SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM, PART TAP D, QUEENS COUNTY

PRESENT: HONORABLE GREGORY LASAK, Justice

THE PEOPLE OF THE STATE OF NEW YORK

- against -

JULIO NEGRON,

Defendant.

Motion: To Dismiss the Indictment and Preclude Evidence

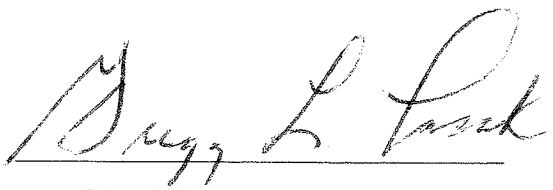
Ind. No.: 398/05

JOEL B. RUDIN, ESQ.
For the Motion

ADA WILLIAM H. BRANIGAN
Opposed

Upon the foregoing papers, defendant's motion has been decided in accordance with the accompanying memorandum.

DATE: September 6, 2017



GREGORY LASAK, J.S.C.

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART TAP D

THE PEOPLE OF THE STATE OF NEW YORK

: BY: Gregory Lasak, JSC

against

: DATED: September 6, 2017

:

JULIO NEGRON

The following constitutes the opinion, decision and order of the Court:

On September 13, 2016, the defendant filed a motion in which he moves for dismissal of the indictment on two grounds: first, that the integrity of the Grand Jury was impaired because the People withheld exculpatory evidence and misled the Grand Jury; and, second, that the indictment should be dismissed in the interest of justice pursuant to section 210.40 of the Criminal Procedure Law. The defendant alternatively moves for a new *Wade* hearing under the authority of *People v. Marshall*, 26 N.Y.3d 495 (2015), which was decided by the Court of Appeals long after the defendant's initial conviction in this case.

In response, the People have filed an affirmation and memorandum of law in opposition to the defendant's motion, which is dated November 7, 2016. In it, they argue that the defendant's motion must be denied in its entirety. First, the People argue that the defendant's motion is untimely. The People also maintain that the defendant's motion is meritless. Specifically, they claim that evidence presented to the Grand Jury was sufficient, and that the prosecutor's failure to present exculpatory evidence to the Grand Jury did not impair its integrity. In addition, the People argue

that the defendant is not entitled to dismissal of the indictment in the interest of justice or, in the alternative, that a hearing should be held on this issue. Finally, the People argue that the defendant is not entitled to a new *Wade* hearing under *People v. Marshall.*

On November 14, 2016, the defendant submitted a reply to the People's opposition papers. On March 9, 2017, he submitted a letter in support of his motion to dismiss the indictment in the interest of justice.

This Court has reviewed the Grand Jury minutes, the pre-trial suppression hearing minutes, the trial minutes, the court file, and all filings submitted in connection with this case in consideration of the claims raised in this motion.

BACKGROUND OF THIS CASE

On March 3, 2005, an indictment was filed with the Court charging the defendant with Attempted Murder in the Second Degree, Assault in the First Degree, Reckless Endangerment in the First Degree, Criminal Possession of a Weapon in the Second Degree, and two counts of Criminal Possession of a Weapon in the Third Degree.[1] In short, these charges were based on evidence presented to the Grand Jury that the defendant and the victim, Martin Fevrier, got into an argument after the defendant backed down a one-way street in order to get a parking spot. Evidence was also presented that, during this argument, the defendant took out a gun and shot Mr. Fevrier in the hip.

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[1] One count of Criminal Possession of a Weapon in the Third Degree – count 5 of the indictment – was dismissed by the Court on March 28, 2006.

After the defendant was indicted, a pre-trial suppression hearing was held. At the hearing, evidence was presented that Martin Fervier picked person #5 – the defendant – out of the lineup and stated that this was the person who shot him. During cross-examination, Detective Mosoco testified that when Fervier initially viewed the lineup, he stated that he thought or believed that #5 was the shooter. After that, Detective Mosoco, another detective, and the Assistant District Attorney who was present at the lineup took Fervier into a room away from where the lineup was being conducted. This meeting occurred outside of the presence of defense counsel, who was otherwise present for the lineup.[2] The meeting in the separate room lasted around 15 minutes. During that time, the parties went over what happened. The detectives asked the witness if he was 100% sure that #5 was the shooter and he replied that he was. The detective did not take notes on this conversation. After this meeting, Fervier unequivocally identified person #5 in the lineup as the person who had shot him.

Following the hearing, the Court suppressed Fervier's identification of the defendant on the ground that the lineup was suggestive based on the appearance of the fillers and because the Court found that there was an inference of suggestibility at the lineup based on the meeting between the detectives, the ADA, and the victim after the victim's initial equivocal identification of the defendant (See hearing minutes, July 29, 2005 written decision, and August 16, 2005 written decision on motion to reargue)(J. Grosso)(retired).[3] The Court also granted an independent

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[2] James Kilduff, Esq. represented the defendant at the lineup.

[3] The court file contains a written decision on a motion to reargue the initial suppression decision. No written motion to reargue is contained in the court file.

source hearing, which was held before a different judge. After that hearing, the Court ruled that the People had met their burden to permit Mr. Fervier to make an in-court identification of the defendant at trial based on his independent recollection of the defendant (September 25, 2005 Decision) (J. Buchter).

The defendant was then tried before this Court and a jury. At trial, Martin Fervier testified that on February 6, 2005, in the early morning, he got into an argument with the defendant, who was backing down a one-way street. During the argument, the defendant shot Fervier in the hip. At trial, Fervier was the only witness to identify the defendant as the perpetrator of the crimes.

Zoryana Ivaniv, who was a witness to the shooting, testified that the day after the shooting the police took her to view a man sitting alone in the police precinct and she told the police that that man was not the shooter. Other evidence established that the defendant was the person who Ms. Ivaniv stated was not the shooter.[4] Dmitriy Khavko testified that he witnessed the shooting and identified person #1 in the lineup as the shooter (other evidence at trial established that the defendant was person #5 in the lineup). Elliot Miley, who was the passenger in Fervier's car when Fervier was shot, testified that he was an eyewitness to the shooting and that he identified person #2 in the lineup as the shooter. Andriy Vintonyak testified that he was present when

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[4] Ms. Ivaniv testified at trial that the man that she viewed at the police precinct was not the defendant on trial but Detective Moscoso testified at trial that the defendant was the person he presented to Ms. Ivaniv and asked her to view at the police precinct. Ms. Ivaniv testified that she could not recall whether or not the person she viewed at the precinct was in handcuffs.

Fervier was shot. He viewed a lineup and he told the police that nobody in the lineup looked familiar.

Aside from Fervier's in-court identification of the defendant as the person who shot him, evidence was presented at trial that the shooter had been driving a green, 2-door, Monte Carlo, and that he had fled into 583 Woodward Avenue, which was a multi-family residential building. Witnesses had pointed out that car to the police,[5] the police learned that the car was registered to the defendant, who resided at 583 Woodward Avenue, and the police questioned the defendant, who stated that he had parked his car across the street from his apartment around 2:30 a.m. and he was the only person who had driven his car that night.

The defendant presented three witnesses at trial – himself, Manuel Santiago, and Edwin Mendez. All three witnesses testified that on the night of the shooting they had gathered together at a bar called Life on Flatbush and Central Avenues. The defendant, who was wearing an engineer jacket, left the bar around 2:00 a.m. in his own green, two-door Monte Carlo. The defendant testified that he parked his car around 2:30 a.m. in a spot diagonally across the street from his residence, 583 Woodward Avenue, and that he went inside his house and remained there for the rest of the night. He denied shooting Mr. Fervier.

At the conclusion of trial, the jury convicted the defendant of all charges.

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[5] Although the witnesses at trial gave varying descriptions of the shooter's car, the evidence at trial established that the actual car was pointed out to the police and that the hood of the car was warm, indicating that it had recently been driven.

The defendant then appealed his conviction to the Appellate Division, Second Department. His conviction was unanimously affirmed. *People v. Negron*, 41 A.D.3d 865 (2nd Dept. 2007).

The defendant subsequently filed a *pro se* motion to vacate his judgment of conviction pursuant to section 440 of the Criminal Procedure Law, which was denied by this Court. Leave to appeal that decision was denied by the Appellate Division, Second Department.

The defendant then filed a *pro se* federal petition for a writ of *habeas corpus*. During that proceeding, current counsel was assigned to represent the defendant in order to present his unexhausted claims to state court. Counsel subsequently filed a motion to vacate the defendant's judgement of conviction pursuant to section 440.10 of the Criminal Procedure Law in this Court. In that motion, counsel claimed that the defendant's trial attorney was ineffective for failing to elicit testimony that the defendant did not have facial hair at the time of the crime and did not articulate the correct standard for the admissibility of third-party culpability evidence when attempting to admit such evidence at trial. In addition, counsel alleged that the defendant was not told prior to trial that Fernando Caban,[6] who lived in the same building as the defendant, possessed .45 caliber ammunition and tried to dispose of a cache of weapons when the police went to 583 Woodward Avenue to search the defendant's apartment following the crimes that occurred in this case. The People

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[6] During the pendency of the defendant's current motion, this Court learned, for the first time, that Fernando Caban is related to the defendant. At the time of the crime, Caban was dating the defendant's wife's sister and living in an apartment downstairs from the defendant's apartment. He is now the defendant's brother in law.

opposed that motion and, on September 26, 2012, this Court denied it. The Appellate Division unanimously affirmed the denial of the motion. *People v. Negron*, 112 A.D.3d 741 (2nd Dept. 2013). The Court of Appeals subsequently granted leave to appeal and, on appeal, the Court reversed the Appellate Division's decision and remanded the defendant's case for a new trial. *People v. Negron*, 26 N.Y.3d 262 (2015).[7]

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[7] During the time that the section 440 motion was pending, the defendant and the People had both maintained that there was no proof that information that Caban possessed .45 caliber ammunition had been provided to the defense before trial. This Court, however, reviewed the materials that were available to it at that time and located a document that was labeled "inventory notes of property vouchered on February 7, 2005." This Court quoted from that document, which listed ".45 caliber ammunition" as being contained in "bag #4." *See* September 26, 2012 decision, p. 5, fn. 3. As a result, this Court found in its September 26, 2012 decision, among other things, that the People had turned over this information to the defense prior to trial. The Appellate Division affirmed this finding of fact, but the Court of Appeals later held that it was not bound by this Court's factual finding because there was "no support in the record for that determination and the People concede that they have no record of ever providing the defense with such evidence." *People v. Negron*, 26 N.Y.3d at 269, fn. 5. The People now maintain that they "found a ballistics report matching the report cited by this Court in its original decision denying the defendant's motion." *See* People's Affirmation at ¶13. Basically, they now state, approximately one year after reversal, that they have now found the same document that they told the Court of Appeals was not in their possession, the absence of which was, in part, the basis of the Court of Appeals decision reversing the defendant's conviction. Although the Court of Appeals declined to adopt this Court's factual finding regarding the People's pre-trial disclosure of the recovery of .45 caliber ammunition from Caban, it remains clear to this Court that it had in its possession an inventory list of the property recovered and that .45 caliber ammunition appeared on that list. Indeed, it would have been impossible for this Court to quote from a document that did not exist or that it did not possess.

After this case was remanded for a new trial, the People requested time to look into the viability of retrying this case twelve years after it was initially indicted and after the defendant had finished serving his full prison sentence. After the People determined that they would go forward to trial, the defense requested time to file motions. The defendant subsequently filed the current motion, which is detailed fully above.

DECISION

The defendant first moves to dismiss the indictment pursuant to sections 210.35(5) and 210.30 of the Criminal Procedure Law and the New York State and Federal Constitutions. In order to protect the liberty of all citizens, section 210.20(c) of the Criminal Procedure Law requires that an indictment be dismissed when the Grand Jury proceeding is "defective." *See People v. Huston*, 88 N.Y.2d 400, 401 (1988). Section 210.35(5) of the Criminal Procedure Law provides that a Grand Jury proceeding is "defective" when the "integrity is impaired and prejudice may result." Although it is difficult to establish that a defect in the indictment prejudiced the defendant, a showing of "actual prejudice" is not required; rather, the defendant is required to establish only the "possibility of prejudice" or that "prejudice *may* result" from the defective indictment. *People v. Huston*, 88 N.Y.2d at 409. The analysis of prejudice turns on the specific facts of an individual case, "including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias." *Id.* Defendant claims that the prosecutor impaired the integrity of the Grand Jury when he presented misleading testimony and withheld exculpatory evidence related to the identity of the shooter and argues that his indictment should be dismissed on this ground.

A motion to dismiss the indictment must be made within 45 days of a defendant's arraignment. *See* C.P.L. §255.20(1). The Court may extend this time period for "any pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified" in subsection one of section 255.20 of the Criminal Procedure Law. C.P.L. §255.20(3). Any other pre-trial motion made after the forty-five day period contained in section 255.20 "may be summarily denied, but the court, in the interest of justice and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits." *Id.*

The District Attorney's contention that the motion is untimely because it was made more than 45 days after the case was remanded from the Court of Appeals and thus runs afoul of the time requirement set forth in section 255.20 of the Criminal Procedure Law is without merit. The statute itself imposes no time constraints on motion practice that occurs once a higher court vacates a judgment of conviction and the case reverts to a pre-judgment posture.

To the extent that *People v. Hults*, 76 N.Y.2d 190, 196 (1990) can be read to have engrafted a 45 day rule that post-dates an appellate remand, it should also be read to incorporate a "good cause" exception to the rule, *Hults*, *supra*, at 196. Here, the post-remand delay was largely the result of the time the District Attorney took to decide whether or not to proceed with this case at all. When they ultimately decided to go forward with the prosecution, a motion schedule was set at the request of the defense without objection from the People. There is, therefore, good cause for any

delay in filing this motion.[8] In fact, it would have been unreasonable for the defense to have attempted to file a motion to dismiss before the District Attorney's Office even announced whether they were able or inclined to retry this case. Accordingly, in the interest of justice, this Court will consider the merits of the defendant's current motion.

Specifically, the defendant claims that the integrity of the Grand Jury was impaired by the prosecutor's decision not to elicit evidence that: the only witness to identify the defendant only did so unequivocally after a 15 minute meeting with two detectives and the ADA that was held outside of the presence of defense counsel; the

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[8] In addition, current counsel contends that prior counsel was unaware of all of the facts upon which defendant bases his current motion at the time he filed defendant's original motion to dismiss the indictment (Defendant's Memorandum of Law at p.7). It appears the current motion to dismiss is largely based on the grand jury minutes, which counsel likely did not have until the time of trial. To the extent that prior counsel was unaware of these facts, he cannot be faulted for failing to file a motion based on them. Accordingly, good cause would be shown to entertain the defendant's current motion on the merits. *See* C.P.L. §255.20(3). And, to the extent that prior counsel was aware of the circumstances underlying the defendant's current claim before defendant proceeded to trial and failed to file a motion to dismiss the indictment at the time at which he became aware of those circumstances, the defendant can likely establish good cause for failing to file his current motion sooner. Under these circumstances, the defendant's failure to file a more timely motion would be based on the inexplicable failure of prior counsel (who the Court of Appeals already found ineffective on other grounds in this case) to do so. *See generally, People v. Ferguson*, 144 A.D.2d 226 (1st Dept. 1986)(counsel ineffective for failing to file a material pre-trial motion within statutory time constraints).

This Court notes that the judge who decided the defendant's original motion to dismiss (J.Cooperman)(retired) did not have any of the information upon which the defendant's current motion to dismiss is based before it.

specific description of the defendant's car that had been given to the police was a 4-door sedan, as opposed to a 2-door coupe; Ms. Ivaniv observed the defendant alone at the precinct and stated that he was not the shooter; two other witnesses chose a filler in the lineup and stated that a filler (a person other than the defendant) was the shooter; another witness viewed a lineup and stated that he did not recognize anybody in it as the shooter; and Fernando Caban, who lived in the same building as the defendant was arrested on weapon-possession charges after he disposed of a cache of weapons, including .45 caliber ammunition, after the police approached the residence in which the defendant and Caban lived following the shooting in this case. The defendant also claims that the prosecutor's decision to elicit that the police had searched the defendant's apartment a few hours after the shooting but later refused to permit a Grand Juror to ask the defendant if the search had revealed any items of clothing that the defendant was described to have been wearing during the crime impaired the integrity of the Grand Jury.

The People's response to these allegations largely focuses on the sufficiency of the evidence before the Grand Jury and fails to adequately address the heart of the defendant's claim; to wit, that the omission of certain exculpatory evidence impaired the integrity of the Grand Jury. Rather they argue that any variances in the description of the car elicited in the Grand Jury, the failure to present evidence about how no incriminating evidence was recovered during the search of the defendant's apartment, and the failure to present evidence that certain witnesses misidentified a filler in the lineup while others failed to identify the defendant did not bear on the sufficiency of the evidence before the Grand Jury. The People also claim that there was nothing misleading about the People's presentation to the Grand Jury of Mr. Fervier's identification of the defendant at the lineup.

The prosecutor serves a dual role as both an advocate and a public official and, in his role as a public officer he "owes a duty of fair dealing to the accused" both at trial and during pre-trial proceedings, including the presentation of evidence to the Grand Jury. *People v. Pelchat*, 61 N.Y.2d 97, 105 (1984). He is responsible for "protecting individuals from needless and unfounded prosecutions" at the Grand Jury stage [*see People v. Lancaster*, 69 N.Y.2d 20, 25-26 (1986)] and must be mindful of the Grand Jury's role as "the shield of innocence . . . and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source." *People v. Huston,* 88 N.Y.2d 400, 410 (1996), *quoting People v. Minet*, 296 N.Y. 315, 323 (1947).

While the People ordinarily are not obligated to search for evidence favorable to the accused or to present all evidence they possesses to the Grand Jury that is favorable to the accused [*See People v. Lancaster*, 69 N.Y.2d at 25-26; *People v. Scruggs*, 201 A.D.2d 514 (2nd Dept. 1994)], their discretion in this regard is not absolute. *See People v. Huston*, 88 N.Y.2d at 410. For example, when an exculpatory defense exists that has the potential for eliminating an unfounded prosecution the prosecutor must present that defense to the Grand Jury. *See People v. Valles*, 62 N.Y.2d 26, 38 (1984). Similarly, when the prosecutor knows at the Grand Jury stage of exculpatory evidence that would "materially influence" the Grand Jury's investigation or would possibly cause the Grand Jury to change its findings, he is obligated to present the evidence to the Grand Jury. *See People v. Golon*, 174 A.D.2d 630 (2nd Dept. 1991); *People v. Suarez*, 122 A.D.2d 861 (2nd Dept. 1986).

In this case the only real issue was the identity of the perpetrator. Importantly, the ADA who presented the case to the Grand Jury was the very same ADA who was

at the lineup. Thus, he *knew* that the complainant initially had only equivocally identified the defendant when he stated, "I think it's him" and "I believe it's him." He also knew a positive identification was made only after *he himself* took the complainant out of the lineup room and, along with detectives, had a 15 minute conversation with the complainant outside the presence of defense counsel about "what happened with the shooting." Thus, his failure to share this crucial episode with the Grand Jury was indisputably deliberate.

Instead, the prosecutor only presented evidence that the complainant identified the defendant in the lineup as the person who had shot him. The Grand Jury, therefore, was left with the impression that the complainant unequivocally identified the defendant as the shooter, when, in truth, the complainant had first equivocally identified the defendant and only unequivocally identified him after the ADA and detectives met with the complainant behind closed doors.

Standing alone, this deception by omission arguably could have "materially influenced" the decision of the Grand Jury in this one-witness identification case. It certainly influenced Judge Grosso's subsequent decision to suppress the lineup identification once this episode was revealed.

But this omission was merely the tip of the iceberg. The prosecutor withheld from the Grand Jury evidence that eyewitness Ivaniv, upon observing the defendant seated by himself in the 104th Precinct, stated that he was *not* the perpetrator. Ivaniv

lived on the same block as the defendant (and Caban) and stated that she had recognized the shooter from prior occasions.[9]

The prosecutor also withheld from the Grand Jury evidence that *two other* eyewitnesses (Khavko and Miley) each identified *fillers* as the shooter in the lineups in which the defendant stood.

Under the unique circumstances of this case, where the defendant was identified by only one person, and where that identification was initially equivocal and only changed after the extremely unusual circumstance of a mid-lineup, closed -door meeting, and there was such a plethora of exculpatory evidence, fundamental fairness required that the Grand Jury be given an opportunity to evaluate all of the exculpatory identification evidence. By failing to do so, the prosecutor violated his obligation of "fair dealing to the accused." *People v. Pelchat*, 61 N.Y.2d at 105.

The court finds that the failure of the prosecutor to apprise the Grand Jury of the significant evidence pertaining to the identification of the defendant – specifically, the mis-identification of a person other than the defendant by two witnesses, the statement of one witness that she was familiar with the shooter and it was not the defendant, and the full set of unusual circumstances surrounding the only positive identification of the defendant – materially influenced the Grand Jury

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[9] In the People's affirmation in opposition to the defendant's motion to suppress they state that the following *Brady* material was known to the People: "Zoryana Amiv (or Ivaniv) claims to have witnessed the shooting and to have recognized the perpetrator of the shooting from prior occasions. In a showup identification of defendant at the 104 Precinct Amiv (or Ivaniv) claimed defendant was not the perpetrator." At trial, Ivaniv testified that she lived on the same block that the shooting occurred.

proceedings and impaired the integrity of the Grand Jury.[10] When the prosecutor put this case in the Grand Jury, he was aware that there was significantly more evidence pointing away from the defendant's identity of the perpetrator of the crimes than there was pointing towards it. In spite of that, he not only failed to present any of this exculpatory evidence, but he chose to present the only piece of evidence that he did have to connect the defendant to the crime in an incomplete way, which created the impression that the complainant's identification of the defendant was stronger than it actually was. In this case, the defendant's identity was the only significant issue.

Under the circumstances here, where an unusual volume of exculpatory evidence pertaining to the identity of the shooter was not presented to the Grand Jury, and the utterly misleading manner in which Mr. Fervier's identification was submitted, this Court is constrained to find that the integrity of the Grand Jury was misleading and incomplete on the decisive issue of the identity of the shooter. This evidence was essential for the Grand Jury to completely understand the tenuousness of the defendant's identity as the perpetrator. The prosecutor must have understood this himself; otherwise, he and the detectives would not have felt it was necessary to

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[10] Defendant also claims that the prosecutor should have presented to the Grand Jury evidence that Vintonyak failed to pick anybody out of the lineup in which the defendant appeared, that Caban disposed of weapons and .45 caliber ammunition shortly after the crime and, therefore, exhibited a consciousness of guilt, and that the police did not find any incriminating evidence in the defendant's apartment after they searched it. While each of these pieces of evidence are relevant and certainly support the defense, they are not the type of truly exculpatory evidence that would necessarily materially influence a Grand Jury investigation. *See generally, People v. Gibson,* 260 A.D.2d 399 (2nd Dept. 1999)(witness's failure to identify defendant in a lineup not "entirely exculpatory" and would not "materially influence" the Grand Jury).

take Mr. Fervier into a back room in the middle of the lineup to ensure that his identification was a certain one. Under these circumstances, the integrity of the Grand Jury was impaired.

As such, the indictment should be dismissed if the defendant can establish the possibility of prejudice. Had the Grand Jury understood that two witnesses selected a person other than the defendant in the lineup, one witness had stated that she was familiar with the shooter and the shooter was not the defendant, and the circumstances under which Mr. Fervier's identification changed from an equivocal to a certain one, not only would the Grand Jury presentation have been forthright, but it is very likely that the outcome of the Grand Jury proceeding would have been different and that the Grand Jury would have determined that this was a needless or unfounded prosecution. Indeed, given the sheer volume of the exculpatory evidence and its bearing on the only critical issue in the case, the omission or incomplete nature of this evidence obviously had the potential to prejudice the ultimate decision reached by the Grand Jury that the defendant was, in fact, the shooter. Accordingly, the failure to present this evidence had a material effect on the proceedings and possibly prejudiced the defendant. *See People v. Golon,* 174 A.D.2d at 632 (indictment properly dismissed in grand larceny/insurance fraud case in which the prosecutor's failure to disclose that the defendant had owned the car while presenting evidence that another party owned the car created a mis-impression that went to the "heart of the charge"), *People v. Livingston*, 175 Misc.2d 322 (Broome Co. Court 1997) (dismissing indictment where prosecutor failed to present videotaped evidence of a field sobriety test that contradicted police officer testimony that the defendant appeared intoxicated); *People v. Scott*, 150 Misc.2d 297 (Sup. Ct. Queens Co. 1991) (indictment dismissed because prosecutor did not present evidence of eyewitness

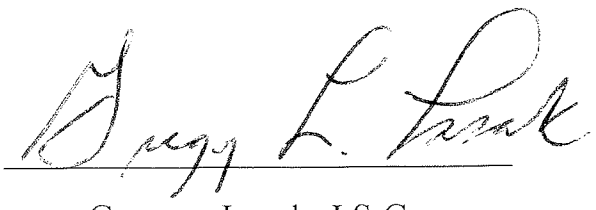
recantation to the Grand Jury and identity was a "critical issue" in the case); *People v. Monroe*, 125 Misc.2d 550 (Sup. Ct. Bx. Co. 1984) (indictment dismissed based on prosecutor's presentation of evidence that witness conclusively identified defendant in a lineup when witness only equivocally identified defendant at a lineup). Under these circumstances, this Court finds that the integrity of the Grand Jury was impaired. Accordingly, the indictment is dismissed.

In light of the Court's resolution of this issue it does not reach the defendant's remaining claims. Although this Court has not reached the defendant's claim that the indictment should be dismissed in the interest of justice pursuant to section 210.40 of the Criminal Procedure Law and, therefore, has not ordered a hearing on this issue, this Court notes that there are certainly compelling reasons to warrant dismissal under this theory as well.

C.P.L. §210.40 contains a list of factors for the court to consider in determining a motion made under this section. In this case, the defendant concedes that the offenses charged and the harm caused to the victim were serious. But, as discussed above, the evidence in this case supporting that the defendant was the shooter was undermined by the one eyewitness who stated that the defendant was not the shooter, the two eyewitnesses who identified lineup fillers as the shooter, the fourth eyewitness who failed to identify the defendant in the lineup, and the unusual and suggestive circumstances surrounding the lineup in which the victim positively identified the defendant. In addition, in this case, the defendant has fully served his sentence and, as a result, dismissal would have little, if any, impact on the criminal justice system. In addition, the defendant's history and character both before and

after the incident charged in this case was relatively non-threatening and stable. Although the defendant has one prior conviction for possession of a weapon (arising from an incident that took place when he was 17 years old) and served a sentence of 5 years of probation on that case, he went on to be a custodian in a public school, and he appears to have had a record of good behavior during his many years in prison. In addition, the one misdemeanor case with which the defendant was charged after his release from prison has since been dismissed. Under these circumstances, were this Court to consider the defendant's claim that his indictment should be dismissed in the interest of justice, and putting aside any factors that could possibly be contested, like the extent of any misconduct on the part of law enforcement or the attitude of the victim regarding this motion, it appears that the defendant's claim that the indictment should be dismissed in the interest of justice potentially has merit. This Court cannot fathom why the District Attorney's Office would insist that retrial is necessary in this case, where the evidence presented to the first jury was "far from overwhelming" (*See People v. Negron*, 26 N.Y.3d at 270). In addition, even assuming the People could secure a conviction, there is no real possibility of punishment in this case because the defendant has served his sentence. The judicial and prosecutorial resources that will go into retrying this case are better spent elsewhere.

Order entered accordingly.



Gregory Lasak, J.S.C.