Further, under the new discovery regime, it is not up to the defense to establish an item or evidence is discoverable. Instead, to withhold material the prosecution must establish the contested materials are wholly irrelevant to the criminal proceedings *and* rebut the "presumption in favor of disclosure when interpreting sections . . . subdivision one of section 245.20, of this article." *See* CPL § 245.20(7). Here, however, the prosecution has withheld the above material

without establishing that it is irrelevant to the case, and without making any attempt to overcome the presumption in favor of disclosure. Because of the deficiencies outlined in the Defense Affirmation, the discovery provided is insufficient to comply with CPL § 245.20 and the insufficiency renders the certificate of compliance invalid.

V. PRECLUSION OF UNNOTICED IDENTIFICATIONS AND STATEMENTS

To date, Defense has not received any notices pursuant to C.P.L. § 710.30(1)(a) and (1)(b), which the People are required to serve on defense within 15 days of arraignment on the Indictment. The Defense seeks preclusion of any unnoticed statements or identifications at trial.

VI. INDICTMENT MUST BE DISMISSED IN THE INTERESTS OF JUSTICE PURSUANT TO CPL § 210.20 (1) (i), C.P.L. §210.40 AND *PEOPLE V. CLAYTON*, 41 A.D.2D 204, 208 (N.Y. APP. DIV. 2D DEP'T 1973)

In 1983, in *People v. Rickert*, the New York Court of Appeals described the "ancient roots" underlying C.P.L. §210.40 motions to dismiss in the interests of justice and characterized it as means to "accomplish the spirit of justice." 58 N.Y.2d 122, 126.

Recently disclosed powerfully exculpatory evidence demonstrates that the People cannot prove any of the charges beyond a reasonable doubt, a compelling factor necessitating dismissal in the interests of justice. We have presented the information and made our case to the prosecutors, but thus far, the office has opted to proceed with prosecution. Defense Letter to District Attorney Korchak, Dated February 21, 2023. Accordingly, it is left to the Court to put an end to this now verifiably unfounded prosecution and "accomplish the spirit of justice." *Id*. The Defense therefore seeks dismissal of the Indictment with prejudice pursuant to *People v.*

Clayton, 41 A.D.2D 204 208 (NY App. Div.2d Dep't 1973) and C.P.L. §210.40 and respectfully requests a hearing if it pleases the Court.

C.P.L. § 210.40 authorizes the Court to dismiss upon analysis and finding of a "compelling factor, consideration or circumstance" that clearly demonstrates that "conviction or prosecution of the defendant… would constitute an injustice." "The court must, to the extent applicable, examine and consider, individually and collectively, the following:

> (a) the seriousness and circumstances of the offense;
> (b) the extent of harm caused by the offense;
> (c) the evidence of guilt, whether admissible or inadmissible at trial;
> (d) the history, character and condition of the defendant;
> (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
> (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
> (g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
> (h) the impact of a dismissal on the safety or welfare of the community;
> (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
> (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose." *Id*.

The *Clayton* decision explained that "[t]he sensitive balance between the individual and the State… must be maintained in applying the test of the interests of justice which CPL § 210.40 contemplates moves in response to factors largely resting on value judgments of the court. But those judgments in turn hinge on the production of facts in the possession of the prosecution and the defendant." *People v Clayton*, 41 A.D.2d 204, 208, 342 N.Y.S.2d 106, 110 (N.Y.A.D. 2 Dept., Apr. 02, 1973). We respectfully submit that upon consideration of the facts and the law, "the sensitive balance" weighs in favor of dismissal in the interests of justice of the entire indictment in this case. "[C]onviction or prosecution of the defendant[s] upon such indictment or count [will] constitute or result in injustice." C.P.L. §210.40.

The application of that "sensitive balance" articulated in *Clayton* begins with C.P.L. § 210.40 (a) and (b) factors. To be sure, the allegations of Rape in the First Degree are among the most serious and heinous allegations that can be levied against an individual and prosecuted by law enforcement. The People have a very strong interest in prosecuting such conduct and preventing the harm inflicted by such conduct. However, in instances like this one, where investigation reveals that the complainants consented to the physical intimacy, that they joked about the encounter in the hours and days afterward, that they deliberately hid evidence from law enforcement, that they worried that their own choices and conduct would bring them shame and other repercussions, then the balance shifts. Here, due to all that has come to light since the Grand Jury presentation, the interests of justice require termination of the prosecution. Terminating prosecution will prevent the harm to the public caused by wrongful prosecution and conviction and prevent the concomitant damage to the public's faith in law enforcement and the criminal justice system. *See* C.P.L. § 210.40 (g).

The most compelling factor in favor of dismissal pursuant to C.P.L. § 210.40 is subdivision (c) - evidence of guilt. Here, there is a dearth of evidence of guilt. DNA evidence exonerates Leor Kweller and Yaron Kweller of Rape and therefore, also Jordan Rindgen of facilitating Rape. Evidence submitted to the Grand Jury, as argued in detail *infra* at Section I fails to establish the essential elements of Rape in the First Degree and Criminal Sexual Act in the First Degree under a forcible compulsion theory. Likewise, the evidence presented to the Grand Jury failed to establish the essential elements of Rape in the First Degree or Sexual Abuse in the First Degree under the physical helplessness theory. In November 2022, the Defense apprised the prosecutors of the case law showing these legal deficiencies prior to filing these motions, but

it seems that the People are choosing instead to rely on cases that have been explicitly overruled by the New York Court of Appeals.

In addition to failures of evidence in the Grand Jury, the newly discovered (and alarming) evidence uncovered within the recently disclosed forensic images of the complainants' smartphones demonstrates that the complainants have misled law enforcement from the inception of the investigation. It is worth noting again, that prior to arrest and indictment, in December 2021, the Defense put the prosecution on notice via Order to Show Cause seeking the preservation of the complainants smartphone data, confident that the communication data stored on the complainants smartphone devices would contain material, relevant evidence that could help us clear the Defendants of any criminal wrongdoing.

The evidence in the smartphone communication between S.H. and H.D. that occurred after that Defense filing, substantiates the concern that evidence would be lost as well as validates the Defense efforts to ensure that the People preserved that evidence back in December 2021; communications between H.D. and S.H. and third parties reveal their panicked effort to delete communication and images from the night/morning of the encounter - communications and images that would verify the consensual nature of the interaction. As the Court knows from the letter submitted to District Attorney Korchak, (1) the complainants deliberately excised at least one image and deleted at least four text messages from screenshots of their communications of the night/morning hours of November 26, and 27, 2021[28] and, (2) communications from that night/morning were deleted from H.D.'s phone to prevent H.D.'s boyfriend at the time from seeing the communications. It is fair to surmise that H.D. and her friends wanted messages from

[28] It should be noted that Defense review of H.D.'s cellular phone reveals that she obtained screenshots of her group chat text message communications from another group chat participant and it was these messages that were altered after receipt by H.D. and prior to being handed over to the Binghamton Police Department.

that night/morning deleted so that they could hide from H.D.'s boyfriend that H.D. had voluntarily and consensually been physically intimate with another man.[29]

We must assume that the prosecutors and law enforcement requested honesty and transparency from the complainants, and requested access to all relevant communications, videos and images from the complainants and other witnesses. For whatever reason, it appears the material produced by the complainants was not scrutinized by law enforcement (if it was scrutinized then there are very serious *Brady* violations, not just *Brady* revelations to support dismissal in furtherance of justice). But indubitably, law enforcement had to want to know, as part of a thorough investigation, the truth of what the complainants communicated to one another and to others via text, social media, and instant messaging on that night/morning and about that night/morning. By not looking at these communications, or by looking at them and then failing to immediately disclose same to the Defense, the prosecutors have at best neglected their responsibilities.[30]

The data from H.D.'s phone was produced on February 14, 2023. Within 24 hours, the Defense had uncovered exculpatory communications in which the only complainant who testified as to any intimate physical contact between the complainants and the defendants, says she needs to "confess her sins," and characterizes the physical contact as consensual. *See* February 21, 2023 Letter to D.A. Korchak. Even more disturbing, contents of these messages reference prior conversations of the complainants with the "ADA" and the police department

[29] The Defense team is working to determine if these communications can be recovered and which communications were deleted.

[30] On February 23, 2023 the Defense received a forensic image of S.H.'s cellular phone. There is no data in this image dated before March 2022. It would seem that law enforcement lost the opportunity to preserve evidence that may have been on S.H.'s cellular phone. Most respectfully, if the data is not accessible in Cloud storage, then S.H. successfully destroyed evidence. This destruction of evidence was avoidable. Not only is S.H. responsible, law enforcement is responsible. The Defense implored law enforcement to take all necessary steps to preserve this evidence so that should it be deemed subject to disclosure, it would exist.

regarding the consensual nature of the physical activity, and contents of these messages reference "accidentally" deleting problematic text messages to conceal communications about the consensual nature of the activity from the Defense. *Id*. The actions of the complainants may constitute perjury, tampering with evidence and obstruction of governmental administration and they should be investigated. As the Defense's review of H.D.' s and S.H.'s phones is incomplete and still ongoing, the Defense may be uncovering even more exculpatory evidence.

Inexplicably, the prosecutors refuse to dismiss the case after the Defense uncovered exculpatory, problematic and downright criminal text messages from the complainants in less than 24 hours of being given access to the phones in February 2023. Instead of acknowledging that Leor Kweller, Yaron Kweller and Jordan Rindgen have been wrongly accused, the Broome County District Attorney's Office allows the destruction of the Defendants and their families to continue. As they do not have the courage to admit that they rushed to present the matter to the Grand Jury without doing thorough investigative work and obtained an indictment against three men who are factually and legally innocent of the crimes alleged, they wait for the Court to rule.

We now know that instead of honesty and transparency, law enforcement got dishonesty, obfuscation and obstruction from the complainants. The Defense respectfully submits that the prosecutors in this matter have failed their sworn oath and the ethical obligations imposed on them by Rule 3.8 of the New York Rules of Professional Conduct. They cannot prove the charges beyond a reasonable doubt. The Defense therefore respectfully requests dismissal of the Indictment with prejudice pursuant to *People v. Clayton*, 41 A.D.2D 204 208 (NY App. Div.2d Dep't 1973) and respectfully requests a hearing if it pleases the Court. *"Fiat justitia et ruant coeli."*

VII. PRECLUSION OF PRIOR BAD ACTS AND *MOLINEUX* MATERIAL OR HEARINGS PURSUANT TO *PEOPLE V. SANDOVAL,* 34 NY2D 371 (1974) AND *PEOPLE V. VENTIMIGLIA*, 52 NY2D 350 (1981).

The People may attempt to offer bad acts against the Defendants should they elect to testify at trial. The People may further attempt to offer *Molineux* evidence in their case-in-chief. The Defense respectfully requests that the Court hold hearings pursuant to *People v. Sandoval*, 34 NY2d 371 (1974) and *People v. Ventimiglia,* 52 NY2d 350 (1981) no later than 15 days before trial. C.P.L. § 245.10(1)(b). The Defendants further request an Order directing the People to serve upon them, pursuant to C.P.L. § 245.20(3), a list of all misconduct and criminal acts not charged in the Indictment which the prosecution intends to use at trial for purposes of impeaching the Defendants' credibility or as substantive proof of any material issue in the case.

VIII. AN ORDER COMPELLING THE PEOPLE TO OBTAIN A FORENSIC IMAGE OF S.H. CELLULAR PHONE THROUGH DATA RETAINED IN WHATEVER ICLOUD WAS USED BY S.H. FROM NOVEMBER 26, 2021 THROUGH MARCH 2022.

As detailed above, S.H.'s cellular phone that was in existence November 26, 2021 through March 2022 was not preserved or provided to the Defense. The Defense respectfully requests an order from the Court compelling production of a forensic image and iCloud that was in existence during the above time period. Defense respectfully submits that said Rosario material is relevant and material to the case and must be provided to the Defense.

IX. RESERVATION OF FURTHER MOTIONS

The Defendants respectfully reserve the right to make such further motions pursuant to C.P.L. §§255.20 (2) and (3) as may be necessitated by the Court's decision on the within motions and by further developments which, even by due diligence, Defendants could not presently be aware of. Specifically, the Defense is contemplating a change of venue motion. If a change of venue motion is filed, it will be supported by results of community polling on the partiality of the venue as it relates to the defendants and the defense team. Rather than dissipate our clients' resources on community polling at this time, Defense respectfully seeks a decision on the instant motion prior to filing said motion with the Court.

X. CONCLUSION

WHEREFORE the defense respectfully requests that this omnibus motion be granted in its entirety.

Dated: February 24, 2023
New York, New York

Respectfully Submitted,

s/ Elena Fast
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CERTIFICATE OF SERVICE

I, PAUL BATTISTI ESQ., hereby certify that on February 24, 2023, I filed the foregoing with the Clerk of the Broome County Court and Assistant District Attorney Alyssa Congdon of the Broome County District Attorney's Office.

Dated: February 24, 2023
New York, New York

s/ Paul Battisti
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EXHIBIT A

PSNY v. Rindgen, Kweller, Kweller
Ind. 70185-22

NEW YORK STATE | State Police | Forensic Investigation Center

KATHY HOCHUL
Governor

KEVIN P. BRUEN
Superintendent

DR. RAY WICKENHEISER
Director

Biological Science DNA Case Report

To: Binghamton City Police Chief
Binghamton City Police Department
38 Hawley Street
Binghamton, New York 13901

Report Date: July 21, 2022
Lab Case #: 21SL-00990
Agency Case #: [redacted]

Subject(s): *S[redacted] H[redacted] - Victim*
LEOR E KWELLER - Defendant

Item Number and Description	**Examination Results**
DA001. Buccal Swab Collection - Leor Kweller	
A. Buccal swab	See DNA results.
B. Buccal Swab	No examination conducted.

A DNA extraction procedure was performed on the following reference(s):

Item Number	**Description**
DA001A.	Buccal Swab - Leor Kweller

An STR DNA amplification procedure was performed on the following reference(s):

Item Number	**Description**
DA001A.	Buccal Swab - Leor Kweller

STR Amplification Results:

The DNA extracts were tested using the GlobalFiler™ PCR Amplification Kit.

A Y-STR DNA amplification procedure was performed on the following reference(s):

Item Number	**Description**
DA001A.	Buccal Swab - Leor Kweller

Y-STR Amplification Results:

The DNA extracts were tested using the Yfiler™ Plus PCR Amplification Kit.

Referring to the New York State Police laboratory case number 21SL-00989, report dated December 28, 2021:

Vaginal swabs (21SL-00989, 2C2-3) and Cervical swabs (21SL-00989, 2D2-3): The results are consistent with at least two male donors, with the major contributor being an unknown male donor, "John Doe". Leor Kweller (DA001A) can be excluded as being the major contributor. The major contributor to this evidence is suitable for further comparison. The remainder of this evidence is not suitable for further comparison due to insufficient genetic information.

Building 30, 1220 Washington Avenue, Albany, NY 12226-3000 | (518) 457-1208 | www.troopers.ny.gov

Biological Science DNA Case Report

Subject(s):	***YARON I KWELLER - Suspect***	**Report Date:**	July 21, 2022
	JORDAN M RINDGEN - Suspect	**Lab Case #:**	21SL-00990
	H[redacted] D[redacted] - Victim		
	S[redacted] L[redacted] - Victim	**Agency Case #:**	[redacted]
	DYLAN WESCO - Other		
	LEOR E KWELLER - Defendant		

The DNA extracts prepared in this case have been retained in a biological specimen bag.

All evidence associated with this case will be returned to the submitting agency upon completion of all testing.

(CPL 190.30(2) Certification)

I, Kristine J. Robinson, Forensic Scientist III, hereby certify that I am a public servant in the employ of the New York State Police and performed a forensic examination on or concerning certain evidence submitted to the New York State Police Crime Laboratory System in the above referenced case. I further certify that this is the electronic record of my report and contains the results, opinions and interpretations of the forensic examination I performed in the above referenced case. The electronic record of this report is maintained in and made available to the District Attorney's office through the New York State Police Crime Laboratory System's electronic Laboratory Information Management System.

False Statements made herein are punishable as a class A misdemeanor pursuant to section 210.45 of the Penal Law.

[redacted]

Kristine J. Robinson
Forensic Scientist III

[redacted]

Jay A. Caponera
Supervisor of Forensic Services
Administrative Reviewer

Definitions of terms used in this report can be located within the Report Standardization Manual at http://criminaljustice.ny.gov/forensic/labreportstandards.htm. This report does not constitute the entire case file. The case file may be comprised of worksheets, images, analytical data and other documents.

Abbreviated terms used in this report may include: Deoxyribonucleic Acid (DNA), Short Tandem Repeat (STR), male-specific Short Tandem Repeat (Y-STR), Polymerase Chain Reaction (PCR), Combined DNA Index System (CODIS) and Cross-Referenced (X-Ref).

If stated in this report, insufficient amplification results are not suitable for comparison due to incomplete genetic recovery and/or low quantities of DNA. Complex amplification results are not suitable for comparison due to uninterpretable DNA mixtures of multiple and/or related individuals.

Any statistical calculations provided in this report utilize databases provided by the Federal Bureau of Investigation (including African American, Caucasian American, Southeastern US Hispanic and Southwestern US Hispanic populations) and/or the YHRD Yfiler Plus Worldwide Database. Information regarding the population composition of the YHRD Database can be found at https://yhrd.org/pages/resources/national_databases. Loci may be omitted from statistical calculations due to incomplete or inconclusive genetic results and/or database restrictions.

EXHIBIT B

PSNY v. Rindgen, Kweller, Kweller
Ind. 70185-22

March 23, 2022

BY EMAIL & HAND DELIVERY
ADA Alyssa Congdon
45 Hawley Street
Binghamton, NY 13901

RE: Grand Jury Investigation Presentation in the Matters of:
People v. Yaron Kweller CR 00730-22
People v. Jordan Rindgen CR 00731-22 & CR 00732-22
People v. Leor Kweller CR 00798-22

Dear Ms. Congdon,

It is our understanding from the notices you served yesterday that you intend to proceed with a Grand Jury presentation of evidence that you believe supports felony charges against Leor Kweller, Yaron Kweller and Jordan Rindgen in connection with allegations being made by Ms. H[redacted] and Ms. D[redacted]. It is our further understanding that you will be presenting evidence on Thursday, March 24, 2022.

We ask the People to reconsider presenting this matter to the Grand Jury at this time. At this stage of the investigation and the proceedings related to these allegations, which received tremendous social media and media attention prior to the filing of the Felony Complaints, a fair and just approach would have the People provide discovery pursuant to Article 245.00 of the Criminal Procedure Law and give Defendants and their counsel genuine opportunity to analyze that evidence and to make considered decisions about testifying and offering evidence before the Grand Jury. If the People are prepared to provide discovery and to delay any Grand Jury action, the Defendants are willing to waive their rights under New York CPL 30.30 for at least thirty days while reviewing the discovery.

Should you choose to proceed in the Grand Jury rather than first producing discovery, we do not have sufficient information to provide our clients with considered legal advice as to whether to exercise their right to testify before the Grand Jury. Therefore, we have no choice but to hereby withdraw the previous notices of Yaron Kweller, Leor Kweller and Jordan Rindgen's intent to testify before the Grand Jury pursuant to CPL Section 190.50 (5) regarding Ms, H[redacted] and Ms. De[redacted]'s allegations.

In addition, should you choose to proceed, we submit the attached letter addressed to the Grand Jury and request that it be submitted to the Grand Jury for consideration. In the attached letter we respectfully request that the Grand Jury ask for the digital surevillance evidence disclosed to Detective Amanda Miller on November 30, 2021. The video contains material and relevant evidence regarding the conduct of all parties on the night and the early morning in question. The

Grand Jury has a right to request the digital surveillance as part of their consideration of these allegations.

Please let us know if you wish to discuss any of the matters raised in this letter.

Sincerely,

Paul Battisti, Esq.
Attorney for Yaron Kweller

Thomas Jackson, Esq.
Attorney for Jordan Rindgen

Andrea Zellan and Elena Fast
Attorneys for Leor Kweller

March 23, 2022

Grand Jury
Supreme Court of The State of New York
Broome County
65 Hawley Street
Binghamton, NY 13901

RE: Grand Jury Investigation Presentation in the Matters of:
People v. Yaron Kweller CR 00730-22
People v. Jordan Rindgen CR 00731-22 & CR 00732-22
People v. Leor Kweller CR 00798-22

Dear Grand Jurors,

On behalf of Yaron Kweller, Leor Kweller and Jordan Rindgen, we respectfully ask the Grand Jury to obtain specific, critically important and relevant evidence that was had delivered to Binghamton Police Department Detective Amanda Miller on November 30, 2021. A copy of the receipt signed by Detective Miller can be provided to you at your request.

The evidence that Detective Miller possesses and that we ask the Grand Jurors to consider is a digital surveillance video. The digital surveillance video contains images of the two women that we believe are the complainants in this matter interacting with one another and interacting with Mr. Leor Kweller and Mr. Yaron Kweller at the Colonial Restaurant in Binghamton, NY a short time before the complainants allege that they were sexually assaulted. (Mr. Jordan Rindgen is also present at that time but less visible in the digital video).

Thank you for your consideration.

Sincerely,

Paul Battisti, Esq.
Attorney for Yaron Kweller

Thomas Jackson, Esq.
Attorney for Jordan Rindgen

Andrea Zellan and Elena Fast
Attorneys for Leor Kweller

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TENY R. GERAGOS
ADMITTED IN NY & CA
STUART GOLD

March 23, 2022

BY EMAIL & HAND DELIVERY
ADA Alyssa Congdon
District Attorney's Office
Broome County
State of New York
45 Hawley Street
Binghamton, NY 13901

RE: Grand Jury Investigation Presentation in the Matters of:
People v. Yaron Kweller CR 00730-22
People v. Jordan Rindgen CR 00731-22 & CR 00732-22
People v. Leor Kweller CR 00798-22

Dear Ms. Congdon,

We received your email inquiry and response to our letter dated March 23, 2022, regarding the Broome County District Attorney's Grand Jury presentation in the above referenced matters.

In response, by 9:00 AM tomorrow morning Paul Battisti will hand deliver to your office the identifying information for the one camera angle of surveillance video that we are asking the Grand Jurors to view and to consider. Please note that we are asking the Grand Jurors to view the entire segment generated by the camera angle that Mr. Battisti will identify for you tomorrow

morning. We will not object on authenticity grounds to the introduction into evidence of surveillance video that was disclosed to Detective Miller November 30, 2021 and is identified tomorrow morning by Paul Battisti.

In addition, we are asking the Broome County District Attorney's office to read to the Grand Jurors the entire letter addressed to the Grand Jurors that we submitted to your office earlier today, and we are asking that it be read before the video surveillance is played for the Grand Jurors.

Sincerely,

[redacted]

Andrea Zoffan and Elena Fast
Attorneys for Leor Kweller

[redacted]

Paul Battisti, Esq.
Attorney for Yaron Kweller

[redacted]

Thomas Jackson, Esq.
Attorney for Jordan Rindgen