

STATE OF NEW YORK  
ERIE COUNTY COURT

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THE PEOPLE OF THE STATE OF  
NEW YORK

v.

SUPPORTING AFFIRMATION

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

ss.

████████████████████ 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 possessing a sexual performance by a child (Penal Law § 263.16) and possessing an obscene sexual performance by a child (Penal Law § 263.11).
2. I make this affirmation in support of the relief requested below.
3. When a party to a criminal action becomes “aware of a potential defect or deficiency related to a certificate of compliance,” the party “shall notify or alert the opposing party as soon as practicable” (CPL 245.50[4][b]).
4. There are at least three deficiencies in the prosecution’s certificate of compliance.
5. The first deficiency is the failure to disclose all information relating to the Grand Jury presentation, including the legal instructions and attendance and voting sheets.
6. As part of the prosecution’s initial discovery obligations, they must disclose “all items and information that relate to the subject matter of the case and are in possession, custody or control of the prosecution or persons under the prosecution’s direction or control, **including but not limited to**” the 21 categories of discovery that follow (CPL 245.20[1], emphasis added).

7. The legal instructions and attendance and voting sheets relate to the subject matter of the case and are in the possession of the prosecution, so they should be turned over as part of automatic discovery.
8. Alternatively, the Court may, “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, order the prosecution ... to make available for disclosure to the defendant any material or information which relates to the subject matter of the case and is reasonably likely to be material” (CPL 245.30[3]).
9. The defendant is unable to obtain the exhibits, legal instructions, and attendance and voting sheets without being provided them by the prosecution.
10. A Grand Jury proceeding is defective, thus requiring dismissal of the indictment, if “[t]he proceeding is conducted before fewer than sixteen grand jurors” or if “[f]ewer than twelve grand jurors concur in the finding of the indictment” (CPL 210.35[2], [3]). The only way to determine whether this is the case is to review the attendance and voting sheets.
11. A Grand Jury proceeding is defective, thus requiring dismissal of the indictment, if “[t]he proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result” (CPL 210.35[5]). The only way to determine whether this is the case is to review the legal instructions.
12. The second deficiency is the failure of the prosecution to permit the defense to copy the images subject to the indictment. Although the prosecution has indicated that they will make the images available for review, they have not provided copies to the defense.
13. As part of its initial discovery obligations, “the prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, *copy*, photograph, and test” 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" (Penal Law § 245.20[1], emphasis added).

14. Although the prosecutor has expressed concern for the legality of providing copies to the defense, "the terms 'possession,' 'control,' and 'promotion' shall not include conduct by an attorney when the performance was provided to such attorney in relation to the representation of a person under investigation or charged under [the Penal Law] ... and is limited in use for the purpose of representation for the period of such representation" (Penal Law § 263.00[9]).
15. The third deficiency is the failure to provide all of the data from the search of the defendant's phone. The data is in the possession of the New York State Police, "and all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution" (CPL 245.20[2]).
16. Because of these deficiencies, the prosecution has not satisfied its initial discovery obligations and is not ready for trial. If the missing discovery is not provided, the defendant will move to strike the certificate of compliance.
17. The defendant moves to suppress all information gathered from the search of his phone on the ground that it was "obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof" in the criminal action (CPL 710.20[1]).
18. The information was gathered pursuant to a search warrant, and "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (US Const, Amend 4).
19. Based on the discovery provided by the prosecution, the State Police lacked probable cause to seize or search the defendant's phone.

20. The only information that the State Police had was that the defendant had downloaded an image of a female who appeared to be underage, but this is far too vague to provide probable cause that the defendant violated a specific statute.
21. The defendant requests a hearing pursuant to CPL 710.60(4) to determine whether there was probable cause for the issuance of the warrant.
22. The defendant moves to dismiss the indictment on the ground that the Grand Jury proceeding was defective within the meaning of CPL 210.35 (CPL 210.20[1][c]).
23. A Grand Jury proceeding is defective, in relevant part, if 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]).
24. The Grand Jury proceeding was defective for two reasons.
25. First, although the discovery indicates that the images were recovered from the defendant’s phone in thumbnail form, they were presented to the Grand Jury as full-size photos, and the witness who authenticated the photos testified that they were fair and accurate depictions of what he found.
26. An element of both crimes is that the defendant possessed a sexual performance “knowing the character and content thereof” (Penal Law §§ 263.11, 263.16). A thumbnail image makes the character and content of the image far less apparent than a full-size photo. Notably, the defense asked the prosecutor to explain to the Grand Jury that these were thumbnail images, but she declined to do so. Because this error misled the Grand Jury on an essential element of the crime, it impaired the integrity of the Grand Jury proceeding, requiring dismissal of the indictment.
27. Second, the prosecutor failed to explain to the Grand Jury that the images, which were found in the cache of the defendant’s phone, could not be accessed by the defendant. This is critical, as to “possess” is defined as “to have physical possession or otherwise exercise dominion or control over tangible property” (Penal Law § 10.00[8]). While the courts have

expanded this definition to include intangible property, there must still be proof that the defendant exercised dominion or control over the images, which he could not do if he could not access them.

28. While exculpatory evidence does not need to be presented to the Grand Jury in every instance, its omission results in a “needless or unfounded prosecution” (*People v. Carr*, 99 AD3d 1173, 1176 [4<sup>th</sup> Dept. 2012]). Because the omitted evidence negates an essential element of both crimes, it impaired the integrity of the Grand Jury proceeding, requiring dismissal of the indictment.

29. 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 should the need arise.

Accordingly, the defendant requests the relief described above, as well as any other relief the Court deems proper.

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