

STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF OMNIBUS MOTION

YOUR HONOR:

Please take notice that at a term of Erie County Court, [REDACTED] held at 1:45 p.m. on January [REDACTED] or as soon thereafter as counsel can be heard, the defendant will move for the following relief.

1. Inspection of the Grand Jury minutes and dismissal of Count 3 of the indictment on the ground that it is not supported by legally sufficient evidence.
2. Dismissal of the indictment on the ground that it is defective.
3. Dismissal of the indictment on the ground that the Grand Jury proceeding was defective.
4. An Order directing the prosecution to disclose all items and information related to the Grand Jury presentation, including the legal instructions and attendance and voting sheets.
5. Any other relief this Court deems proper.

Respectfully yours,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DATED:

[REDACTED]
[REDACTED] NY

TO:

Hon. [REDACTED]
Erie County Court Part [REDACTED]
25 Delaware Ave.
Buffalo, NY 14202

ADA Cathleen Roemer
Erie County District Attorney's Office
25 Delaware Ave.
Buffalo, NY 14202

STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

SUPPORTING AFFIRMATION

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

_____, an attorney licensed to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel to the defendant, who is charged in this indictment with four counts of rape in the first degree (Penal Law § 130.35[4]), four counts of predatory sexual assault against a child (Penal Law § 130.96), one count of sexual abuse in the first degree (Penal Law § 130.65[4]), and one count of endangering the welfare of a child (Penal Law § 260.10[1]).
2. I make this motion in support of the relief described below. Unless otherwise stated, this motion is made upon information and belief, the source of which is my review of the indictment and the discovery provided by the prosecution.

The defendant moves for inspection of the Grand Jury minutes and dismissal of Count 3 of the indictment.

3. A court may dismiss the indictment, or any count thereof, upon the ground that “[t]he evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense” (CPL 210.20[1][b]). Legally sufficient evidence is “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof” (CPL 70.10[1]).

4. The defendant moves for inspection of the Grand Jury minutes for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support the sole offense charged in the indictment (CPL 210.30[2]).
5. The evidence was legally insufficient to establish Count 3 of the indictment, which charges sexual abuse in the first degree. This offense is committed, in relevant part, when the defendant “subjects another person to sexual contact ... [w]hen the other person is less than thirteen years old and the actor is twenty-one years old or older” (Penal Law § 130.65[4]).
6. “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party” (Penal Law § 130.00[3]).
7. The Grand Jury minutes contained no evidence of sexual contact that was distinct from the four alleged incidents of rape.
8. Because Count 3 was not supported by legally sufficient evidence, it must be dismissed.

The indictment is defective.

9. An indictment, or any count thereof, may be dismissed on the ground that “[s]uch indictment or count is defective, within the meaning of section 210.25” (CPL 210.20[1][a]). An indictment is defective, in relevant part, when it “does not substantially conform to the requirements stated in article two hundred” (CPL 210.25[1]).
10. One of these requirements is that the indictment contain “[a] statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time” (CPL 200.50[6]).
11. The indictment must also satisfy the defendant’s Federal and State constitutional right to be “informed of the nature and cause of the accusation” (*People v. Morris*, 61 NY2d 290, 294 [1984]). The notice requirement is met where “the indictment contains such description of the offense charged as will enable [him] to make his defense and to plead the judgment in bar of any further prosecution for the same crime” (*id.* at 295).

12. For each of the ten counts, the indictment alleges that the offense occurred between [REDACTED]. It does provide the sequence of nine of the offenses: the offense underlying Counts 1 and 2 is alleged to have occurred before the offense underlying Counts 4 and 5, which is alleged to have occurred before the offense underlying Counts 6 and 7, which is alleged to have occurred before the offense underlying Counts 8 and 9. No such frame of reference is provided for Counts 3 or 10.
13. In determining whether the time frame is sufficiently precise, the Court must consider “the span of time set forth and the knowledge the People have or should have of the exact date or dates of the crime,” and the prosecution should “allege the most particular date and time possible” (*Morris*, at 296).
14. The ten-week time frame deprives the defendant of an alibi defense for any of the charges. It can be sufficient only if the prosecution is unable to allege a more precise time frame – but this is not the case.
15. The complainant testified that she arrived in Buffalo at the end of June, and the first incident occurred “two or three weeks” after that (12). She testified that the second incident occurred “probably like four or five days” after the first (15). She testified that the third incident occurred “four or five days” after the second (17). She testified that the fourth indictment occurred “like ten days” after the third and “like three, four days” before she left Buffalo at the beginning of September (19).
16. Based on this testimony, the indictment could have been pled with much more precision that it was.
17. Because the indictment violated the defendant’s right to be informed of the nature and cause of the accusation, it must be dismissed.
18. Additionally, Count 10 of the indictment must be dismissed on the separate ground that it is duplicitous.

19. One of the provisions of article two hundred is the prohibition against duplicitous counts, under which “[e]ach count of an indictment may charge one offense only” (CPL 200.30[1]).
20. Count 10 charges endangering the welfare of a child. The offense is committed, in relevant part, when the defendant “knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old” (Penal Law § 260.10[1]).
21. The complainant’s Grand Jury testimony establishes four alleged instances of rape. The indictment does not specify which conduct underlies Count 10, and the expansive time frame encompasses all of them.
22. “A duplicitous indictment may fail to give a defendant adequate notice and opportunity to defend; it may impair his ability to assert the protection against double jeopardy in a future case; and it may undermine the requirement of jury unanimity, for if jurors are considering separate crimes in a single count, some may find the defendant guilty of one, and some of the other” (*People v. Alonzo*, 16 NY3d 267, 269 [2011], Smith, J.).
23. Because more than one offense is encompassed by Count 10, it is duplicitous, and it cannot stand.

The Grand Jury proceeding was defective.

24. The Court may dismiss an indictment on the ground that “[t]he grand jury proceeding was defective, within the meaning of section 210.35” (CPL 210.20[1][c]). A Grand Jury proceeding is defective, in relevant part, when it “fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result” (CPL 210.35[5]).
25. The complainant’s grandmother testified before the Grand Jury that the complainant said that she was sexually assaulted by the defendant (7).
26. The prosecutor instructed the Grand Jury that the statement was admissible as “prompt outcry” evidence (7-8).

27. With exceptions not applicable here, the rules of the evidence for criminal proceedings are applicable to Grand Jury proceedings (CPL 190.30[1]). A fundamental rule of evidence is that hearsay is not admissible unless it falls within an exception, and the burden of establishing its admissibility “rests upon the proponent of the statement” (Guide to NY Evid rules 8.01[1][a], [2], Admissibility of Hearsay).
28. Although a “prompt outcry” by an alleged sexual assault victim is admissible as a hearsay exception, such a statement is timely only “if made at the first suitable opportunity” (*People v. McDaniel*, 81 NY2d 10, 17 [1993]).
29. No date was provided for the complainant’s statement, but it was made after she left the area, was determined to have missed her period, and had the situation addressed by a doctor (6-7). In other words, it was made long after the occurrence of any of the alleged sexual assaults.
30. The burden to establish the hearsay exception is on the party offering the statement, and the prosecution failed to demonstrate that this was the complainant’s first suitable opportunity to disclose the abuse.
31. This introduction of this inadmissible hearsay was highly prejudicial, as it was the only corroboration of the complainant’s Grand Jury testimony.
32. Because the Grand Jury proceeding was defective, the indictment must be dismissed.

The defendant is entitled to all items and information related to the Grand Jury presentation.

33. The prosecution has disclosed the Grand Jury minutes. However, it has not provided either the legal instructions or the attendance and voting sheets, although these items exist and are in their possession.

These items are part of the prosecution’s automatic discovery obligation.

34. As part of their automatic discovery obligation, the prosecution must disclose to the defendant “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 categories of discovery that follow (CPL 245.20[1], emphasis added).
35. “This mandate virtually constitutes open file discovery, or at least makes open file discovery the far better course of action to assure compliance” (*People v. Cartagena*, 76 Misc3d 1214[A] [Crim Ct, Bronx County 2022], Licitra, J.).
36. If this opening language leaves any question, the discovery statute includes a presumption of openness, which requires “a presumption in favor of disclosure when interpreting sections 245.10 and 245.25, and subdivision one of section 245.20, of this article” (CPL 245.20[7]).
37. There is no question that all items and information related to the Grand Jury presentation – the source of the indictment – are related to the subject matter of the case and are in the possession of the prosecution.
38. They are subject to automatic disclosure.
39. Through this motion, the defendant is notifying the prosecution that their Certificate of Compliance is deficient until these items are provided (CPL 245.50[4][b]).

In the alternative, the Court should issue a discovery order.

40. If the Court finds that these items are not subject to automatic discovery, it may order their disclosure under its discretionary discovery authority. A discovery order may be issued “upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means” (CPL 245.30[3]).
41. The request is reasonable. The legal instructions are necessary to ensure that the Grand Jury was properly instructed on the law and that the charges voted by the Grand Jury are consistent with the indictment. The voting and attendance sheets are necessary to ensure

that the requisite number of grand jurors heard all of the testimony and voted the indictment (CPL 210.35[2], [3]). There are no interests that will be adversely affected by the disclosure of these items.

42. The defendant is unable to obtain these items unless they are provided by the prosecution.

The defendant reserves the right to file further motions.

43. Although the defendant has made every effort to include all motions in the same set of papers, he reserves the right to file further motions if they become necessary.

For these reasons, the defendant requests that the relief described above be granted, along with any other relief the Court deems proper.

