SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 81

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

HARVEY WEINSTEIN,

Defendant.

SUPPLEMENTAL NOTICE OF MOTION

Ind. No. 2335/18

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PLEASE TAKE NOTICE that, upon the annexed affirmation of **BENJAMIN BRAFMAN, Esq.**, duly affirmed on the 5th day of November, 2018, upon the exhibits appended thereto, upon the accompanying memorandum of law, upon the indictment, and upon all those proceedings previously had herein, Defendant **Harvey Weinstein,** by his undersigned attorneys, **Brafman & Associates, P.C.**, will move this Court at the Courthouse, 100 Centre Street, New York, before the **Honorable James M. Burke**, at a date and time to be fixed by the Court, for respective orders:

1. Pursuant to C.P.L. §§ 210.20(1)(c) and 210.35(5), dismissing the entire superseding indictment because it was based on a defective Grand Jury proceeding, that was irreparably tainted by police misconduct, Lucia Evans' false testimony and the District Attorney's failure to provide the Grand Jury with exculpatory evidence of the long-term, consensual, intimate

relationship between Mr. Weinstein and the alleged rape victim charged in Counts Three, Four and Five in the indictment; in the alternative, the Court should conduct a hearing to determine the extent of the misconduct in the Grand Jury and whether the police department or District Attorney's Office or both are responsible;

2. Pursuant to C.P.L. §§ 210.20(1)(b) and 210.30, dismissing Count One of the indictment charging Predatory Sexual Assault because the Grand Jury evidence was legally insufficient to support the charge as the aggravating factor required under that statute did not occur until nearly seven years after the underlying crime had been allegedly committed;

3. Pursuant to C.P.L. §§ 210.20(1)(a) and 210.25(3), dismissing Counts One and Three charging Predatory Sexual Assault as that statute is unconstitutionally vague;

4. Dismissing the entire superseding indictment because the pervasive falsity and professional misconduct in and around the grand jury, attributable to the police, the district attorney and the complainants, completely destroyed the character of that body as a Grand Jury; accordingly, the indictment was invalid, thereby depriving this Court of jurisdiction, in violation of the Grand Jury clause under Article I, Section 6 of the New York Constitution;

5. Granting the relief requested as part of Mr. Weinstein's original omnibus motion filed in August 3, 2018; and

6. Granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that Mr. Weinstein reserves the right to make such further motions pursuant to C.P.L. § 255.20 (2) & (3) as may be necessitated by the Court's decision on the within motion, after further investigation and by further developments which, even by due diligence, Mr. Weinstein could not now be aware.

Dated: November 5, 2018
New York, NY

Respectfully submitted,

BRAFMAN & ASSOCIATES, P.C.
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MARK M. BAKER
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To: Clerk of the Court
Hon. James M. Burke
Joan Illuzzi-Orbon, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 81

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

ATTORNEY'S AFFIRMATION
Ind. No. 2335/18

HARVEY WEINSTEIN,

Defendant.

---x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

BENJAMIN BRAFMAN, being an attorney at law, duly admitted to practice in the courts of New York, affirms the following statements to be true under the penalty of perjury:

1. I am the principal attorney in the firm of Brafman & Associates, P.C., attorneys for Mr. Weinstein in this matter. I make this affirmation in support of Mr. Weinstein's supplemental motion, dated November 5, 2018, seeking an Order, pursuant to C.P.L. §§ 210.20(1)(c), 210.20(1)(a), 210.25(3), and 210.35(5), dismissing the entire indictment, or particular counts thereof, as arising out of a Grand Jury proceeding that was irreparably tainted and rendered defective by police

misconduct, Lucia Evans' false testimony and the District Attorney's failure to provide exculpatory emails to the Grand Jury **(all counts)**, unsupported by legally sufficient evidence (Count One) or based on an unconstitutional statute (Counts One and Three).

2. This affirmation is made upon information and belief. The sources of my information and the grounds for my belief are discovery materials and two *Brady* letters provided by the District Attorney, the results of investigative efforts undertaken by the defense to date, conversations had with numerous individuals, and those other documents and materials comprising counsel's file in this matter.

I. MR. WEINSTEIN'S ORIGINAL MOTIONS AND THE DISTRICT ATTORNEY'S RESPONSE

3. On August 3, 2018, counsel for Mr. Weinstein submitted an omnibus motion requesting, *inter alia*, the following relief[1]:

> Dismissing the indictment because the District Attorney failed to provide the Grand Jury with exculpatory evidence of the long-term, consensual, intimate relationship between Mr. Weinstein and the alleged rape

[1] This supplemental motion incorporates all motions and arguments made in Mr. Weinstein's omnibus motion filed on August 3, 2018.

victim charged in Counts Three, Four and Five in the indictment; and

Dismissing Count Six for failure to contain a statement sufficiently indicating when the alleged crime occurred as required by C.P.L. § 200.50(6).

4. In support of his motion to dismiss, Mr. Weinstein referenced and attached nearly forty complimentary, endearing and solicitous emails between CW-1 (the complaining witness in Counts 3, 4 and 5) and Mr. Weinstein (her alleged rapist) that were sent in the weeks, months and years after the alleged rape. As counsel argued, these emails should have been provided to Grand Jury as the emails, on their face, appeared inconsistent with the allegation that Mr. Weinstein had forcibly raped CW-1 in March 2013 and the Grand Jury should have been given the option of questioning CW-1 as to these specific emails that are so unlike what one would expect to be communications between a true rape victim and her alleged rapist.

5. In its September 12, 2018 motion response, the District Attorney's Office acknowledged that it did not show CW-1's emails to the Grand Jury but argued that it was not required to do so because the

emails were not exculpatory as none of the "emails contain a denial of the charged rape."[2]

II. THE DISTRICT ATTORNEY'S SEPTEMBER 12, 2018 *BRADY* DISCLOSURE RELATING TO LUCIA EVANS AND DETECTIVE DIGAUDIO'S MISCONDUCT AND THE SUBSEQUENT DISMISSAL OF COUNT SIX

6. In its motion papers, the District Attorney's Office did not respond to Mr. Weinstein's motion to dismiss Count Six for failing to contain a statement sufficiently indicating when the alleged crime occurred as required by C.P.L. § 200.50(6). Rather, the District Attorney served Mr. Weinstein with a *Brady* disclosure and noted:

> As a result of recent developments, the People serve this disclosure and additional letter on the defense relating to Count Six of the indictment. The investigation into facts set forth in the disclosure are ongoing, and we will respond to defendant's motion addressing count Six at the conclusion of that investigation.

[2] This argument is specious. The nature, tone and frequency of CW-1's emails, taken individually or collectively, are inconsistent with her being the victim of a forcible rape by Mr. Weinstein. If there was no rape, as the emails suggest, why would the emails contain a denial of a non-existent rape? Moreover, if Mr. Weinstein raped CW-1, one would expect CW-1 to have mentioned it at some point in more than four years of email correspondence she initiated. Tellingly, there is no mention or even the suggestion of any rape in any of the emails.

7. In this disclosure—provided by the District Attorney abiding by prosecutorial obligations imposed under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972)—the lead prosecutor informed counsel that she had come into possession of information that was "at odds with the factual account [Ms. Evans] previously provided to our Office" relating to Ms. Evans' allegation of forced sexual assault that was the basis for Count Six in the indictment. (Exhibit 1: 9/12/18 *Brady* Letter at 1.) Succinctly stated, this information clearly implied that Ms. Evans manufactured her claim of forcible sodomy against Mr. Weinstein and that, in fact, the sexual act was consensual.

8. Specifically, the prosecutor represented that a witness had spoken to the District Attorney's Office on August 14, 2018 concerning Ms. Evans' admission that any sexual conduct between her and Mr. Weinstein had been entirely consensual. The witness told prosecutors the following information:

- She was present with Evans in the summer of 2004 in the bar of a Manhattan restaurant when Ms. Evans was first approached by Mr. Weinstein.

- Mr. Weinstein offered that evening to give Ms. Evans and the witness cash if they exposed their breasts to him.

- The witness refused to do so, and she never saw Ms. Evans do so.

- Ms. Evans, nonetheless, later told the witness, as they walked home from the restaurant that evening, that Ms. Evans had exposed her breasts to Mr. Weinstein in a hallway of the restaurant that evening.

- Sometime after the evening in the restaurant where Ms. Evans had willingly showed her breasts to Mr. Weinstein in exchange for an offer of money, Ms. Evans had gone to Mr. Weinstein's office where he told her, in substance, that he would arrange for her to receive an acting job if she agreed to perform oral sex upon him. According to the witness, Ms. Evans told her that she thereupon performed oral sex on Mr. Weinstein.

(*Id.* at 2.) The prosecutor further advised counsel that her office had also recently obtained a draft email that Lucia Evans had written to her husband (then fiancé) in 2015. According to the prosecutor, the email:

> recounts the incident that is the subject of Count Six of the Indictment. The account describes details of the sexual assault that differ from the account the [Ms. Evans] has provided to our office. [Ms. Evans] has told our office that the inconsistencies may be the product of a flawed

> memory. [Ms. Evans] has also told our office that she permitted her husband to read the email sometime after it was drafted. [Ms. Evans] had previously told investigators in this case that she never disclosed to her husband the details of the sexual assault at issue.

(*Id.* at 4.)[3]

9. In her conversation with the prosecutors, the witness further stated that she had provided Detective Nicholas DiGaudio, the NYPD's lead investigator on Mr. Weinstein's case, with the following information in February 2018:

- Her account of how Mr. Weinstein had asked her and Ms. Evans to expose their breasts, and how Ms. Evans had, later that evening, told the witness that she had exposed her breasts to Mr. Weinstein in the restaurant;
- Her account of how Ms. Evans had, sometime later, stated that Mr. Weinstein had offered her employment in exchange for oral sex, and that Ms. Evans thereupon had performed oral sex on Mr. Weinstein.

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[3] The District Attorney did not state when exactly it received this exculpatory evidence and has never provided it to counsel. If the District Attorney received this draft email before seeking the superseding indictment, then it certainly should have been provided to the Grand Jury—as should have the other exculpatory evidence in this case such as CW-1's emails—to allow it to assess the testimony against Mr. Weinstein.

- That, sometime prior to that date, she had been contacted by a "fact checker" from the New Yorker magazine to confirm Ms. Evans' account of the sexual assault in Mr. Weinstein's office in 2004. According to the witness and her attorney,[4] she told the Detective that, in her discussion with the magazine, she decided not to relate Ms. Evans' statements about exposing her breasts, or the circumstances under which she had performed oral sex on Mr. Weinstein. Instead, according to the witness, she told the magazine that "something inappropriate happened."

(*Id.* at 2-3.)

10. According to the witness and her attorney, following this disclosure to Detective DiGaudio about *The New Yorker* fact checker, Detective DiGaudio told the witness, in sum and substance, that:

> the explanation the witness had provided to the magazine was more consistent with the account Evans had earlier provided the magazine; that, going forward, **"less is more"**; and that the witness had no obligation to cooperate.

(*Id.* at 3; emphasis added.)

11. As part of the *Brady* disclosure, the District Attorney further noted that, when confronted by the witness' allegations, Detective

[4] The witness' attorney, her father, is a well-respected criminal defense attorney and a former assistant United States Attorney.

Digaudio acknowledged speaking to the witness on February 2, 2018, and conceded that he had failed to advise prosecutors about that extraordinarily exculpatory conversation. (*Id.* at 3.) According to the prosecutors, however, Detective DiGuadio denied having made the "less is more" statement that was attributed to him. (*Id.* at 3.)

12. Based on Lucia Evans' false testimony before the Grand Jury and Detective DiGaudio's misconduct, the District Attorney moved to dismiss Count Six of the indictment in open court on October 11, 2018. Without objection by defense counsel, this Court dismissed Count Six without prejudice.

13. In response to the District Attorney's misconduct allegations, Detective DiGaudio claimed in an October 15, 2018 N.Y. Post article that he had indeed personally provided the witness' statements to the lead prosecutor and that another member of the New York City Police Department was present during this conversation. (Exhibit 2: N.Y. Post Article.)

III. THE OCTOBER 16, 2018 *BRADY* LETTER ADDRESSING FURTHER MISCONDUCT BY DETECTIVE DIGAUDIO

14. On October 16, 2018, the District Attorney's Office provided a second Brady letter disclosing additional misconduct by Detective DiGaudio. (Exhibit 3: 10/16/18 *Brady* Letter.) In this disclosure, the District Attorney described how Detective DiGaudio directed and encouraged CW-1 to delete and/or not disclose potential evidence in the case. The prosecutor notes:

> On Wednesday, October 10, I received a call from Attorney A, the lawyer for [CW-1], who is the complaining witness in Counts 3-5 in the indictment in this case. Lawyer A indicated that [CW-1] had certain information to convey to our office concerning Detective DiGaudio, the former lead detective in this case. In response to the call from Lawyer A, I and others from my office spoke by phone with [CW-1] and Lawyer A on Friday, October 12. In that conversation, [CW-1] related the following, in substance:
>
> My office had asked [CW-1] to produce any and all cell phones that she might have used during the time she interacted with the defendant. In response to this request, [CW-1] had a discussion with Detective DiGaudio in which she expressed the concern that, while she had several such phones in her possession, they contained, in addition to communications with the defendant,

> data of a personal nature that she regarded as private.
>
> According to [CW-1], Detective DiGaudio's response was that [CW-1] **should delete anything she did not want anyone to see before providing the phones to our office**. According to [CW-1], Detective DiGaudio then added, "**we just won't tell Joan [Illuzzi-Orbon]**."

(*Id.*)[5]

IV. POTENTIAL ADDITIONAL MISCONDUCT BY DETECTIVE DIGAUDIO RELATING TO MIMI HALEYI

15. In addition to Detective DiGaudio's misconduct relating to Lucia Evans (witness tampering and hiding exculpatory evidence) and CW-1 (tampering with evidence), counsel has reason to believe that Detective DiGaudio committed additional misconduct involving the third complainant in the superseding indictment, Mimi Haleyi.

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[5] The District Attorney claims in its *Brady* letter that CW-1 subsequently provided her phones to the prosecutors without deleting anything. (*Id.*) Counsel formally requests that the District Attorney provide counsel with a forensic copy of CW-1's phones so that the defense can have its own experts examine the phones to determine whether in fact any information was deleted.

16. Specifically, counsel's investigation has uncovered that, just like CW-1, Mimi Haleyi continued to communicate with Mr. Weinstein after the alleged July 2006 assault. For example, on February 12, 2007—more than seven months after the alleged incident—Mimi Haleyi texted Mr. Weinstein's phone with the following message: "Hi! Just wondering if u have any news on whether harvey will have time to see me before he leaves? x Miriam."[6] (Exhibit 4: 2/12/07 Text Message.)

17. This message makes clear that Mimi Haleyi wished to continue seeing Mr. Weinstein even after the alleged sexual assault. Counsel has reason to believe, however, that the Grand Jury was never shown this exchange that would have given the Grand Jury reason to doubt Ms. Haleyi's account.

18. While it is evident that the Grand Jury was not provided with this text message, the reason for this failure is unclear. As seasoned prosecutors, the District Attorney's trial team would have certainly asked the complaining witnesses if they had continued contact with Mr.

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[6] Mimi Haleyi has previously identified herself as Miriam Haley.

Weinstein after he allegedly assaulted them.[7] In the case of CW-1, this continued contact was well known to the District Attorney due to nearly four years of emails between CW-1 and Mr. Weinstein. Yet, the District Attorney purposefully chose not to provide these emails to the Grand Jury.

19. Counsel does not know whether the District Attorney knew about Mimi Haleyi's continued communication with Mr. Weinstein but decided not to inform the Grand Jury (as with CW-1) or whether Detective DiGaudio told Mimi Haleyi that "**less is more**" and made sure that Ms. Haleyi never told the District Attorney about the continued communication. This would not be surprising considering that, as disclosed by the District Attorney in its October 16, 2018 *Brady* letter, Detective DiGaudio was willing to tamper with evidence by telling CW-1 that she should delete everything she wanted to hide from the District Attorney before turning over her phone to the prosecutors. According to

[7] If the District Attorney's Office failed to ask the complaining witnesses this basic question, then counsel and this Court should have serious concerns about whether the District Attorney fully vetted its case or simply chose to indict Mr. Weinstein on flimsy evidence to satisfy the NYPD and the media.

CW-1, Detective DiGaudio further encouraged her to delete evidence by telling her "**we just won't tell Joan [Illuzzi-Orbon]**."

20. Given Detective DiGaudio's penchant for withholding exculpatory evidence that would support Mr. Weinstein's innocence,[8] it is likely that Detective DiGaudio purposefully hid the fact from the District Attorney that Mimi Haelyi continued to communicate with Mr. Weinstein after the alleged assault.

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[8] Notably, at some point in the last year, all three complaining witnesses deleted their social media posts from the time period they were allegedly assaulted by Mr. Weinstein. As all three complaining witnesses are represented by different attorneys, the one unifying point of contact between the women is Detective DiGaudio, who was likely the one who told them to delete this evidence.

V. THE ENTIRE INDICTMENT MUST BE DISMISSED BECAUSE IT WAS BASED ON A DEFECTIVE GRAND JURY PROCEEDING THAT WAS IRREPARABLY TAINTED BY POLICE MISCONDUCT, LUCIA EVANS' FALSE TESTIMONY AND THE DISTRICT ATTORNEY'S FAILURE TO PROVIDE THE GRAND JURY WITH EXCULPATORY EMAILS THAT CONFIRM THE LONG-TERM, CONSENSUAL, INTIMATE RELATIONSHIP BETWEEN MR. WEINSTEIN AND THE ALLEGED RAPE VICTIM CHARGED IN COUNTS THREE, FOUR AND FIVE IN THE INDICTMENT

21. By all accounts, Detective DiGaudio knew at the time of the Grand Jury presentations that there was a witness who had informed the NYPD that Lucia Evans had previously told the witness that her sexual contact with Mr. Weinstein was consensual; therefore, Detective DiGaudio knew at that time that Ms. Evans was falsely accusing Mr. Weinstein of a forced sexual assault. Notwithstanding this evidence, Detective DiGaudio allowed the Grand Jury to rely on potentially perjured testimony to indict Mr. Weinstein in both the original and supersedeing indictments charging him with sexually assaulting Lucia Evans.

22. Moreover, as argued in the attached Memorandum of Law, even assuming that Detective DiGaudio never informed the District Attorney of the exculpatory evidence regarding Lucia Evans, the prosecutors are still charged with this knowledge. *See People v. McLaurin*, 38 N.Y.2d 123, 126 (1975) ("Knowledge on the part of the police department would, of course, be imputed to the District Attorney's office. A defendant ought not be penalized because of any inadequacy of internal communication within the law enforcement establishment." (citing *Santobello v. New York*, 404 U.S. 257, 259-60 (1971))).

23. Consequently, as a matter of law, the District Attorney's Office was aware that the Grand Jury was never informed of critical evidence that proved Lucia Evans to be a perjurer and that Mr. Weinstein was being indicted for a crime he did not commit.[9]

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[9] As will be argued below and in the attached Memorandum of Law, this Court should dismiss the indictment on the current record or, in the alternative, this Court should conduct an evidentiary hearing to determine the full extent of the misconduct and whether the police department, District Attorney's Office or both are responsible for purposefully tainting the Grand Jury proceeding against Mr. Weinstein.

24. Although Ms. Evans' Grand Jury testimony pertained directly only to Count Six, it is inconceivable that her false testimony about a claim of forced sexual assault by Mr. Weinstein did not infect the entire Grand Jury proceeding and thus influence the minds of the Grand Jurors. This is particularly true when addressing the two counts of Predatory Sexual Assault that require Mr. Weinstein to have committed a previous sexual assault.

25. Indeed, even if instructed by the District Attorney not to consider Lucia Evans' claims in deciding whether Mr. Weinstein committed Predatory Sexual Assault in 2006 (Count One) and 2013 (Count Three), it is impossible for the Grand Jury to have ignored the fact that it was presented with evidence that Mr. Weinstein committed a vicious sexual assault against Lucia Evans in 2004. This false claim is even more prejudicial considering that the Grand Jury was instructed to consider Lucia Evans' testimony as true (even though it was false) as to the now-dismissed Count Six.

26. Additionally, the taint of Lucia Evans' false testimony cannot be viewed in isolation. Rather, this Court must also consider how the

integrity of the Grand Jury was already impaired as we now know that it was not shown CW-1's extensive email history with Mr. Weinstein where, after being allegedly raped, she clearly reflected her explicit wish to continue her long-term, consensual, intimate relationship with Mr. Weinstein.

27. As noted in Mr. Weinstein's original motions, these emails include the following statements from CW-1 in the weeks, months and years after the alleged sexual assault: "[I] hope to see you sooner than[] later"; "I appreciate all you do for me, it shows"); "It would be great to see you again, and catch up!"; "Hi Dear, Thinking of you as well as I was on the plane"; "Miss you big guy"; "I got a new number. Just wanted you to have it. Hope you are well and call me anytime, always good to hear your voice."; "I was hoping for some time privately with you to share the direction I am going in life and catch up because its been awhile." (*See* 8/3/18 Memorandum of Law at pp. 5-7.) CW-1 even asks for Mr. Weinstein to meet her mother, stating "She would love to meet you, plus you can see how good my genes are **;)**." (*See id.* at p. 7; emphasis added). Furthermore, as argued in Mr. Weinstein's original motions, "any doubt

about the consensual, intimate nature of the continuous relationship between CW-1 and Mr. Weinstein is dispelled by CW-1's statement to Mr. Weinstein, for example, on February 8, 2017 saying: "**I love you, always do. But I hate feeling like a booty call. :).**" (*See id.* at p. 7.) Yet the Grand Jury was purposely never shown this evidence.

28. In responding to Mr. Weinstein's claims about CW-1's emails, the District Attorney has acknowledged that it did not provide the emails to the Grand Jury. Rather, the District Attorney maintained:

> Most importantly, a review of the Grand jury minutes in this case will reveal, the People presented evidence fairly and in a manner that was not misleading by providing a full and fair account of the relationship between defendant and the victim both before and after the charged rape.

(*See* Gov't Response at ¶ 8.) Tellingly, the District Attorney does not deny that it had actual or constructive possession of the emails at the time of the Grand Jury presentation.

29. In addition to the issues raised by Lucia Evans' false allegations and CW-1's emails, there is more than a reasonable probability that the Grand Jury proceeding was also potentially affected by Detective DiGaudio's misconduct.

30. Thus, the District Attorney has to date acknowledged at least two instances where Detective DiGaudio's misconduct has infected this case, one with Lucia Evans and one with CW-1.[10] Moreover, as noted in Section IV above, counsel has reason to believe that Detective DiGaudio committed misconduct with Mimi Haleyi as well.

31. As has been widely reported, Detective DiGaudio has been very active in this investigation by traveling nationally and internationally to interview more than fourteen different potential witnesses in this case. (Exhibit 5: Kathy Dobie, *To Catch a Predator,* N.Y. Magazine, Mar. 16, 2018.)[11] We may never know how many of these potential witnesses he may have improperly influenced by telling them

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[10] Counsel has a good-faith reason to believe that Detective DiGaudio had **extensive** email and oral communication with CW-1 before and after she testified in the Grand Jury. Given Detective DiGaudio's misconduct in this case, CW-1 would certainly be a witness should this Court conduct a hearing into the misconduct in this case. Accordingly, we request that the District Attorney provide counsel with all communications between Detective DiGaudio and CW-1, as well as all communications between CW-1 and the District Attorney's Office relating to Detective DiGaudio and/or any other members of the NYPD.

[11] As noted in court on October 11, 2018, counsel intends to subpoena the NYPD for all of Detective DiGaudio's interview notes relating this case.

"less is more" or by telling them to remove evidence from their phones before turning them over to the District Attorney's Office.

32. Because the District Attorney has already disclosed that Detective DiGaudio has been caught committing misconduct with two alleged complaining witnesses in this case and given that the NYPD and Detective DiGaudio have shown a willingness to prosecute Mr. Weinstein using whatever means necessary[12]—even potentially illegal ones—there

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[12] As is well documented in the media, the NYPD has been critical of District Attorney Cy Vance in the last few years for not prosecuting Mr. Weinstein based on the complaints of Paz de la Huerta and Ambra Battilana. After investigating both these complaining witnesses, the District Attorney properly rejected their baseless allegations. Indeed, nobody in the media bothered to challenge Ambra Battilana's false narrative. For example, in a New Yorker interview with Ronan Farrow, Ms. Battilana claimed that she did not fully understand the non-disclosure agreement that she entered into with Mr. Weinstein because she was disoriented and did not understand English well. (Exhibit 6: Ronan Farrow, *Harvey Weinstein's Secret Settlements*, The New Yorker, Nov. 21, 2017.) In truth, Ms. Battilana had two lawyers, including an Italian lawyer who translated all materials into Italian. She was therefore fully aware of what she was doing when she signed the agreement that included her sworn affidavit that the March 2015 meeting with Mr. Weinstein (when the alleged assault happened) was "cordial and ended amicably" and that she regretted reporting the allegations to the police—which she admits she only did because of "poor advice [she] received from friends and representatives." (Exhibit 7: Apr.

is reason to believe that their misconduct may have extended to other witnesses in this case, including the alleged third victim in the indictment, Mimi Haleyi, as well as other witnesses who testified before the Grand Jury.[13]

33. Moreover, to the extent the NYPD and the District Attorney's Office are blaming each other for the misconduct (*i.e.*, the District Attorney claiming Detective DiGaudio withheld exculpatory evidence and Detective DiGaudio alleging he told the information to the prosecutors, but they withheld it from the Grand Jury and defense), two things are clear: (1) either Detective DiGaudio or the District Attorney's Office is lying and deceiving the Court; and (2) either Detective DiGaudio or the District Attorney's Office (or possibly both) committed misconduct that infected the Grand Jury.

34. Considering all these issues with the Grand Jury, we believe the impairment of the Grand Jury proceedings and the concomitant

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20, 2015 Battilana Affidavit.) Had the New Yorker done any basic fact checking, Ms. Battilana's entire narrative would have been proven false.

[13] The impairment to the Grand Jury is certainly more pronounced if Detective DiGaudio himself testified in the proceeding.

prejudice to Mr. Weinstein are evident from the current record. Therefore, this Court need not conduct any further inquiry before finding the Grand Jury proceedings to be irreparably harmed and defective and dismiss the supersedeing indictment.

35. Should this Court, however, require additional information regarding Detective DiGaudio and the related misconduct already identified, Mr. Weinstein requests that this Court conduct an evidentiary hearing to determine the extent of misconduct in this case. To get to the truth, this Court would need to hear from Detective DiGaudio (whether or not he invokes his Fifth Amendment right against self-incrimination), ADA Joan Illuzzi-Orbon <u>and</u> the other police officer who was purportedly present when Detective DiGaudio claims he informed ADA Illuzzi-Orbon about the witness' information regarding Lucia Evans' false sexual assault claim. The Court would also need to hear from the alleged complaining witnesses and the other witnesses in this case about their interactions with Detective DiGaudio and the NYPD, and also hear from the independent witness who Detective DiGaudio told "less is more."

36. Also, another witness who should be required to testify at this hearing is Chief Michael Osgood of the NYPD's Special Victims Unit who claims to have personally interviewed all of the potential witnesses against Mr. Weinstein along with Detective DiGaudio. Without this hearing, neither the Court nor the public can have any confidence about the scope of Detective DiGaudio's misconduct, when exactly the District Attorney's Office became aware of the misconduct and, most importantly, whether Mr. Weinstein's case has been handled properly in accordance with the law.

VI. THE EVIDENCE BEFORE THE GRAND JURY WAS LEGALLY INSUFFICIENT TO SUPPORT THE CHARGE OF PREDATORY SEXUAL ASSAULT UNDER COUNT ONE BECAUSE THE AGGRAVATING FACTOR REQUIRED UNDER THAT STATUTE DID NOT ALLEGEDLY OCCUR UNTIL NEARLY SEVEN YEARS AFTER THE UNDERLYING CRIME HAD BEEN ALLEGEDLY COMMITTED

37. The current indictment charges Mr. Weinstein with two counts of Predatory Sexual Assault in violation of Penal Law § 130.95(2). Under this statute:

> A person is guilty of predatory sexual assault *when* he or she commits the crime of rape in the first degree, criminal sexual act in the first degree,

> aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, *and when*:
>
> * * *
>
> He or she *has engaged* in conduct constituting the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, against one or more additional persons.

Emphasis added.

38. The first Predatory Sexual Assault count charged in the indictment, Count One, charges Mr. Weinstein with committing the crime on July 10, 2006 against Mimi Haleyi. The second Predatory Sexual Assault charge, Count Three, alleges that Mr. Weinstein committed the crime on March 18, 2013 against CW-1. The indictment, however, does not specify the predicate sexual crime in either of these counts.

39. Because Penal Law § 130.95 is a recidivist statute, Count One would require that the Grand Jury be presented with evidence that Mr. Weinstein committed a predicate sexual act before July 10, 2006, the date

he allegedly committed the Count One charge of Predatory Sexual Assault. The only alleged sexual assault before that date in the indictment was the alleged sexual assault of Lucia Evans charged in Count Six. Therefore, counsel believed that the Lucia Evans assault was the predicate act for Count One.[14]

40. On October 11, 2018, this Court dismissed Count Six alleging the Lucia Evans assault. Believing Lucia Evans was the predicate sexual assault for Count One, counsel then asked the District Attorney if it would be moving to dismiss Count One as well. In response, the District Attorney advised counsel on October 17, 2018 that the predicate sexual assault for Count One, committed on July 10, 2006, was not the Evans assault but rather the alleged rape of CW-1 **almost seven years later** on March 18, 2013. Conversely, the predicate for Count Three, allegedly committed against CW-1 on March 18, 2013, was the alleged criminal sexual assault on Mimi Haleyi on July 10, 2006.

[14] As part of Mr. Weinstein's original motion papers, counsel requested a Bill of Particulars and specifically asked the District Attorney to identify the predicate sexual crimes for the Predatory Sexual Assault charges. The District Attorney refused to answer.

41. As more fully discussed in the accompanying Memorandum of Law, Count One must be dismissed because the Grand Jury was presented no evidence that Mr. Weinstein had already committed a previous sexual assault when he allegedly committed Predatory Sexual Assault on July 10, 2006. According to the District Attorney, however, the required predicate sexual assault for Count One does not occur until nearly seven years later with the alleged March 2013 rape of CW-1. Consequently, because there was no evidence before the Grand Jury that Mr. Weinstein had already committed a predicate sexual assault at or before July 10, 2006, Count One must be dismissed.

42. Alternatively, if this Court interprets Penal Law § 130.95(2) to allow a subsequent sexual assault to serve as a predicate, then, as argued in the attached Memorandum of Law, the Predatory Sexual Assault statute is unconstitutionally vague as applied and this Court should dismiss Counts One and Three.

43. Should this Court dismiss Count One, Count Three or both, then the balance of the indictment must also be dismissed as it would be impossible for the Grand Jury to have fairly considered any evidence

against Mr. Weinstein after erroneously finding him to be a sexual predator.

WHEREFORE, for all the above-stated reasons and the reasons stated in Mr. Weinstein's original papers, Mr. Weinstein's motion should be granted in all respects and the indictment dismissed or, in the alternative, this Court must conduct an evidentiary hearing to determine the full extent of the misconduct and whether the police department, District Attorney's Office or both are responsible for purposefully tainting the Grand Jury proceeding against Mr. Weinstein.

Dated: November 5, 2018
New York, NY

Respectfully Submitted,

Benjamin Brafman, Esq.
Mark M. Baker, Esq.
Jacob Kaplan, Esq.

To: Clerk of the Court
Hon. James M. Burke
ADA Joan Illuzzi-Orbon

MEMORANDUM
OF LAW

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 81

Indictment No. 2335/2018

THE PEOPLE OF THE STATE OF NEW YORK

-against-

HARVEY WEINSTEIN,

Defendant.

SUPPLEMENTAL MEMORANDUM OF LAW ON BEHALF OF DEFENDANT HARVEY WEINSTEIN

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 81

Indictment No. 2335/2018

THE PEOPLE OF THE STATE OF NEW YORK

-against-

HARVEY WEINSTEIN,

Defendant.

SUPPLEMENTAL MEMORANDUM OF LAW ON BEHALF OF DEFENDANT HARVEY WEINSTEIN

Preliminary Statement

This memorandum of law is respectfully submitted in support of the motion brought by **Defendant Harvey Weinstein,** dated November 5, 2018, for an order pursuant to CPL §§210.20(1)(c) and 210.35(5), dismissing the entire indictment, or particular counts thereof, as arising out of a Grand Jury proceeding that was irreparably tainted and rendered defective by police misconduct, Lucia Evans' false testimony and the District Attorney's failure to provide exculpatory emails to the Grand Jury (all counts), unsupported by legally sufficient evidence (Count

One) or based on an unconstitutional statute (Counts One and Three) and granting such other and further relief as to the Court seems just and proper.

Statement of Facts

The facts of this case, insofar as pertinent to the within motion, are contained in the accompanying affirmation of **Benjamin Brafman, Esq.**, duly affirmed on November 5, 2018 and the exhibits appended thereto, and the affirmation of **Benjamin Brafman, Esq.,** dated August 3, 2018, and exhibits appended thereto, all of which are incorporated herein and made a part hereof.

Argument

Point I

As a Consequence of the People's Recent Disclosure of Exculpatory Evidence Which Prompted Their Consent to the Dismissal of Count Six, in Conjunction with Their Refusal to Introduce Before the Grand Jury Critical Exculpatory Emails Demonstrating Defendant's Innocence, the Integrity of the Grand Jury Proceeding, and the Indictment Thereupon Returned, Were Irreparably Impaired, All to Defendant's Great Prejudice, in Violation of CPL §210.35(5)

A. Introduction

Count Six of the Indictment charged Mr. Weinstein with forcing Lucia Evans to perform an act of oral sex on him against her will. That count was recently dismissed by this Court, with the consent of the People, strongly implying in their *Brady* letter of September 12, 2018, that Ms. Evans had lied under oath when she claimed that her sexual interaction with Mr. Weinstein had been a forcible criminal act.

The Grand Jury that indicted Mr. Weinstein for that alleged serious crime, as well as for Counts One through Five, had no reason to question Evans' testimony. Accordingly, it undoubtedly factored her testimony when considering whether to indict Defendant for the five other sex crimes ultimately returned. It was simply not possible for the grand

jurors who voted to indict Defendant to ignore the Lucia Evans allegation; nor would there have been any reason to have instructed the Grand Jury to ignore her testimony when it voted to indict.

This travesty is compounded by the fact that the lead Detective on the case, Nicholas DiGaudio, knew that Lucia Evans was providing the Grand Jury with false testimony. As a matter of law, of course, that police misconduct is implicitly imputed as the misconduct of the prosecutor who presented the case. Absent the ability to question the Grand Jury about what, if any, consideration it gave to Lucia Evans' testimony as it related to any other count voted, including the Predatory Sexual Acts, the entire indictment is tainted.

The travesty is further exacerbated by the prosecutor's failure to introduce scores of emails between CW-1 and Defendant, as well as a text message between Mimi Haleyi and Defendant -- all temporally subsequent to the other alleged incidents and all demonstrating that they could not have occurred. The necessary consequence of these compounded defects is the dismissal of the entire indictment.

B. The District Attorney's Obligations in the Grand Jury

Reiterating those principles set forth in Defendant's original motion to dismiss, pursuant to C.P.L. § 210.35 (5), a Grand Jury proceeding will be found to be defective 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." Thus, even where the evidence before the Grand Jury may be legally sufficient, C.P.L. § 210.35 (5) requires only the possibility of prejudice to warrant dismissal, not actual prejudice. *See People v. Di Falco,* 44 N.Y.2d 482 (1978); *People v. Darby*, 75 N.Y.2d 449, 455 (1990); *People v. Sayavong*, 83 N.Y.2d at 709, 711 (1994) and *People v. Wilkins*, 68 N.Y.2d 269, 276(1986).

To be sure, "[i]nasmuch as CPL § 210.35(5) is an 'all embracive cowcatcher' subdivision (Bellacosa, Practice Commentary, McKinney's Cons.Laws of N.Y., Book 11A, CPL 210.35, p. 139), each case relying on its provisions must be analyzed on an individual basis to determine whether the integrity of the Grand Jury was impaired and whether the possibility of prejudice existed." *People v. Howard*, 152 Misc.2d 956, 958 (Sup. Ct.

Kings Co. 1991). Upon such analysis, however, 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, supra*) (internal quotation marks omitted).

This duty of "fair dealing" is particularly implicated in this case given the recent prosecutorial disclosure regarding the perjury of Lucia Evans in the Grand Jury and the consented to dismissal of Count Six based upon her testimony. Moreover, as will be seen below, the remainder of the indictment must also be dismissed, given that the Grand Jury had to have been influenced by such perjurious testimony and its

credibility determination of Evans in weighing the credibility of CW-1 and Mimi Haleyi, which supported those remaining counts. Such "fair dealing" also brings to the fore the issue of the potential misconduct of either the case detective, Nicholas DiGaudio, or the ADA or both, thereby warranting an evidentiary hearing if the Court does not dismiss the superseding indictment upon Defendant's motions.

Indeed, as recalled in *People v. Thompson*, 22 N.Y.3d 687, 697 (2014), *rearg. den.* 23 N.Y.3d 948 (2014), the obligation of "fair dealing to the accused and candor to the courts" requires

> the prosecutor not only to seek convictions but also to see that justice is done. This duty extends to the prosecutor's instructions to the grand jury and the submission of evidence. The 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; emphasis added).

In furtherance, of determining when the finding of such a risk of prejudice could me made, the *Huston* court earlier advised that

> [d]ismissal 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.

The Grand Jury has the absolute need 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). Thus, in *Pelchat,*

> the indictment was fatally defective because the Grand Jury had no evidence before it worthy of belief that defendant had committed a crime. *Possessing the knowledge he did before the entry of the plea, the prosecutor was duty bound to obtain a superseding indictment on proper evidence or to disclose the facts and seek permission from the court to resubmit the case* (see CPL 200.80, 210.20, subd. 4). Just as he could not sit by and permit a trial jury to decide a criminal action on evidence known to be false, he could not permit a proceeding to continue on an indictment which he knew rested solely upon false evidence.

62 N.Y.2d at 107 (citing *People v. Robertson*, 12 N.Y.2d 355 (1963); *People v. Savvides*, 1 N.Y.2d 554 (1956); *Napue v. Illinois*, 360 U.S. 264 (1959)) (emphasis added). *Cf. Drake v. Portuondo*, 553 F.3d 230, 240 (2d Cir. 2009)

("Since at least 1935, it has been the established law of the United States that a conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution. This is so because, in order to reduce the danger of false convictions, we rely on the prosecutor not to be simply a party in litigation whose sole object is the conviction of the defendant before him. The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost." (citation omitted)); *Jenkins v. Artuz*, 294 F.3d 284, 295 (2d Cir. 2002) ("We have further noted the heightened opportunity for prejudice where the prosecutor, by action or inaction, is complicit in the untruthful testimony."); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) ("A different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony. Where either of those events has happened, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."); *People v. Berrios*, 173 Misc.2d 76, 79 (Sup. Ct. Kings Co. 1997) ("Once a prosecutor becomes aware that a

witness has perjured herself before the grand jury, disclosure of the perjurious testimony to another grand jury should be complete and precise").[1]

C. Discussion

1. The Entire Grand Jury Proceeding Was Tainted by Evans' Perjury, Detective DiGaudio's Misconduct and the District Attorney's Failure to Confront CW-1 with Her Myriad Exculpatory E-Mails

The holding in *Pelchat* compels the dismissal of the separate charges in this case. Attached to Mr. Weinstein's original motions were dozens of emails between the alleged rape victim, CW-1, and Mr. Weinstein that seriously undermine complainant's claim of rape. They establish that, starting within days of the alleged rape, and continuing on for years, she exchanged endearing, intimate emails with him, demonstrating affection for him and entreaties for additional intimate encounters with a man who is alleged to have forcibly raped her.

Specifically, we earlier moved for dismissal on the basis that

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[1] In contrast, *Pelchat* was held inapplicable in *People v. Goetz*, 68 N.Y.2d 96, 116 (1986) because two of the gunshot victims still adhered to their incriminating Grand Jury testimony, even though the testimony of a third might have been later undermined. *See also People v. Hansen*, 95 N.Y.2d 227, 232 (2000). Thus, unlike in our case as to any one count, there remained legally sufficient cases in those instances.

Mr. Weinstein had been charged with

> the rape of CW-1, whose extensive communications and contact immediately following the now claimed forcible rape instead reflect a consensual, intimate relationship with Mr. Weinstein in an exchange of more than 400 warm, complimentary and solicitous emails with an alleged rapist for more than four years after the alleged rape, never once in those communications claiming to have ever been harmed by Mr. Weinstein.

Brafman affirmation, dated August 3, 2018, at pp. 8-9.

Thus, Mr. Weinstein has argued as to those allegations that the failure to present myriad e-mails and messages between the complainant and Mr. Weinstein impel the unmistakable conclusion that no forcible conduct had been committed by Mr. Weinstein. The failure of the district attorney either to present or to confront the alleged rape victim with the dozens of emails written by her that clearly challenge and undermine CW-1's claim of rape deprived Mr. Weinstein of a fair Grand Jury presentation.

The People now concede that, although they possessed these emails when CW-1 testified in the Grand Jury, the prosecutor did not either present or confront her with the emails. They were never provided to the Grand Jury to allow it to carefully question the witness and likely

reject her claim of Rape. Instead, the People claim that it was sufficient to tell the Grand Jury generally about the ongoing sexual relationship of the alleged victim and Mr. Weinstein before and after the alleged rape.

Simply put, that argument is without merit, as was the People's inexplicable claim in its initial response to the defense motions that they had no obligation to present the emails because nothing therein suggested that "there was no rape." We suggest the very obvious -- *i.e.*, if there was no rape as Mr. Weinstein claims, why on earth would there have been any discussion in their correspondence about rape which never occurred. To be sure, if a rape had in fact occurred, reason dictates that one would expect to read something even slightly incriminating. To the contrary, as we earlier noted, the only complaint by the alleged victim is that she does not wish to be Mr. Weinstein's "booty call."

We submit, therefore, that the failure to provide the emails to the Grand Jury, or to confront the witness with her own damning words, when coupled with the perjury of Lucia Evans, has so compounded the unfairness in the presentation to the Grand Jury as to constitute overwhelming prejudice as to require a dismissal of the balance of the superseding Indictment. The fact remains that, had those materials been

presented, the grand jurors would have been hard-pressed to accept the claim of CW-1 that her alleged interactions with Mr. Weinstein had not been consensual. The end result, just as in *Pelchat*, is that, well aware of such compelling proof, "the prosecutor was duty bound to obtain a superseding indictment on proper evidence or to disclose the facts and seek permission from the court to resubmit the case." 62 N.Y.2d at 107.

Specifically, as recalled in the supporting affirmations, those emails related the following statements from CW-1 in the weeks, months and years after the alleged sexual assault:

> "[I] hope to see you sooner than[] later"; "I appreciate all you do for me, it shows"); "It would be great to see you again, and catch up!"; "Hi Dear, Thinking of you as well as I was on the plane"; "Miss you big guy";"I got a new number. Just wanted you to have it. Hope you are well and call me anytime, always good to hear your voice."; "I was hoping for some time privately with you to share the direction I am going in life and catch up because its been awhile." (*See* 8/3/18 Motion at __.) CW-1 even asks for Mr. Weinstein to meet her mother, stating "She would love to meet you, plus you can see how good my genes are **;)**." (*See id.*; emphasis added)).

Furthermore, as argued in Mr. Weinstein's original motions, "any doubt about the *consensual, intimate* nature of the continuous relationship between CW-1 and Mr. Weinstein is dispelled by CW-1's

statement, for example, on February 8, 2017, that 'I love you,' but that she feels like a 'booty call.'"

The probable perjury of CW-1 -- whose credibility is inextricably intertwined with the credibility of Mimi Haleyi, as supporting inter-related Predator Sexual Assault counts, *see* Point II, *infra* -- is now clearly shown to have been compounded by the failure of the district attorney to have taken any steps in the Grand Jury to correct the unquestionably perjurious testimony of Lucia Evans, whose allegations in Count Six have now been dismissed. It therefore becomes crystal clear that the Grand Jury's consideration of the remaining counts of the indictment, supported by CW-1 and Haleyi, who also had conversations with Det. Nicholas DiGaudio, was irreparably tainted and prejudiced. For each remaining complainant is cross-referenced as to the other, thereby establishing the separately charged counts as mutually dependent.

This is especially so with respect to Counts One and Three, each alleging necessarily provable acts against both of them. In such instance,

> this court's inquiry does not end at determining whether there exists sufficient evidence, aside from the false testimony, to support the indictment. The court must also address whether

or not the irregularity in the proceeding resulted in potential prejudice to the defendant, so as to impair the integrity of the Grand Jury.

People v. Jones, 27 Misc. 3d 1208(A), at *4 (Sup. Ct. Kings Co. 2010) (Where a police officer's perjured testimony undermined the defendant's testimony, and even though there was ample remaining evidence to support the indictment, court dismissed the indictment).

To be sure, the Appellate Division has noted that an indictment obtained on testimony which the prosecutor is unaware is false is not necessarily infirm. *See e.g. People v. Johnson*, 54 A.D.3d 636, 636 (1st Dept. 2008) ("The court properly declined to dismiss the indictment on the ground that a prosecution witness revealed at trial that a portion of his grand jury testimony was untrue. There was no impairment of the integrity of the grand jury proceeding that warranted dismissal, since, rather than being based entirely on false testimony, the indictment was amply supported by other evidence. *Moreover, there was no suggestion that the prosecutor had reason to believe this testimony was false.*") (citations omitted; emphasis added).

In our case, however, as a matter of law, it cannot be said that

the prosecutor, was unaware. Rather, the prosecutor is charged with constructive knowledge actually possessed by DiGaudio, who learned well before the Grand Jury presentation that Evans, and most likely CW-1, based on her non-offered emails, would in fact be perjuring themselves. After all, "[t]he rationale for the imputation of knowledge is that, when police and other government agents investigate or provide information with the goal of prosecuting a defendant, they act as an arm of the prosecution, and the knowledge they gather may reasonably be imputed to the prosecutor under *Brady." People v. Garrett,* 23 N.Y.3d 878, 887 (2014) (citation omitted). Thus, the fact that DiGaudio, having knowledge of the highly exculpatory information brought forth by the witness to whom Evans admitted the truth, concealed it from the district attorney's office, does not relieve the prosecutors of constructive knowledge of that information as a matter of law. *See People v. McLaurin*, 38 N.Y.2d 123, 126 (1975) ("Knowledge on the part of the police department would, of course, be imputed to the District Attorney's office. A defendant ought not be penalized because of any inadequacy of internal communication within the law enforcement establishment.") (citing *Santobello v. New York*, 404

U.S. 257, 259-260 (1971)).[2]

Accordingly, now that it has been demonstrated that the charges arising from one complainant, Lucia Evans, and most likely a second, CW-1 (based upon such highly illuminating emails which demonstrate the post-incident intimacy of the complainant's relationship with Mr. Weinstein), have been manufactured out of whole cloth and are not supported by evidence that Mr. Weinstein committed any crime, the Grand Jury was inappropriately influenced to return a true bill on the remaining complainants' testimony as a matter of course. Put another way, just like a petit jury can be improperly influenced, here, in the Grand Jury, there was prejudicial "spill-over" from the tainted counts to the one count remaining. *Cf. People v. Doshi*, 93 N.Y.2d 499, 505 (1999) ("[t]he paramount consideration in assessing potential spillover error is whether there is a 'reasonable possibility' that the jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in a 'meaningful way.' If so, then the spillover effect of the tainted counts

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[2] Not to be ignored is that the lead investigator, Det. DiGaudio, has also claimed that he explicitly informed the district attorney of the exculpatory evidence. If so, there can be no question that dismissal is warranted.

requires reversal on the remaining charges.") (quoting *People v. Baghai-Kermani*, 84 N.Y.2d 525, 532, 533 (1994)).

In short, there exists a "reasonable possibility," indeed, even a *probability,* that an indictment involving the remaining complainant *alone* would not have been returned. Under such circumstances, at the very least, the potential prejudice to the defendant is amply established on this record. Most respectfully, therefore, "the court cannot in good conscience find that the integrity of the Grand Jury was not impaired by the presentation of false evidence." *People v. Jones*, *supra*, 27 Misc. 3d 1208(A), 910 N.Y.S.2d 407 at *4.

2. If Det. DiGaudio Testified Before the Grand Jury, the Potential for Additional Prejudice Was Greatly Magnified, Given His Blatantly Improper Conduct With at Least Two Witnesses

This impairment was only buttressed if DiGaudio was involved in interviewing the remaining complainant, or if he was a witness with respect as to *any* of the charges presented to the Grand Jury. Given the prosecution's recent *Brady* disclosure requiring the dismissal of the Lucia Evans-based count, we now know that DiGaudio, as a serial obstructor, also sought to corrupt the testimony of CW-1 by instructing her to conceal

potentially exculpatory information from the prosecutor. DiGaudio's effort to foster concealment of this vital information from the district attorney, coupled with his "less is more" comment to the witness to whom Evans had admitted Mr. Weinstein had not forced her to engage in oral sex, dramatically illustrates how DiGaudio was singularly hell-bent on concealing the truth as to all charges.

There is no question but that DiGaudio's sole motivation, as lead detective, was to ensure that all charges against Mr. Weinstein -- despite knowing full well that Evans, and probably CW-1, had a consensual relationship with Defendant -- remained intact. Certainly, improper testimony by a case detective can only enhance the probability of a tainted Grand Jury proceeding. *Cf. People v. Gordon*, 101 A.D.3d 1473, 1475 (3rd Dept. 2012) (Detective added to the improper hearsay in Grand Jury, as testified by the complainant).

It is for that reason that our current request for materials relating to DiGaudio's discussions with all would-be complainants, or potential *Molineux* witnesses, be disclosed by the District Attorney pursuant to *People v. Vilardi*, 76 N.Y.2d 67 (1990). *See also People v.*

Negron, 26 N.Y.3d 262, 270 (2015). Surely, such material is within the People's actual or constructive possession, for, as stated in *People v. Garrett, supra,*

> Exculpatory or impeaching evidence is subject to *Brady* disclosure only if it is within the prosecution's custody, possession, or control. What constitutes possession or control for *Brady* purposes has not been interpreted narrowly, and it is beyond cavil that the government's duty to disclose under *Brady* reaches beyond evidence in the prosecutor's actual possession. *Specifically, the duty encompasses evidence known only to police investigators and not to the prosecutor.* As the Supreme Court explained in *Kyles* [v. *Whitley*, 514 U.S. 419 (437)], in order to comply with Brady, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. at 437.)

23 N.Y.3d at 886–87 (emphasis added; additional citations and internal quotation marks omitted).[3]

Moreover, by seeking to conceal such quintessential *Brady*

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[3] Pursuant to CPL §210.30(3), request is also made for the court to order that portion of the Grand Jury transcripts involving any testimony of Det. DiGaudio CW-1 and Mimi Haleyi to be disclosed to the defense. Such disclosure would allow the defense to amplify those arguments addressed in this and Mr. Weinstein's earlier motion. We further submit that, under these circumstances, where it has been well documented that a lead case detective has had a significant and improper influence on virtually all the complainants who testified in the Grand Jury, there has been established, "[a]s a threshold matter,... a compelling and particularized need for them[,]" with the result that "disclosure is appropriate under the circumstances presented." *People v. Robinson*, 98 N.Y.2d 755, 756 (2002).

material from the prosecutors who, he well knew, would have an immediate duty to disclose the information from CW-1 to the defense, and given his outrageous statement to an exculpating witness regarding Lucia Evan's claims, that "less is more," the integrity of the entire Grand Jury proceeding has been irreparably impaired. Indeed, had DiGaudio been the sole law enforcement witness against Mr. Weinstein, a forceful argument would exist -- certainly in conjunction with any similar discoverable information yet to be disclosed -- that the charges are subject to dismissal as a matter of due process. *Cf. People v. Isaacson*, 44 N.Y.2d 511, 521 (1978) ("Upon an inquiry to determine whether due process principles have been transgressed in a particular factual frame there is no precise line of demarcation or calibrated measuring rod with a mathematical solution. Each instance in which a deprivation is asserted requires its own testing in the light of fundamental and necessarily general but pliant postulates. All components of the complained of conduct must be scrutinized but certain aspects of the action are likely to be indicative.") (citations omitted).[4]

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[4] *See also Isaacson*, 44 N.Y.2d at 519 (citing, *inter alia, United States v. Russell*, 411 U.S. 423 (1973), *Sorrells v. United States*, 287 U.S. 435 (1932), *Rochin v. California*, 342 U.S. 165 (continued...)

Crucially, the lead investigator's disclosed misconduct goes to the core of this case -- suppression of evidence which revealed that a complaining witness had falsified her allegations of sexual assault. Detective DiGaudio did not merely suppress evidence that the complaining witness differently described the color of Mr. Weinstein's shirt or where she had gone after the alleged assault. Rather his misconduct suppressed the crucial fact that the complaining witness admitted that she had in fact had consensual sexual contact with Mr. Weinstein.

Certainly, had DiGaudio given the same advice to any other complainants, would-be complainants, or *Molineux* witnesses, and had his involvement in this case resulted in *any* additional false or perjurious proof being put before the Grand Jury, the integrity of the entire proceeding becomes highly suspect as a matter of law. The result would

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[4](...continued)
(1952) and *Hampton v. United States*, 425 U.S. 484 (1976)). *See also United States v. Hudson*, 3 F.Supp.3d 772, 778 (C.D. Cal. 2014) (dismissing indictment upon noting that "[t]he outrageous-government-conduct doctrine permits a court to dismiss an indictment when the Government engages in conduct 'so grossly shocking and so outrageous as to violate the universal sense of justice.' Judicial scrutiny focuses solely on the government's actions—not the alleged actions of the criminal defendant. The outrageous-government-conduct doctrine thus differs in that respect from an entrapment defense.") (citing *United States v. Smith*, 924 F.2d 889, 897 (9th Cir.1991) and *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir.1991)).

be that there is extant great potential that Mr. Weinstein was prejudiced in the eyes of the tainted jurors. Under such circumstances, it is unquestionably open to consideration with respect to DiGaudio as to "whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace." *Isaacson,* 44 N.Y.2d at 521. If so, dismissal of all charges is further required.

The Court of Appeals' observation in *Pelchat* that "[j]ust as [the prosecutor] could not sit by and permit a trial jury to decide a criminal action on evidence known to be false, he could not permit a proceeding to continue on an indictment which he knew rested solely upon false evidence[,]" 62 N.Y.2d at 107, has been well recognized in succeeding cases -- be it trial or Grand Jury. Compare *People v. Davis*, 256 A.D.2d 200, 201 (1st Dept. 1998) ("Although the prosecutor advised defendant and the court of his belief that one witness had offered perjured testimony before the Grand Jury, the record indicates that there was additional, apparently competent evidence before the Grand Jury to support the indictment. Thus, the prosecutor's duty to disclose the facts and seek permission to

resubmit the case was not triggered because there was no reason to conclude that the indictment had been based solely upon perjured testimony.") (citations omitted) to *People v. Jones*, 31 A.D.3d 666, 667 (2d Dept. 2006) (concerning the sole charge, "[h]ere, a prosecution witness falsely testified that she had identified the defendant's nephew in a lineup as one of two people who shot at a group which included the victim, and the prosecutor failed to correct that testimony. As the People correctly concede, the error cannot be said to be harmless.") (citing, *inter alia Napue v. Illinois* and *Pelchat); People v. Lantigua*, 228 A.D.2d 213, 221–22 (1st Dept. 1996) ("When the witness responded that "I was probably nervous and I said 'we'. I was by myself", the prosecutor permitted the statement to remain on the record without informing the court that it was perjured. As the Court of Appeals noted in *People v. Pelchat*, [*supra*] 62 N.Y.2d at 105, the prosecutor 'is charged with the duty not only to seek convictions but also to see that justice is done.' It hardly advances the interest of justice for a prosecutor to use testimony she knows to be false to discredit the evidence given by defense witnesses during her summation."); and *People v. Figueroa*, 167 A.D.2d 101, 104 (1st Dept. 1990) ("Fundamental

fairness to the defendant required that the true facts be clearly and forcefully communicated to the jury to correct the false testimony. A conviction which is obtained based on evidence which is known to be false impairs a defendant's due process rights requiring a reversal of that conviction. The brief stipulation read to the jury did not fully and forcefully correct the testimony or convey to them the full impact of Berkman's admission that he was unable to see glassine envelopes and that his testimony in that regard was false. Since the conviction lies, at least in part, on Officer Berkman's reprehensible and false testimony, the error is so fundamental and substantial that the conviction should not be allowed to stand.") (citing *Pelchat*). *Cf. People v. Rose*, 307 A.D.2d 270, 271–72 (2d Dept. 2003) ("The prosecutor's conduct in advocating a position which he knew to be false was an abrogation of his responsibility as a prosecutor. A prosecutor is charged with the duty not only to seek convictions but also to see that justice is done and owes a duty of fair dealing to the accused and candor to the courts. Despite a request from the defense counsel, the prejudicial effect of the prosecutor's improper statement was not negated because the trial court did not give a curative instruction to the jury.") (citations and internal quotation marks omitted)

and *People v. Cotton*, 242 A.D.2d 638, 638 (2d Dept. 1997) ("The interest of justice is disserved when, as here, a prosecutor during summation advances a theory premised on a fact that he knows to be false in order to discredit the defendant's justification defense.").

It follows that, having abandoned the Evans charges based on her perjury, and owing to DiGaudio's likely compelling, though improper, influence on the remaining complainants, the integrity of the entire the Grand Jury proceeding was irreparably tainted. The indictment should be dismissed and the People should be required, upon a proper showing, CPL §190.75(3); *People v. Jones*, 206 A.D.2d 82, 85 (1st Dept.1994), *aff'd sub nom. People v. Franco*, 86 N.Y.2d 493 (1995), to seek authority from this Court to re-present the matter to another Grand Jury.

3. The Grand Jury Was Further Tainted If the People Presented Any Witnesses With Respect to Uncharged Offenses

In *People v. Winters*, 16 Misc. 3d 782 (Co. Ct. Onon. Co. 2007), *adhered to on reargument*, 17 Misc. 3d 488 (Co. Ct. Onon. Co. 2007), involving a charge of murder of her infant son, the defendant contended that the integrity of the proceedings had been impaired because the

Medical Examiner testified in the Grand Jury about the deaths of two of the defendant's other children. Noting that only the possibility of prejudice would warrant dismissal and that actual prejudice was not required to be shown, the court ruled, notwithstanding the good faith limiting instruction that the prosecutor had given to the grand jurors, that the impairing of the integrity of the proceeding had been irreparable. As explained:

> Putting aside the obvious prejudice that inured from the Grand Jurors being instructed that it could consider evidence of other crimes on the question of "her guilt," it is apparent from a full reading of the proceedings that the evidence of the homicides of the other two children was being offered to rebut illusory issues. All of the witnesses who testified concerning the two calls to the defendant's residence that preceded and culminated in the victim's death, testified that the defendant was alone with the victim. Thus, there was no factual issue being presented which suggested that some other individual was responsible for the death. Likewise, the manner in which the deaths of the first two siblings were caused, i.e. blunt head trauma and smoke inhalation from the house fire, and the opinion that the victim in the indictment was suffocated, presents no similarity in modus operandi which would illuminate the issue of whether the defendant was responsible for both occurrences. Similarly, no testimony was presented raising the issue that the defendant caused the death of the victim either negligently, recklessly, mistakenly or accidentally. Moreover, the Medical Examiner's testimony that the death of the other two siblings in the fire "corroborate and verify" that the victim's death was a homicide, clearly demonstrates that the evidence served no other purpose than

> to prove the defendant's propensity and predisposition to murder her children, the prosecutor's limiting instruction notwithstanding.

16 Misc. 3d at 787–88.

Under those circumstances it was held that "given the paucity of medical and scientific evidence concerning the cause of death of the victim, that the prejudice of this testimony vastly outweighed its probative value so as to have impaired the integrity of the Grand Jury proceeding requiring dismissal of the indictment." *Id,* at 789. *Cf. People v. Louissant*, 240 A.D.2d 433 (2d Dept. 1997) (where prosecutor extensively questioned the defendant in grand jury about a militant black group to which he did not belong, and which was unrelated to the charges, as well as with respect to the defendant's unrelated attendance at a gun show, court "agree[d] with the Supreme Court that such evidence, aimed at establishing a propensity for violence, exacerbated the effect of the improper hearsay testimony that the defendant, along with two of the other alleged perpetrators, was involved in the purchase of a handgun used in the shooting[,]" and that "[c]onsidering the weight and nature of the admissible proof against the defendant and the degree of prosecutorial misconduct, the likelihood of prejudice to the defendant is apparent, and

the indictment was properly dismissed." 240 A.D.2d at 433–34; *People v. Nash,* 64 A.D.3d 878, 882 (3rd Dept. 2009) (while noting that "the mere presentation to a single grand jury of evidence regarding two different alleged criminal transactions -- even though the offenses arising therefrom would not be joinable -- neither 'fails to conform to the requirements of [CPL article 190]' nor does it, without more, present an impairment of the integrity of the grand jury which may result in prejudice to the defendant...[,]" the court remanded the matter. In doing so, it explained that "[i]t is also necessary to determine whether there were any improprieties in the manner in which the two alleged criminal transactions were presented to the grand jury which may have impaired the grand jury's integrity and prejudiced defendant" [citations omitted].).

The defense has no way of knowing whether the prosecutor sought to present any such *Molineux* witnesses in the Grand Jury. Had she done so, however, because there would have been no basis beyond establishing propensity, it would have been highly improper. In such event, there could only have been further impairment of the integrity of

the Grand Jury proceeding, all to Mr. Weinstein's severe prejudice.[5]

Point II

The Evidence Before the Grand Jury Was Legally Insufficient to Support the Charge of Predatory Sexual Assault Under Count One Because the Previous Aggravating Offense Required Under That Statute Did Not Occur For Nearly Seven Years After the Underlying Crime Had Been Allegedly Committed

According to the People's theory of this case, the alleged offense involving CW-1 as the victim in **Count Four** is the aggravating factor in support of the charges of Predatory Sexual Act pursuant to PL §130.95(2) involving Mimi Haleyi in **Count One**. In turn, the alleged offense involving Mimi Haleyi in **Count Two** is theorized as the aggravating factor in support of the charge of Predatory Sexual Act involving CW-1 alleged in **Count Three**.

Specifically, the allegation in **Count One**, alleging Predatory

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[5] Notably, if the People file a *Molineux/Ventimiglia* motion, if the indictment is not dismissed, counsel intends to file as exhibits many hundreds of e-mails between many potential complainants and Mr Weinstein, all of which demonstrate, beyond cavil, that any sexual activity between these women and Mr. Weinstein was unquestionably consensual. Indeed, just like CW-1 in the alleged rape count already charged, intimate and endearing emails strongly suggest that any claim of a forcible sexual act against Mr. Weinstein by other women would be untruthful. Although technical approval of the Bankruptcy court will be required before these emails may be used by counsel, we have no doubt that approval will be given when faced with the prospect of a criminal case being adversely affected, given that such e-mails are exculpatory and demonstrate the falsity of any such claims.

Sexual Act, theorizes the **July 10, 2006** Crime of Criminal Sexual Act in the First Degree (PL §130.50[1]) against Haleyi, as aggravated by the **March 18, 2013** offense committed against CW-1, alleged **in Count Four**. At the same time, under **Count Three**, the **March 18, 2013,** Rape in the First Degree against CW-1 is said to be aggravated by the **July 10, 2006,** Criminal Sexual Act in the First Degree against Haleyi as alleged in **Count Two**. Based upon this inherently conflicted theory, the allegations in Count One are not supported by legally sufficient evidence.

In pertinent part, PL §130.95(2), as charged in Counts One and Three, provides:

> A person is guilty of predatory sexual assault *when* he or she commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, *and when*:***
>
> He or she *has engaged* in conduct constituting the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, against one or more additional persons.

Emphasis added.

It becomes readily apparent that the evidence supporting

Count One is legally insufficient. Surely, if PL §130.95(2), is to be read as requiring the aggravating act to have preceded the underlying substantive act, as specifically held in *People v. Hairston*, 35 Misc. 3d 830 (Sup. Ct. Kings Co. 2012),

> the *temporal implications* of the language of PL § 130.95(2) must be recognized when charging the crime. The section specifically requires that, *at the time of the underlying violent sexual offense*, the defendant "has engaged" in the conduct constituting the aggravating factor. *This means that the aggravating factor must precede the underlying offense.*

35 Misc. 3d at 838; emphasis added.

This interpretation is supported by the Third Department in *People v. Lancaster*, 143 A.D.3d 1046 (3rd Dept. 2016), *lv denied*, 28 N.Y.3d 1147 (2017), *recon. denied*, 29 N.Y.3d 999 (2017). There, declining to consider the unpreserved challenge to the statute on vagueness grounds, *but see* Point III, *infra*, the Appellate Division nevertheless addressed the construction of PL §130.95(2) by rejecting, on the merits, Lancaster's exception to the trial judge's instructions.

The trial judge had instructed the jury as follows:

> In other words, let me rephrase this for you, folks. The two elements of this crime, quite simply put as I can do it, are this: *Number 1,* first of all you have to have unanimously found the

defendant guilty beyond a reasonable doubt of either criminal sexual act in the first degree, rape in the first degree or aggravated sexual abuse in the first degree against one alleged victim. *Element Number 2*, that you have unanimously found the defendant guilty beyond a reasonable doubt of either rape in the first degree, criminal sexual act in the first degree or aggravated sexual abuse in the first degree as against a different, separate alleged victim." (A1095 line 14-1096 line 3).

Emphasis added.[6]

The claim of error raised by Lancaster on appeal was that

> the judge neglected to instruct the jurors "that the aggravating factor must precede the underlying offense." *People v Hairston,* 35 Misc3d 830 [Kings County 2012]. Accordingly, the "temporal implications" of the language of PL section 130.95(2) were not explained when charging the crime.

Id. at p. 14.

Specifically endorsing the same position, the Appellate Division embraced *Hairston's* "temporal implication" concept as having been satisfied by the trial judge. Thus, *Lancaster* held that, in properly instructing the jury,

> County Court specified that the jury first had to "[find] ... defendant guilty beyond a reasonable doubt of either criminal sexual act in the first degree, rape in the first degree or aggravated sexual abuse in the first degree against one alleged victim" and, second, *find defendant guilty* of one of those crimes

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[6] All materials from the *Lancaster* case herein quoted will be provided upon request.

against "a different, separate victim." County Court's

> instructions made clear that the jury had to preliminarily find defendant guilty of one of the enumerated crimes *before finding him guilty* of one of the same crimes against a separate, *subsequent victim,* thus addressing the inherent "temporal implications" of the predatory sexual assault statute.

143 A.D.3d at 1048; emphasis added.

Consequently, because *Lancaster,* an Appellate Division decision, adopted the "temporal implications" concept articulated in *Hairston,* it must be followed by this Court. *See People v. Turner*, 5 N.Y.3d 476, 482 (2005) (Mountain View Coach Lines v Storms, 102 AD2d 663, 664 (2d Dept.1984) (Titone, J.) ("The Appellate Division is a single State-wide court divided into departments for administrative convenience ... and, therefore, the doctrine of stare decisis requires trial courts [and the Appellate Term] in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or [the Appellate Division of this department] pronounces a contrary rule.")).

Logic and fundamental fairness also dictate that result. Indeed, if the alleged Predatory Sexual Assault charge in Count One against Mimi Haleyi is said to have occurred on **July 10, 2006,** how can it be possible that a crime committed on that earlier date can have been

aggravated by a crime that would not yet be committed against CW-1 until **March 18, 2013,** *almost seven years later*? Otherwise stated, how could Mr. Weinstein possibly have been a predator on the *earlier* date, as charged in Count One, when the very alleged act in aggravation which would elevate his offense is not claimed to have been committed until far into the future?

Notably, were the People's theory under Count One taken to its logical conclusion, it would mean that Mr. Weinstein could conceivably have been earlier tried, convicted, sentenced and incarcerated for the July 10, 2006 charge of Criminal Sexual Act in the First Degree against Mimi Haleyi. Then, seven years later, when the March 18, 2013, offense was allegedly committed, he could be retried for the July 10, 2006 charge, now aggravated by the later offense as a newly component element. The double jeopardy implications of such a scenario, both constitutionally and statutorily under CPL §40.20(2), would be staggering. *See People v. Gause*, 19 N.Y.3d 390, 394 (2012) ("At its core, double jeopardy precludes "the government from prosecuting a [defendant] for the same offense after an acquittal or a conviction; or from imposing multiple punishments for the

same offense in successive proceedings") (citing *Matter of Suarez* v. Byrne, 10 N.Y.3d 523, 532 (2008)). The fact remains that a defendant could not again be prosecuted based on the July 10, 2006 charge *as the underlying offense* "[b]ecause no charges from the original indictment remain unconsidered[.]" *Gause*, 19 N.Y.3d at 396.

In contrast, Count Three alleges that the commission of the Predatory Sexual Assault against CW-1 occurred on March 18, 2013. But there, the aggravating offense allegedly committed against CW2 is said to have occurred *earlier*, on July 10, 2006. Since that is indeed a previous offense that could be aggravated by the later charge, the dates involved -- at least facially, if not evidentially -- support the charge.

Finally, it should be noted again that if the court agrees that Count One must be dismissed for reasons cited in this Point, the entire indictment must be dismissed. To be sure, if the Grand Jury erroneously concluded that Mr. Weinstein was a Sexual Predator, as charged in Count One, it would simply not be possible for a Grand Jury to then have been dispassionate and fairly vote as to the other counts of the Indictment, even without the Evans perjury and the errors relating to the suppression

of exculpatory evidence.

In sum, no such finding could have been evidentially made by the Grand Jury with respect to Count One, as the aggravating act must precede the underlying act. Consequently, Count One, alleging Predatory Sexual Assault based on the earlier July 10, 2006 offense, with a March 18, 2013 aggravating offense, is bereft of legally sufficient evidence and must be dismissed.

Point III

If Read to Allow a Subsequent Act to Constitute the Aggravating Offense, Penal Law §130.95(2) Would Be Unconstitutionally Void for Vagueness by Failing to Give Proper Notice as to Whether the Aggravating Act Can Have Occurred Prior, Subsequent To, or Even Contemporaneous With, the Underlying Substantive Offense; Nor Would it Provide Sufficient Notice as to Whether the Aggravating Offense Needs to Have Resulted in a Conviction

Should the Court reject our claim that Count One is unsupported by legally sufficient evidence demonstrating a *previous* aggravating offense, PL §130.95(2) would be rendered unclear as to the precise conduct it was intended to cover. In such event, for reasons that follow, it would be unconstitutionally void for vagueness in violation of due process of law.

A. Controlling Principles of Due Process

As concerns what "at times has been called "the first essential of due process of law," *People v. New York Trap Rock Corp.*, 57 N.Y.2d 371, 378(1982) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)), it is well settled that a statutory enactment "may be impermissibly vague because it fails to establish standards for the police

and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Thus, "a prime purpose is to meet the constitutional requisite that a statute be informative on its face to assure that citizens can conform their conduct to the dictates of the law. To this end, nothing less than adequate warning of what the law requires will do." *New York Trap Rock Corp.*, 57 N.Y.2d at 378 (quoting *People v. Firth*, 3 N.Y.2d 472, 474 (1957); *People v. Illardo*, 48 N.Y.2d 408, 413(1979); and *People v. Cruz*, 48 N.Y.2d 419, 424(1979), *app. dsmd.* 446 U.S. 901 (1980)) (internal quotation marks omitted).

In such event "[v]agueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago*, *supra*, 527 U.S. at 56 (citing *Kolender*, 461 U.S., at 357).

Our Court of Appeals has similarly held. As recently reiterated in *People v. Stephens*, 28 N.Y.3d 307 (2016), The Court also analyzes a

> vagueness challenge using a two-part test. First, we must determine "whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden". Second, we must determine "whether the enactment provides officials with clear standards for enforcement" so as to avoid "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."Accordingly, a statute is "unconstitutionally vague under the Due Process Clauses of the Federal and State Constitutions [where] it fails to give fair notice to the ordinary citizen that the prohibited conduct is illegal, [and] it lacks minimal legislative guidelines, thereby permitting arbitrary enforcement."

28 N.Y.3d at 312 (quoting *People v. Stuart*, 100 N.Y.2d 412, 420 (2003) and citing *People v. Nelson*, 69 N.Y.2d 302, 307 (1987); *People v. Smith*, 44 N.Y.2d 613, 618 (1978); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972); and *People v. Bright*, 71 N.Y.2d 376, 379 (1988) [holding that the loitering statute under former PL §240.35(7) was "unconstitutionally vague, since it provides absolutely no legislative 'guidelines governing the determination as to whether a person is engaged in suspicious loitering' in places of unrestricted public access." 71 N.Y.2d at 387 (quoting *People v. Berck*, 32 N.Y.2d 567, 571 (1973)]).

Simply stated, to pass constitutional muster under vagueness analysis, there exists "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358. So understood, where women and "men of common intelligence must necessarily guess at its meaning[,]" *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973), a statute that lends itself to sharply competing interpretations is hard-pressed to survive such vagueness analysis. For, "[a]s common sense and experience both tell us, unless by its terms a law is clear and positive, it leaves virtually unfettered discretion in the hands of law enforcement officials." *New York Trap Rock Corp.*, *supra*, 57 N.Y.2d at 378–79 (citing *Illardo*, *supra*, 48 N.Y.2d at 413- 414) (footnote omitted).

In the final analysis, as the Court of Appeals explained upon addressing the second requirement -- *viz.*, that "a penal law not permit arbitrary or discriminatory enforcement is, perhaps, the more important aspect of the vagueness doctrine[,]" *Bright*, 71 N.Y.2d at 383 (citing *Kolender,* 461 U.S. at 358),

> [t]he absence of objective standards to guide those enforcing the laws permits the police to make arrests based upon their own personal, subjective idea of right and wrong. A vague statute "confers on police a virtually unrestrained power to

arrest and charge persons with a violation", and "furnishes a

> convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' "

Bright, 71 N.Y.2d at 383 (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) [Powell, J., concurring]) and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972), *quoting Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940)).

B. If The Aggravating Offense is Read By This Court to Encompass a Prescribed Sex Offense Occurring *Subsequent* to the Underlying Offense, Thereby Salvaging Count One, Penal Law §130.95(2) is Unconstitutionally Void for Vagueness

As earlier recalled, Penal Law §130.95(2), as charged in Counts One and Three, provides as follows:

> A person is guilty of predatory sexual assault *when* he or she commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, *and when*:***
>
> He or she *has engaged* in conduct constituting the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, against one or more additional persons.

Emphasis added.

There is sparse case law discussing this statute. In *People v. Hairston, supra*, the *nisi prius* court advised that "this court's research confirms, Penal Law § 130.95 is a relatively new statute for which there exists little or no legislative history or commentary (see generally, Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 130.00 at 91 [2009 ed.])." 35 Misc. 3d at 836.[7] Noting that "defendant concedes that PL §130.95(2) is intended to apply to *past conduct* and *requires no convictions*," 35 Misc. 3d at 835, the court emphasized that

> the *temporal implications* of the language of PL § 130.95(2) must be recognized when charging the crime. The section specifically requires that, *at the time of the underlying violent sexual offense*, the defendant "has engaged" in the conduct constituting the aggravating factor. *This means that the aggravating factor must precede the underlying offense.* Consequently, the People correctly dismissed Counts One through Four of the indictment, due to the fact that the *May 14, 2011* offenses could not act as the aggravating factors for the underlying offenses that took place on *May 2, 2011.* However, nothing in the plain language of the statute prevents the People from charging defendant with Predatory Sexual Assault where the underlying violent sexual offenses took

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[7]*See also People v. Singh*, 36 Misc. 3d 910, 913 (Sup. Ct. 2012), *aff'd*, 147 A.D.3d 787 (2d Dept. 2017), *lv denied.* 29 N.Y.3d 1037 (2017), where the same Justice addressed subd. (3) of PL §130.95.

place on *May 14, 2011* and the offenses constituting the aggravating factors took place on *May 2, 2011*.

35 Misc. 3d at 838 (emphasis added).

This is certainly a reasonable interpretation of what presents as a recidivist statute. On the other hand, a problem might arise when subd. (3) of §130.95 is contrasted. There, the Legislature provided for culpability for Predatory Sexual Assault where a defendant

> has *previously* been subjected to *a conviction* for a felony defined in this article, incest as defined in section 255.25 of this chapter or use of a child in a sexual performance as defined in section 263.05 of this chapter.

Penal Law § 130.95 (3) (emphasis added).

To be sure, where the Legislature wanted to specify that "previous" conduct needed to have resulted in a "conviction," it did not hesitate to do so in stark terminology. Hence, given the maxim of statutory construction known as "*expressio unius est exclusio alterius*," "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *People v. Smith*, 139 A.D.3d 131, 135–36 (1st Dept. 2016), *lv denied*, 28 N.Y.3d 1031 (2016) (*citing People v Jackson*, 87 N.Y.2d 782, 788 (1996)). *See also Patrolmen's Benev. Ass'n of*

City of New York v. City of New York, 41 N.Y.2d 205, 208–09 (1976) ("where as here the statute describes the particular situations in which it is to apply, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' (McKinney's Cons.Laws of N.Y., Book 1, Statutes, s 240)."). On such premise, the fact that the terms "previous" and "conviction," while included in subd. (3), are omitted from subd. (2), perhaps raises questions concerning the legislative intent as to the latter. *See also* Penal Law § 70.04(1)(b)(ii) ("sentence upon such prior conviction must have been imposed before commission of the present felony).

But, as noted in Point II, *ante*, for our purposes, such questions are allayed by the decision of the Third Department in *People v. Lancaster, supra.* It is clear, therefore, that the language in *Hairston*, holding that "[t]his means that the aggravating factor must precede the underlying offense[,]" was adopted by a Department of the Appellate Division. As earlier argued, given that *Lancaster* is binding on this Court, *People v. Turner, supra,* 5 N.Y.3d 476, 482, this view requires that

dismissal of Count One which contemplates an aggravating offense that allegedly occurred *subsequent* to the underlying alleged act,

In support of Count One, however, the People might misapprhend somewhat misleading language utilized by the *Lancaster* court in characterizing the aggravating act as alleged by a "subsequent victim." Obviously, by using that terminology, the court only meant that the jury was *to consider* the allegation of the previous victim as constituting an aggravating act, *subsequent* to its initial consideration of the later, underlying, recidivist offense. In fact, that is what both trial judges in *Hairston* and *Lancaster* had instructed.

So understood, the term "subsequent" applies to the *order* of the jury's *consideration* of the earlier, aggravating offense, not to the "temporal implication" of such aggravating act *vis a vis* the underlying offense. Were this court to sustain Count One, therefore, with its *subsequent* alleged aggravating act, and thereby to allow Penal Law §130.95(2) to be read in a way obviously not intended by the Legislature, it would only invite an alternative interpretation of the statute that raises serious notions of fair notice and due process.

Moreover, the indictment in *Lancaster* certainly fails to support any such reading. Given the allegations in Count Nine therein, it is apparent that both components of the Predatory Sexual Assault charge in *Lancaster* -- alleged to encompass the underlying crime *and* five aggravating offenses -- were committed over the 4½ year time frame of "on or about the summer of 2007 through on or about January 18, 2012." Yet, the indictment does not delineate which dates applied to the underlying offense and which contemplated the aggravating offenses.[8] So, given the

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[8] The Ninth Count in *Lancaster*, reads as follows"

THE GRAND JURY OF THE COUNTY OF BROOME, by this Indictment, accuse the above defendant, THOMAS J. LANCASTER, of the crime of PREDATORY SEXUAL ASSAULT, in violation of Section 130.95, subdivision 2, of the Penal Law of the State of New York, a Class A-II Felony, committed as follows:

That the said defendant, THOMAS J. LANCASTER, in the County of Broome and State of New York, between on or about the Summer of 2007 through on or about January 18, 2012, committed the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, and did so against two or more persons, to wit: during the aforementioned time period and place, said defendant, being over eighteen years of age, did against two or more persons:

(1) commit the crime of Criminal Sexual Act in the First Degree against a female ____________ as alleged *in* count one of the indictment; and/or

(continued...)

Appellate Division's use of the term "subsequent victim" in sustaining the trial judge's instructions by adopting the "temporal implications" language of *Hairston,* it is far easier to read *Lancaster* as supporting the "previous" act holding in *Hairston.* Certainly, the *Lancaster* indictment, by not specifying which dates support the underlying offense and the aggravating offense, does not suggest the contrary.[9]

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[8](...continued)

(2) commit the same crime against another female_______ as alleged in count two of the indictment or commit the same crime against the same female_____________as alleged in count three of the indictment; and/or

(3) commit the crime of Rape *in* the First Degree against another female_______ as alleged in count four of the indictment; and/or

(4) commit the same crime against another female_______ as alleged in count five of the indictment or commit the crime of Aggravated Sexual Abuse in the First Degree against the same female______ as alleged in count six of the indictment; and/or

(5) commit the same crime against another female_______ as alleged in count seven of the indictment or commit the same crime against the same female______________ as alleged in count eight of the indictment, all contrary to the provisions of the statute in such case made and provided.

[9] We do acknowledge that there is a modicum of confusion which is fostered by the precise statutory construction. After all, subd. (3), unlike subd. (2) specifically requires the defendant to have been "previously subject to a conviction." Thus, again, under the *expressio unius est exclusio alterius* rule of statutory construction, the fact that such term was purposely omitted certainly gives pause as to whether it should be applied to subd. (2), thereby requiring a finding of guilt as to the aggravating offense as well. On the other hand, to the extent that *Lancaster* requires a previous finding of guilt, which in turn, entails a determination beyond a (continued...)

Were the court to sustain Count One, however, we would be faced with a statute that lends itself to differing interpretations. And were such ambiguity to be ascribed, the statute would be rendered not "sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden and fails to provide[] officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *People v. Stephens, supra* 28 N.Y.3d at 312. As a consequence, the statutory construction of Penal Law § 130.95(2), unlike subds. (1) and (3), would "provide[] absolutely no legislative 'guidelines governing the determination as to whether...[it has been violated]" *Bright*, 71 N.Y.2d at 387 (quoting *People v. Berck*, 32 N.Y.2d at 571) (internal quotation marks omitted).

Significantly, a review of the New York pattern jury instructions offers no support for an interpretation that would uphold Count One, with its later alleged commission of an aggravating act.

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[9](...continued)
reasonable doubt of the aggravating offense, *In re Winship*, 397 U.S. 358 (1970), some ambiguity is presented. That, however, does not at all impact on our claim that Count One is evidentially unsupported, given the controlling reality that the aggravating act is alleged to have occurred subsequent to the underlying offense.

Although there are pattern instructions for subd. (1)(a) and (b), there is no provision regarding subd. (2). *But see* Donnino, Practice Commentary, N.Y. Penal Law §130.00 (McKinney) (" Whether each must be subject to the same type of sexual offense and whether the conduct against each must be as part of the same criminal transaction, remains to be determined by the courts."

In sum, were this Court to ignore *Hairston* and *Lancaster*, and thereby uphold Count One, the result would be two conflicting interpretations of the statute, along with the already problematic two inconsistent subdivisions in PL §130.95 (2) and (3). The result is that women and "men of common intelligence must necessarily guess at its meaning[,]" *Broadrick v. Oklahoma, supra*, 413 U.S. at 607.

We would be left with this *nisi prius* court holding that the aggravating offense may have been committed *subsequent* to the charged crime, in contrast to the presently controlling holding of an appellate court (and the coordinate ruling of another *nisi prius* court) that the aggravating offense must be committed *previous* to the underlying offense. As a consequence, Penal Law §130.95(2) would be rendered

"impermissibly vague because it would fail to establish unambiguous standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, *supra*, 527 U.S. at 52 (citing *Kolender v. Lawson*, *supra*, 461 U.S. at 358).

In sum, any upholding of Count One on sufficiency grounds, with its alleged *subsequent* aggravating act, would cause Penal Law §130.95 to violate due process. Ironically, such a result would necessitate, not just the dismissal of Count Three in the alternative on sufficiency grounds (as alleging a previous aggravating crime), but the ineluctable dismissal of *both* Counts One and Three on *constitutional grounds*, as predicated on a statute that is void for vagueness.

C. The Fact That the Grand Jury Was Also not Informed That Mimi Haleyi Had Also Reached out by Text to Try and Meet with Mr Weinstein "After" the Date of the Alleged Assault Further Undermines the Integrity of the Grand Jury Proceedings by Highlighting the Absurdity of the Charges Against the Defendant.

We must also assume that a careful investigation would have inquired of Ms. Haleyi whether she, like CW-1, had also attempted to contact Mr. Weinstein "after" the date of the alleged assault. Certainly, a lawyer as experienced as Gloria Allred would have made such inquiry of

her own client, especially after learning that the alleged victim of the rape counts had hundreds of email exchanges with Mr. Weinstein for years after the date of the alleged rape.

Indeed, if Det. DiGaudio, the District Attorney and even Ms. Allred had done their jobs by conducting thorough investigations, yet kept this message from the Grand Jury, then the integrity of Ms. Haleyi's claim is greatly undermined. Their combined misconduct, therefore, further undermined the integrity of the Grand Jury's efforts.

Accordingly of the three "victims" in the Indictment, one (Evans) perjured herself in the Grand Jury. As to the remaining two, the Grand Jury was not provided with personal emails/texts from either of them, both of whom had the temerity to reach out to Defendant and try to engage him in social relationships -- "after" they now claim he viciously sexually assaulted them. The sheer hypocrisy of the Indictment is simply stunning.

Point IV

If the Superseding Indictment is Not Dismissed Outright on the Law, the Court Should Conduct an Evidentiary Hearing in Order to Determine the Extent of Prosecutorial Misconduct, either on the Part of the Case Detective, the District Attorney or Both

As demonstrated in the accompanying affirmation and the motion to unseal the District Attorney's letter regarding the perjury of Lucia Evans, the ADA alleges that Nicholas DiGaudio, the lead investigating detective, took affirmative efforts to conceal the witness's highly exculpatory information from her.[10] Further, the ADA alleges that DiGaudio made his outrageous "less is more" admonition to the witness.

Because it is certainly plausible that DiGaudio's own grand jury testimony, had he testified, was at best misleading and, at worst, perjurious, the integrity of the proceeding would have been further impaired, all to Defendant's severe prejudice. *People v. Huston, supra.*

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[10] Again, even if DiGaudio had concealed the entire conversation from prosecutors, the ADA is still chargeable with the knowledge thereof as a matter of law. *See People v. McLaurin, supra,* 38 N.Y.2d at 126 ("Knowledge on the part of the police department would, of course, be imputed to the District Attorney's office. A defendant ought not be penalized because of any inadequacy of internal communication within the law enforcement establishment.") (citing *Santobello v. New York, supra,* 404 U.S. at 259- 260).

This would certainly be the case if the testimony of any of the respective complainants was thereby compromised and influenced in any way by their conversations with DiGaudio, which can only be determined by an evidentiary hearing.

Moreover, according to an article in the New York Post, published on October 15, 2018,

> DiGaudio claims that he personally told special counsel Joan Illuzzi-Orbon, who is leading DA Cyrus Vance Jr.'s prosecution, about the evidence against Weinstein accuser Lucia Evans — and that a fellow cop was present during the conversation, law-enforcement sources said.

Exhibit 2.

Obviously, were this claim to be established at an evidentiary hearing on the issue of potential prosecutorial misconduct in the grand jury -- and the defense certainly has no knowledge, at present, whether there is any validity to this claim -- it would compel a finding that the ADA may have *actually,* rather than only constructively, withheld highly exculpatory evidence. As further discussed, *ante*, such would certainly have impaired the integrity of the entire proceeding.

Any such impairment of the proceeding would only have been exacerbated by the ADA's implicit admission that she had withheld from the grand jury all the highly exculpatory emails addressed in Defendant's original motion to dismiss, as pertaining to the allegations of CW-1. Indeed, rather than claiming that such emails had simply not been in her actual or constructive possession at the time of the presentation (which would have admittedly satisfied *People v. Mitchell*, 82 N.Y.2d 509 [1993]), the ADA elected to argue, in response to Defendant's motion, that she has no such obligation. Rather, she maintained that,

> [m]ost importantly, a review of the Grand jury minutes in this case will reveal, the People presented evidence fairly and in a manner that was not misleading by providing a full and fair account of the relationship between defendant and the victim both before and after the charged rape. Defendant's motion to dismiss on this. ground is without legal or factual support, and should be denied.

People's affirmation in response at p. 5.

If it is demonstrated at such evidentiary hearing -- which the Court should now conduct, in the alternative, if the indictment is not dismissed outright -- that the allegations by the lead detective in this case in the recent New York Post article are true, not only would it be

established that the ADA has deceived the Court, but it would be further evident that she had purposely withheld highly exculpatory evidence from the grand jury.[11] Such a finding, in furtherance of which the testimony of both DiGaudio and the claimed additional police officer will also be necessitated, would likewise impair the integrity of the grand jury proceeding in its entirety, all resulting in prejudice to Mr. Weinstein.

Accordingly, for the reasons earlier stated, if the indictment is not dismissed on the law pursuant to the defense motions, an evidentiary hearing should be conducted in furtherance of dismissing the entire indictment. Moreover, because such a hearing must be conducted in order to determine whether the dismissal of the indictment is warranted owing to the impairment of the integrity of the grand jury proceeding, the ADA cannot represent the People at such proceeding. The fact is that DiGaudio's explicit counter-claim now makes the ADA a material witness at any such evidentiary hearing on the issue of possible prosecutorial or

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[11] We must emphasize, however, that to date, and in all counsels' extensive dealings with ADA Illuzi-Orbon over many years, we have only maintained the highest regard and respect for what we believe to be the forthright manner in which she, and all her colleagues, have always dealt with us. The allegations by Det. DiGaudio have been made and widely published, however, and it is our professional responsibility, in properly representing our client, to ensure that they be fully evaluated.

police misconduct in the investigation and presentation to the Grand Jury in this case. On such premise, contrary to the result reached in *People v. Paperno*, "[i]f the prosecutor will be called as a witness for the People, to testify to a disputed material issue, [s]he should be disqualified from trying the case. Similarly, if it appears that the court will allow the defense to call the prosecutor as a witness, and that the prosecutor will testify adversely to the People, the prosecutor should be disqualified." 54 N.Y.2d 294, 300 (1981).

Point V

The Pervasive Falsity and Professional Misconduct in and Around the Grand Jury, Attributable to the Police, the District Attorney and the Complainants, Completely Destroyed the Character of That Body as a Grand Jury; Accordingly, Indictment Was Invalid, Thereby Depriving the Court of Jurisdiction, in Violation of the Grand Jury Clause under Article I, Section 6 of the of the New York Constitution

Defendant's arguments for dismissal of the indictment pursuant to the Criminal Procedure Law are compelling. *See* Point I(C)(1) - (3), *supra.* The Grand Jury presentation in this case included police tampering with, and coaching Grand Jury witnesses to lie; Grand Jury witnesses lying under oath; the suppression of exculpatory evidence by the police or prosecutor or both; the prosecutor, who is the Grand Jury's only legal advisor, possibly kept in the dark by the police; the finger-pointing between police investigators and the prosecutor; and the general chaos in the grand jury caused by this egregious multitude of acts of misconduct. Individually, and certainly collectively, the forgoing misconduct surely satisfies the Criminal Procedure Law's Grand Jury "integrity" requirement -- *i.e.*, whether the Grand Jury proceeding "fails to conform to the requirements of article one hundred ninety to such a

degree that the integrity thereof is impaired and prejudice to the defendant *may* result." CPL §210.35(5) (emphasis added).

But this extraordinary presentation goes much further. Here, given the public and official pressure in this tabloid-obsessed city, all brought to bear upon the District Attorney to prosecute Defendant, in addition to the provisions of the Criminal Procedure Law, the overall misconduct in the Grand Jury, and the profoundly compromised proceeding described herein, there arise serious implications under the New York State Constitution's Grand Jury Clause. *See* Art. I, §6 ("no person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury"). And since New York's Grand Jury clause is nearly identical to the Fifth Amendment's Grand Jury clause (U.S. Const., Amendment V), cases interpreting the Fifth Amendment are generally viewed as relevant to the interpretation of New York's constitutional analog. *See Matter of Nassau County Grand Jury Subpoena,* 4 N.Y.3d 665, 674 (2005) ("If the language of the State Constitution differs from that of its Federal counterpart, then the court

may conclude that there is a basis for a different interpretation in it" [quoting *People v. P.J. Video, Inc.* 68 N.Y.2d 296, 302 (1986)]).

Importantly, in the context of the Grand Jury clause in particular, New York courts have been more protective of defendants' rights than have been the federal courts. *See, e.g., People v. Wilkins,* 68 N.Y.2d 269 n. 7 (1986) (*rejecting* the rule of *United States v. Mechanik*, 475 U.S. 66 (1986), that conviction after fair trial renders a defect in the Grand Jury harmless error).[12] Indeed, an analog of New York's Grand Jury Clause was adopted in 1787, two years before the adoption of the Fifth Amendment, and the N.Y. Constitution's present Grand Jury Clause

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[12] For example, although *Mechanic* does not recognize reversible error based on grand jury defects following a jury verdict of guilt, *Wilkins* noted that certain grand jury defects are still cognizable in New York on appeal, even following a plea of guilty. 68 N.Y.2d at 277, n. 7, with the Court thereafter noting in *People v. Hansen*, 95 N.Y.2d 227, 233 (2000), however, that owing to *Wilkins'* reference to *People v. Dunbar*, 53 N.Y.2d 868 (1981), such was "limited to review of a defect alleged to be of a jurisdictional nature: whether a nonresident Special Assistant District Attorney had authority to present a matter to a Grand Jury (*People v. Dunbar*, *supra*, at 871). Jurisdictional matters, of course, do survive the entry of a guilty plea." On the other hand, to be sure, federal cases following *Midland*, where the rule is far stricter, few cases have resulted in dismissed charges on this ground. *See e.g. United States v. Wright*, 776 F.3d 134, 144–45 (3d Cir. 2015) ("Since *Midland Asphalt* was decided, very few federal appellate courts have identified allegations of grand-jury error giving rise to interlocutory jurisdiction"). But, as noted, the New York analogue Grand Jury clause is far less forgiving.

language was included in the state's 1821 Constitution, almost 200 years ago. So the Clause has a long and honored history.

The result is that such a compounding of violations of New York's Grand Jury clause, as in this case, amounts, in sum, to a defect of such extraordinary proportions as to deprive the Court of jurisdiction over the criminal matter. *See People v. Zanghi,* 79 N.Y.2d 815 (1991) ("an infringement of defendant's right to be prosecuted only by indictment implicates the jurisdiction of the court"); *People ex rel. Battista v. Christian*, 249 N.Y. 314, 318 (1928) (the constitutional grand jury requirement is a "public fundamental right" which is "requisite to jurisdiction").

No doubt, a New York felony defendant such as Mr. Weinstein has a state constitutional right to be tried only upon an accusatory instrument returned by a Grand Jury. But, if the charging body is not properly constituted, or there is absent a properly functioning Grand Jury, the charging document it returns is not a real indictment. As Justice Scalia wrote for a unanimous Court, interpreting the Fifth Amendment's Grand Jury Clause, a defendant has a right not to be tried on an indictment returned by a grand jury suffering from a defect "so fundamental that it causes the grand jury no longer to be a grand jury or the indictment no longer to be an indictment." *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 802 (1989). A defendant's right to be tried only upon an

indictment returned by a Grand Jury, therefore, "is recognized as not merely a personal privilege of the defendant, but a 'public fundamental right,' which is *the basis of jurisdiction to try and punish an individual.*" *People v. Boston,* 75 N.Y.2d 585, 587 (1990) (emphasis added).

Since Grand Juries and indictments returned by Grand Juries, are ancient institutions in this country, and under English common law, *People v. Huston*, 88 N.Y.2d 400, 401, 405 (1996), Justice Scalia's formulation — a defect so fundamental that its causes the Grand Jury to no longer be a Grand Jury — must have contemplated the existence of a Grand Jury that looked like a regular grand jury, but suffered from a basic defect that prevented it from carrying out its noble and time-honored purpose of serving as a "buffer between the state and its citizens." *Huston* at 405.

Such a "jurisdictional" defect, *see Hansen, supra,* is the situation this case presents -- *i.e.*, a seemingly regular Grand Jury prevented from carrying out its important responsibilities by the duplicity of the People, its agents and witnesses. This is *not* a case of isolated misconduct, or that contemplated in *United States v. Wright* , *supra,* suck has the violation of grand jury secrecy at issue in *Midland Asphalt.* Rather, it is a pervasive, deep-seated subversion of the Grand Jury's historic role.

In view of Defendant's foregoing, accurate description of the hollowed out nature of the Grand Jury proceeding in this case, its integrity was not merely "impaired" within the meaning of the Criminal Procedure Law. Far worse, the body itself was not what it appeared to be, and consequently was incapable of carrying out its constitutional function -- i.e., fairly determining whether to indict and for what crimes. In other words, the Grand Jury here was exactly the kind of body that Justice Scalia had in mind in *Midland Asphalt* which warrants immediate relief because it implicates the defendant's right "not to be tried" which is "requisite to jurisdiction." *Battista,* 249 N.Y. at 318.

Just as a defendant cannot be forced to trial on an indictment returned by a Grand Jury regular in all respects if the trial would violate the defendant's double jeopardy or immunity rights, *Midland Asphalt*, 489 U.S. at 801 (right not be tried in violation of Double Jeopardy Clause), neither can this indictment, returned by a Grand Jury destroyed by the People's duplicity and mendacity, be the vehicle for prosecuting Mr. Weinstein and remain consistent with New York's constitutional Grand Jury Clause. On this ground, as well, given its wholly jurisdictional predicate, *Hansen, supra,* therefore, the indictment must be dismissed.

Conclusion

The Motion Should Be Granted in All Respects, and the Indictment, in its Entirety, Should Be Dismissed; Alternatively, the Court Should Conduct the Requested Evidentiary Hearing; In Either Event, Count One Must be Dismissed and the Additionally Requested *Brady* Material, Along With the Grand Jury Testimony of Detective DiGaudio, CW-1 and Haleyi Should Be Ordered Disclosed to the Defense

Dated: New York, New York
November 5, 2018

Respectfully submitted,

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MARK M. BAKER
JACOB KAPLAN
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EXHIBIT 1

DISTRICT ATTORNEY
COUNTY OF NEW YORK
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(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

September 12, 2018

Benjamin Brafman, Esq.
Brafman & Associates, P.C.
767 Third Avenue
New York, NY 10017

Re: People v. Harvey Weinstein
Indictment #: 02335/2018

Dear Mr. Brafman:

In connection with the above-captioned case, the People disclose the following information pursuant to our obligations under Criminal Procedure Law 240.20, as well as Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and their doctrinal progeny. The following facts relate to the allegations in Count Six of the above-captioned indictment. As is described more fully below, a third-party witness (the "Witness") has recently described to the People an account by the complainant in Count Six of the Indictment (the "Complainant") that is at odds with the factual account the Complainant previously provided to our Office. The People have recently learned that this account was earlier provided by the Witness to a detective of the New York City Police Department (the " Detective"), who failed to inform our office of important aspects of the account prior to the indictment in this case.

The Witness' Account

In December 2017, during an early stage of the investigation of this matter, the Complainant stated to the Detective and to attorneys in this Office that, at the time she first met the defendant at a restaurant in Manhattan in the summer of 2004, she was accompanied by the Witness, who was a friend of hers.[*] The Detective later interviewed the Witness by telephone on February 2, 2018, and thereafter reported on various occasions to the attorneys in this Office that he had spoken by phone to the Witness (along with her attorney); that she was reluctant to cooperate; that she was difficult to reach; and that the Detective would attempt to conduct an in-person interview.

[*] The identities of the Witness and the Detective are being contemporaneously provided to defense counsel in a separate letter.

On August 14, 2018, attorneys from this Office arranged to speak by telephone to the Witness, after the Complainant informed our Office that the Witness recalled being told by the Complainant about the incident at issue in Count Six of the Indictment. In that telephone call, and in a follow-up in-person meeting on August 29, 2018, the Witness, in the presence of her attorney, related to our Office the following, in substance:

- The Witness was present with the Complainant in the summer of 2004 in the bar of a Manhattan restaurant when the Complainant was first approached by the defendant.
- According to the Witness, the defendant offered that evening to give the Complainant and the Witness cash if they exposed their breasts to him.
- According to the Witness, she refused to do so, and she never saw the Complainant do so.
- According to the Witness, the Complainant nonetheless later told her, as they walked home from the restaurant that evening, that the Complainant had exposed her breasts to the defendant in a hallway of the restaurant that evening.
- According to the Witness, sometime later that summer or the following summer, the Complainant told the Witness that, sometime after the evening in the restaurant, the Complainant had gone to the defendant's office, where the Defendant told her, in substance, that he would arrange for the Complainant to receive an acting job if she agreed to perform oral sex upon him. According to the Witness, the Complainant told her that she thereupon performed oral sex on the defendant.
- According to the Witness, at the time of this discussion about the incident, the Witness and the Complainant had been drinking, and the Complainant appeared to be upset, embarrassed and shaking. According to the Witness, the Witness' memory about the exchange is imperfect, but has been consistent over time.

During the discussions with the Witness and her attorney about these issues in August 2018, the Witness and her attorney told the lawyers in our Office that the Witness described the above recollections to the Detective in his call with her and the attorney on February 2, 2018. The Witness and her attorney stated the following, in substance:

- The Witness related to the Detective on February 2, 2018 her account of how the defendant had asked her and the Complainant to expose their breasts, and how the Complainant had, later that evening, told the Witness that she had exposed her breasts to the defendant in the restaurant.
- The Witness related to the Detective on February 2, 2018 her account of how the Complainant had, sometime later, stated that the defendant had offered her employment in exchange for oral sex, and that the Complainant thereupon had performed oral sex on the defendant.

- The Witness related to the Detective on February 2, 2018 that, sometime prior to that date, she had been contacted by a 'fact checker' from the New Yorker magazine to confirm the Complainant's account of the sexual assault in the defendant's office in 2004. According to the Witness and her attorney, she told the Detective that, in her discussion with the magazine, she decided not to relate the Complainant's statements about exposing her breasts, or the circumstances under which she had performed oral sex on the defendant. Instead, according to the Witness, she told the magazine that "something inappropriate happened."

- According to the Witness and her attorney, the response from the Detective on February 2, 2018 was, in substance, that the explanation the Witness had provided to the magazine was more consistent with the account the Complainant had earlier provided the magazine; that, going forward, "less is more;" and that the Witness had no obligation to cooperate.

<u>The Complainant's Response to the Witness' Account</u>

Our office again interviewed the Complainant, in the presence of her attorney, on August 27, 2018. In that interview, the Complainant stated that, contrary to the Witness' account:

- The Complainant was never at any time asked to expose her breasts to the defendant, she never did so, and she never advised the Witness otherwise.

- After the evening at the restaurant, the Witness was so intoxicated that she was put into a taxi home, and the Complainant never had a discussion with the Witness as they walked home together that night.

- The Complainant never consented to any form of sex with the defendant.

- The Complainant does not recall describing to the Witness the incident that is the subject of Count Six in the indictment.

- With respect to the Detective's February 2, 2018 telephone interview of the Witness, the Complainant stated that, shortly after that interview, the Detective called the Complainant's attorney to share the Witness' account of the 'breast exposure' incident and the circumstances surrounding the sexual encounter with the defendant. According to the Complainant, she denied both accounts at the time.

<u>The Detective's Explanation</u>

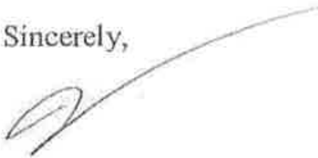
Our Office also conducted recent interviews of the Detective about the foregoing subjects. In those interviews, the Detective acknowledged that he spoke by phone to the Witness and her attorney on or about February 2, 2018. According to the Detective, in that discussion, the Witness provided the account of the facts attributed to her above. The Detective said that he thereafter failed to inform our Office of the important details of that discussion. The Detective also denied making the above statements attributed to him by the Witness and her attorney.

Disclosure of Draft Email

The People have recently obtained a draft email that the Complainant wrote to her husband (then her fiancé) in 2015, which recounts the incident that is the subject of Count Six of the Indictment. The account describes details of the sexual assault that differ from the account the Complainant has provided to our office. The Complainant has told our office that the inconsistencies may be the product of a flawed memory. The Complainant has also told our office that she permitted her husband to read the email sometime after it was drafted. The Complainant had previously told investigators in this case that she never disclosed to her husband the details of the sexual assault at issue.

Our office's review of the above facts is ongoing. Any additional disclosures will be made promptly to defense counsel and the Court.

Sincerely,



Joan Illuzzi-Orbon
Special Counsel to the District Attorney

EXHIBIT 2

Booted Weinstein cop insists he didn't withhold any evidence

By Larry Celona, Rebecca Rosenberg and Bruce Golding

The sex-assault case against Harvey Weinstein is in worse shape than the Manhattan District Attorney's Office has let on — because the cop accused of covering up evidence damaging to the prosecution claims he actually told the lead prosecutor about the problem, The Post has learned.

NYPD Detective Nicholas DiGaudio was booted off the Weinstein case over allegations by the DA's Office that he withheld information that discredited one of the disgraced movie mogul's accusers, which last week led to dismissal of a key felony charge against Weinstein.

But DiGaudio claims that he personally told special counsel Joan Illuzzi-Orbon, who is leading DA Cyrus Vance Jr.'s prosecution, about the evidence against Weinstein accuser Lucia Evans — and that a fellow cop was present during the conversation, law-enforcement sources said.

In addition, The Post has learned that Illuzzi-Orbon's No. 2 on the case quietly quit and took a new job late last month, shortly after the DA's Office secretly disclosed its allegations against DiGaudio to the defense.

A law-enforcement source said that last week's decision to drop the third of the case pertaining to Evans — who said Weinstein forced himself on her in 2014 — coupled with DiGaudio being taken off the case "causes very serious problems" for the DA's Office.

Evans was considered the strongest of Weinstein's three accusers because she didn't have a lengthy history with him, the source said.

In court last week, the defense said it would seek dismissal of the entire case because DiGaudio — who was the lead investigator — "attempted to influence the integrity of these proceedings."

In a Sept. 12 letter, Illuzzi-Orbon told defense lawyers that DiGaudio had admittedly "failed to inform our Office of the important details" from his Feb. 2 interview of a friend of Evans.

The unidentified friend later revealed to prosecutors that Evans confided that she performed oral sex on Weinstein after he offered her an acting job — and that Evans previously exposed her breasts to Weinstein inside a Manhattan restaurant, the letter says.

Law-enforcement sources said DiGaudio claims his version of events — that he told Illuzzi-Orbon about the witness' statements — can be corroborated by another cop who was present.

When told of DiGaudio's assertions, Weinstein defense lawyer Benjamin Brafman said, "I would be even more upset if I were to learn that DiGaudio told the DA about this information at or about the time he received it."

The new details about DiGaudio's claims came in the wake of a Friday statement by the head of his union, Michael Palladino, who said that DiGaudio "disclosed all the information in question to the District Attorney."

"Whether the information was forgotten or ignored, we do not know," added Palladino, president of the Detectives' Endowment Association.

But Danny Frost, a spokesman for Vance, said, "We stand by our disclosure. The Detective has conceded to multiple prosecutors on multiple occasions that he failed to recount these critical facts to our Office."

Meanwhile, the DA's Office on Sunday confirmed that ADA Rachel Hochhauser, who was the "second chair" prosecutor in the Weinstein case, left for the private sector on Sept. 21.

Hochhauser is now working for T&M Protection Resources, a private security and investigations firm, where she's managing director of sexual misconduct consulting and investigations, according to the company's Web site.

Her move came despite the potential boost that a Weinstein conviction would have meant for her career.

Hochhauser, who was hired by the DA's Office in September 1999, also quit while she was within striking distance of 20 years on the job. which would have made her eligible for a state pension.

Frost said Hochhauser's resignation, which she submitted on Aug. 10, had been in the works for a while and was unrelated to the Weinstein case.

Hochhauser, 45, declined to comment on the matter.

If the case against Weinstein collapses, it would mark yet another black eye for Vance, who in 2011 had to drop a high-profile sex-assault case against former International Monetary Fund chief Dominique Strauss-Kahn.

Earlier that year, Vance's prosecutors also lost a rape trial involving two NYPD cops, and Vance last year came under fire for not prosecuting Weinstein over allegations he groped model Ambra Battilana Gutierrez in 2015.

In March, Gov. Cuomo announced that the state attorney general would investigate Vance's handling of that case, then ordered the probe suspended pending resolution of the charges against Weinstein.

EXHIBIT 3

Benjamin Brafman, Esq.
Brafman & Associates, P.C.
767 Third Avenue, 26th Floor
New York, NY 10017

October 16, 2018

People v. Weinstein
Indictment No. 2335/2018

Dear Mr. Brafman:

I am writing with an additional disclosure concerning information that was provided to my office last week, in the wake of last Tuesday's court appearance in this matter.

On Wednesday, October 10, I received a call from Attorney A, the lawyer for Complainant 2, who is the complaining witness in Counts 3-5 in the indictment in this case. Lawyer A indicated that Complainant 2 had certain information to convey to our office concerning Detective DiGaudio, the former lead detective in this case. In response to the call from Lawyer A, I and others from my office spoke by phone with Complainant 2 and Lawyer A on Friday, October 12. In that conversation, Complainant 2 related the following, in substance:

My office had asked Complainant 2 to produce any and all cell phones that she might have used during the time she interacted with the defendant. In response to this request, Complainant 2 had a discussion with Detective DiGaudio in which she expressed the concern that, while she had several such phones in her possession, they contained, in addition to communications with the defendant, data of a personal nature that she regarded as private.

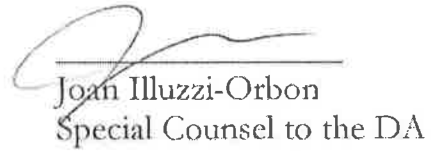
According to Complainant 2, Detective DiGaudio's response was that Complainant 2 should delete anything she did not want anyone to see before providing the phones to our office. According to Complainant 2, Detective DiGaudio then added, "we just won't tell Joan".

Notwithstanding this communication with Detective DiGaudio, Complainant 2 did not delete anything from her cellphones, and instead retained Lawyer A for advice. Complainant 2 later produced the phones on consent to our office, again without any deletions. The phones remain in the custody of our office.

Complainant 2 indicates that at no time did Detective DiGaudio or anyone else influence her testimony or any evidence she provided.

The People will be filing a sealed version and this redacted version of this letter with the Court. The sealed version is attached. It includes the names of the civilians.

Sincerely,



Joan Illuzzi-Orbon
Special Counsel to the DA

Cc: The Honorable James Burke

EXHIBIT 4

Last Activity 2007-02-12 17:31:12 (UTC-5)

Participants * me

(Miriam Haley)*

Hi! Just wondering if u have any news on whether harvey will have time to see me before he leaves?x miriam

2007-02-12 17:31:12 (UTC-5)

EXHIBIT 5

The NYPD Investigator Who's Determined to Bust Harvey Weinstein

Kathy Dobie

Early in the evening of March 27, 2015, a young Italian model named Ambra Battilana walked into the NYPD's 9th Precinct house, a few blocks from Tompkins Square Park. She was so physically and emotionally distressed that the desk sergeant almost called an ambulance. When two patrol officers transported her to the 1st Precinct house, in Tribeca, she cried throughout the short drive. There, at 8:20 p.m., she made a formal complaint that she had been sexually assaulted by Harvey Weinstein.

By nine o'clock, the commander of the NYPD's Special Victims Division, Michael Osgood, had been notified. Osgood understood immediately that the case had to be handled with extreme care. He and Lieutenant Austin Morange, head of the SVD's Manhattan unit, mapped out a plan to keep the case under wraps, to prevent Weinstein from calling in his army of high-powered lawyers and publicists. Knowledge of the investigation, they decided, would be confined to a small circle of detectives and supervisors. Their reports, contrary to standard procedure, wouldn't be loaded on the NYPD's system, and Osgood orally informed his boss, Chief of Detectives Robert Boyce, rather than putting his briefing in writing.

Then Morange called Martha Bashford, head of the Sex Crimes Unit at the Manhattan District Attorney's Office, to apprise her of the complaint. The call was made reluctantly, after much internal debate. Osgood's team felt that ever since 2011, when District Attorney Cyrus Vance Jr. had been blasted in the press for dropping a sexual-assault case against IMF chief Dominique Strauss-Kahn, the DA's office had been gun-shy about taking on powerful defendants. While Osgood cannot talk about the case his team built against Weinstein, sources close to the investigation provided the first detailed account of its inner workings — and how the police became convinced that Vance's office was systematically working to derail the investigation.

In the station house that evening, Battilana told an SVD detective that Weinstein had invited her to a meeting earlier that day, saying he might have work for her. As soon as they were alone in his office, he reached out, two-handed, and groped her breasts. She told him to stop, but he put a hand on her left thigh, moved it up under her skirt, and asked for a kiss. When she refused, he told her he was a very powerful man, boasting that he could make her $2 million a year. The meeting ended with Weinstein telling his receptionist to get Battilana a ticket to that night's performance of *Finding Neverland* on Broadway.

Just then, as Battilana was providing her account to the SVD detective, she got an email from Weinstein. Why hadn't she shown up at the theater, he wanted to know. Recognizing an opportunity for a "controlled call" — a police technique used to solicit and record incriminating evidence — the detective instructed Battilana to reply to the email and say that she didn't have his phone number. They exchanged numbers, and Weinstein called.

"How did my breasts feel?" Battilana asked him, as the detective had coached her. (A flat-out accusation isn't a good strategy for a controlled call. "Why did you touch my breasts?" is only likely to prompt an apology, which isn't an admission.)

"They felt beautiful," Weinstein replied, according to a source who heard the recording. "They're great."

The call was used to set up a meet with Weinstein — one that would be surveilled and recorded by the SVD — for the next day, at the Tribeca Grand Hotel. At one o'clock that Saturday afternoon, Lieutenant Morange called Bashford at the DA's office to tell her about the meet. "Her response to it was, in sum and substance, that it was fine," recalls Michael Bock, a retired sergeant who was one of only six SVD members privy to the investigation. "At no time did she request to prep the victim or direct any specific questions to be asked by the victim during the controlled meet. In other words, she didn't participate, but the opportunity was there."

At the Tribeca Grand, detectives listened in as Weinstein again admitted to fondling Battilana's breasts, all the while trying to wheedle and bully her into a room he had rented in the hotel. Once Battilana had gotten safely away, Morange and another officer approached Weinstein, asking him to come down to the station house. Weinstein refused. "He threatened to call the police commissioner," Bock says. When Morange told him that the commissioner knew they were there — a bluff the egotistical Weinstein readily believed — he agreed to go with them.

On the way to the precinct, Weinstein threatened Morange and the two detectives escorting him, telling them he was going to call Police Commissioner William Bratton, former commissioners Ray Kelly and Bernard Kerik, and former mayor Rudy Giuliani. By messing with him, Weinstein said, they were putting their jobs in jeopardy.

At the precinct, Weinstein demanded to know why he had been hauled into the station. As soon as Battilana's name was mentioned, he invoked his right to counsel. "All he needed to know was her name," Bock says. Weinstein's machine went into high gear. He retained two lawyers with ties to the district attorney's office, including Elkan Abramowitz, Vance's former law partner and a donor to his campaign. To cement their access to Vance's office, the lawyers hired Linda Fairstein, the former head of the DA's Sex Crimes Unit and a close friend of Bashford's.

On April 1, five days after Battilana had filed her complaint, Bashford conducted an interview with her. The next day, sources say, Vance's office sent its own investigators to Battilana's apartment. There, according to Bock, they aggressively questioned her roommates. Was Battilana a prostitute? Did she bring home lots of strange men? Was she a stripper? The DA's office also reviewed video from the apartment building's surveillance cameras, which would enable them to create a record of Battilana's personal life. "When she found out about this, the victim became afraid," recalls Bock. "She began to cry."

According to Bock, Osgood believed that Vance and his office were actively working to discredit Battilana. So the chief and his team decided to take an extraordinary step. "We decided we're going to hide the victim," Bock says. "From the DA."

On April 2, under the direction of Osgood, the SVD put Battilana in a hotel, registering her under a false name. For the next five nights, she was kept safe from Vance's investigators, first at the Franklin Hotel, then at the Bentley. A 22-year-old

woman had come forward to accuse one of the most powerful men in Hollywood of sexual abuse, and the police decided she needed protection — not only from her alleged assailant, but from the elected official responsible for prosecuting him.

The Special Victims Division is headquartered in a gray brick building on Avenue C, where the front doors are routinely stuck halfway open and, at night, roof floodlights give the humble edifice a penitentiary glare. Outside of Chief Osgood's office there are dozens of desks, set side by side, where SVD detectives comb over every sex-crimes complaint made in the past 24 hours to make sure they were classified correctly. That was one of the first and most sweeping changes that Osgood made when he took over Special Victims in 2010. Too many rape complaints, he discovered, were improperly dismissed as "unfounded," while attempted rape was often misclassified as forcible touching, a misdemeanor charge. Shortly before Osgood took command, a journalist named Debbie Nathan had been grabbed by a man and dragged into the woods in Inwood Hill Park, where he rubbed himself against her. "Special Victims showed up and made it a forcible touching," Osgood recalls. "Yeah, she was grabbed — but that's not what his intended goal was. He wasn't gonna bring her into the woods and practice salsa dancing." Osgood implemented what he called the "attempted-rape rule," ordering investigators to take into account a perpetrator's intent. "The worst thing you can do to a victim is to improperly classify her complaint," he says. "Plus, I need to know if I have a possible rapist, so I can zero in on him."

When then-commissioner Ray Kelly tapped Osgood to oversee the SVD, the unit was in bad shape. For many years, the NYPD had treated Special Victims like an investigatory backwater. "If you couldn't cut it someplace," Chief Boyce recalls, "we'd send you there." Although the division was slowly beginning to improve, Osgood found that detectives were still making too many "jump collars" — premature arrests on slim evidence, which led to innocent people being picked up and guilty ones being let go. SVD detectives fought incessantly with prosecutors, each unit in the division acted as a world unto itself, and there was deep distrust between the SVD and advocacy groups for sexual-assault victims. When Monica Pombo, a social worker at the nonprofit Crime Victims Treatment Center, took a job at the NYPD, her fellow advocates responded warily. "Oh," they said, "you're going over to the other side."

Osgood, who had spent eight years heading up the NYPD's Hate Crimes Task Force, had developed a reputation for solving high-profile cases and working closely with traumatized victims and their communities. A former Marine who stands six-foot-four, he has the forthright manner of a seasoned cop, coupled with a buoyant, restlessly tuned energy; many of our conversations were accompanied by the sound of his fingers drumming on the tabletop. Around the NYPD, where excessive reading is viewed with a degree of suspicion, he's often referred to as an academic. "He's not a regular chief," says Boyce. "He's an expert in his field, and he has an unbelievable amount of knowledge." Osgood majored in mathematics in college, and the shelves in his office are lined with books on criminal investigations, complex-systems theory, advanced management, biochemistry, and probability — a collection Osgood describes as a "body of knowledge and set of modern intellectual thought that is necessary to move policing forward."

Osgood used such thinking to hone the way the NYPD investigates hate crimes. Breaking with long-established traditions of policing, he eliminated the military-style hierarchy ingrained in the NYPD, creating a flat command structure that allows for a constant flow of real-time information between detectives and supervisors. When a

hate crime was especially violent or complex, he flooded the crime scene with manpower — a move his detectives affectionately call "an Osgood mobilization." In what has become a mantra for Osgood, he imposed "investigative process discipline," pushing his team to follow each investigative pathway to the very end, no matter how time-consuming or frustrating it might be. Searching for witnesses in one homicide case, for example, detectives in the hate-crimes unit identified and tracked down the six bus drivers who were working the B38 route in Bushwick the night of the murder. That step alone took two weeks, and led nowhere.

Employing such unconventional techniques paid off. The Hate Crimes Task Force, which Osgood continues to lead, has solved every case of stranger homicide it has investigated in the past 15 years. By contrast, the national solve rate for homicides — the majority of which involve known offenders — is roughly 65 percent.

Osgood brought the same instincts as a reformer to the task of investigating the more than 5,000 rapes and other sex crimes reported in New York City each year. When he took over the SVD, he knew nothing about what he calls the "hard, hazy world of sexual-assault complaints." Years before Weinstein's predatory behavior helped spark the #MeToo reckoning, Osgood decided that the cops needed to do a better job of listening — not only to the victims of sexual assault but also to the vocal and organized network of social workers, doctors, and prosecutors who advocate on their behalf. Going against the culture of the NYPD, Osgood allowed victims' advocates to step inside the closed world of the Special Victims Division and independently audit case files — a step that only two other police departments in the country have taken. He sits down with advocates twice a year to hear their criticisms and suggestions, and he makes a point of being on call whenever they spot something that needs fixing.

"We have his phone number, and he's always available," says Brigitte Alexander, an emergency-medicine physician who formed the first sexual-assault response team for the city's public hospitals in 2004. "So if there's a problem, like some patrol officer not taking a report, it's very easy to make that call and get it resolved. Honestly, before he took over, that did not exist. There's a level of openness and professionalism that just wasn't there 20 years ago."

At the same time, Osgood ordered SVD detectives to stop jumping the gun on arrests. "I communicated to the whole division that we're not a jump-collar division," he says. "We're a beyond-a-reasonable-doubt division." He studied the science of DNA — "the molecular structure, DNA-extraction technology, the probability mathematics" — and created a DNA Cold Case squad that has resolved more than 1,800 dormant cases. Most recently, he formed a new squad dedicated to reexamining 4,000 unsolved cases of stranger rape.

The Stranger Rape Cold Case unit was formally approved by Commissioner James O'Neill in February, after Osgood and the SVD reopened and solved one of the NYPD's most infamous cold cases. In 1994, a 27-year-old Yale graduate was raped in broad daylight by a stranger in Prospect Park while she was walking home from the grocery store. But as SVD detectives worked to solve the case, a high-ranking police source told the *Daily News* that the victim was lying, and the paper published a series of columns dismissing the attack as a "hoax." The victim described the experience as being raped twice. Using new technology, Osgood's team managed to match DNA evidence from the original investigation to a serial rapist who was serving a 75-year sentence in Sing Sing.

Osgood brought the victim to his office to give her the news personally. "I don't know how to say this," he told her, "but we solved your case." She broke down in tears. Osgood also apologized to her, on behalf of the NYPD, for whoever had smeared her in the press.

The biggest innovation that Osgood brought to the Special Victims unit — one that is only now beginning to make its way across the country, police department by police department — was also the trickiest to implement. The NYPD's police academy, Osgood observed, offered a range of courses on questioning suspects but none on talking to victims. As a result, SVD investigators were stuck in a "who, what, when, where, and why" mind-set. They wanted the facts, ideally in chronological order. "Start from the beginning," they might tell a victim. "What time did this happen? Tell me the exact location where he first approached you. What color shirt was the suspect wearing?"

But victims of sexual assault are often unable to answer such straightforward questions. There will be gaps in their stories. Events will be out of sequence. And the fractured nature of their testimony can lead investigators to conclude that they are unreliable at best or dishonest at worst. "What I saw time and time again is something like this," Osgood says. "A victim says, 'I was walking down the street, a red van passes me, and then I'm assaulted.' But when you pull video, you see that she's walking down the street, she's assaulted, and *then* a red van passes. Most police departments would go, 'Oh, she's inconsistent, she's lying.' "

Osgood saw the phenomenon play out in one of his earliest cases at SVD. On Memorial Day in 2011, an 85-year-old woman was sexually assaulted while taking her early-morning walk on East 83rd Street, just four blocks from Mayor Michael Bloomberg's townhouse. The media jumped on the story, and Osgood assembled an investigative team of more than 60 detectives. After the police released video images of the suspect dragging the woman into a stairwell, someone identified him as the same person who hung around his apartment building in East New York. But when SVD detectives staked out the location and grabbed the guy, they noticed something odd.

One of the detectives immediately called Osgood. "Chief, we don't think this is the guy," he said.

"Why?" Osgood asked.

"He's got a New York Yankees tattoo on his face," the detective explained. It was inked on his left cheekbone and it was pretty big — larger than a silver dollar. But the victim, when giving her physical description of the suspect, had never mentioned it.

"Bring him in," Osgood told the detective. "He's the guy." And he was. DNA lifted from the elderly women's blouse matched that of the 32-year-old suspect.

In 2015, a deputy commissioner named Susan Herman, who works closely with victims, handed Osgood a research paper about something called the Forensic Experiential Trauma Interview. Developed by Russell Strand, a former special agent with the U.S. Army Criminal Investigation Command, FETI drew on emerging neuroscience that dovetailed precisely with what Osgood has observed in action. "Memory encoding during a traumatic event is diminished and sometimes inaccurate," Strand wrote. When trauma occurs, the prefrontal cortex often shuts down, and more primitive parts of the brain take over. Information necessary to

survival continues to be recorded, Strand explained, but the primitive brain doesn't do very well "recording the information many professionals have been trained to obtain."

Osgood, who was making notes in the margin, only had to read the first page to feel the kick of recognition. "This guy's correct," he said to himself. "This is what I've been seeing over 14 years."

Osgood decided to fly to Idaho, where a former detective named Carrie Hull, one of the country's leading innovators in sexual-assault investigations, was offering a training program in FETI. He brought along Monica Pombo, the victims' advocate who had joined the NYPD, and Bock, one of his most "experienced, gritty sergeants." If his seasoned vets couldn't learn FETI, Osgood reasoned, or if they balked at the process, it wouldn't matter how effective the technique was.

"I was skeptical," Bock admits. "It's not the normal way of doing business. But going out there, I kept an open mind. Maybe they know something that we didn't."

Osgood, Bock, and Pombo were blown away by what they discovered. FETI, it turned out, provides a way to interview victims that allows them to access the kind of rich and detailed information that investigators can then follow up on in the field. The questions are open-ended and empathetic — more an invitation to share than a relentless hammer to provide a precise chronological account. "What are you able to tell me about your experience?" takes the pressure off the victim to figure out what the investigator wants and allows for actual recollection. "What are you able to recall about what you heard or smelled?" taps into the victim's deeper sensory experience. "What can't you forget about your experience?" bypasses what the victim has forgotten and offers an entryway into other memories.

That night, over dinner with Hull and his colleagues, Osgood plunged right in. "I love this — I want this," he said. "This is what I've been looking for." Plates were pushed aside and everyone pulled out notebooks and pens, sketching out a plan to bring FETI to the NYPD. "When Chief Osgood gets excited, he just starts talking more and more and more and more and faster and faster and faster," says Pombo. "He starts doing what he does well, which is saying: 'This is great — here's how it can be better.' " With the backing of Chief Boyce, Osgood put 30 of his best investigators through the FETI course, enabling him and Hull's team to fine-tune it to match the needs of the NYPD. Today, all 144 detectives in the SVD who investigate sex crimes involving adults have received seven days of training in the technique.

"Of anybody we've worked with, the NYPD has made by far the most significant commitment in training their people," says Hull, who has worked with police departments across the country. "Chief Osgood not only said, 'Hey, what kind of training can I bring in?' He went out and put himself through the trainings. You tend to see people that want a quick fix, but for him, it wasn't just a way to check a box. He made sure it was the right fit for his department."

Since Osgood took charge, Special Victims has solved 79 percent of all cases involving rapists who commit more than one assault — compared to a national average of 36 percent. But whatever innovations he has brought to the investigations of hate crimes and sexual offenses, there is one variable that remains outside Osgood's control: politics. Five days after he and his team sequestered Ambra Battilana in a hotel room to protect her from Vance's office, she agreed to meet with Martha Bashford, the head of the DA's sex-crimes unit. Bashford didn't inform the

SVD, but Battilana's lawyer did, and Osgood's investigative team showed up at the attorney's office before Bashford arrived.

During the meeting, according to Bock, Bashford grilled Battilana about her personal life — including one of the infamous sex parties thrown by Italian prime minister Silvio Berlusconi that she had attended.Battilana told Bashford that she and her friends had left as soon as the sex started. "The questioning was aggressive and accusatory," Bock recalls. "Again, the victim was upset. She felt like she was under attack."

Three days later, Bashford called Osgood's team to inform them that Vance had decided not to prosecute the case. Weinstein's team, which smeared Battilana in the press as a gold digger, reached a settlement requiring her to turn over a copy she possessed of the phone call recorded by the SVD. Anonymous sources close to Vance's office, meanwhile, painted Battilana as an unreliable witness and blamed Osgood's team for having moved too quickly. The SVD, a source told the New York *Times* last fall, failed to give prosecutors "an opportunity to help steer the secretly recorded encounter with Mr. Weinstein."

Three years later, Bock is still incensed. "This is only a misdemeanor case!" he fumes. "It's not a felony! They prosecute people for misdemeanors with far less probable cause than this. We gave them beyond a reasonable doubt. We obviously know who this man is. We obviously know we have a different burden of proof. So to go above and beyond as we did, he should've been arrested. He should've been arrested."

The DA's office continues to insist that it handled the case by the book. Joan Vollero, a senior adviser to Vance, denies that Osgood's team notified Bashford about the complaint against Weinstein or consulted with her about the meet at the Tribeca Grand. Vollero also maintains that the DA's office never interviewed Battliana's roommates or questioned her aggressively. "It is customary for prosecutors to discuss potential areas of cross-examination when meeting with complainants," Vollero says. "This characterization of the meeting is incorrect and, moreover, troubling. It was a normal, typical interview of a complainant."

The deep-seated mistrust between the DA's office and the SVD is bad news for the victims of sex crimes, who rely on public officials to bring their assailants to justice. In the wake of #MeToo, 14 women have filed sexual-assault complaints against Weinstein with the NYPD. This time around, to ensure that nothing goes wrong, Osgood has taken an extraordinary step: He personally conducted each of the investigations, along with two of his best investigators, Sergeant Keri Thompson and Detective Nicholas DiGaudio. The task force of three has worked on the case full-time since October, traveling to Paris, London, Toronto, Montreal, Florida, and California. Many of the cases had passed the statute of limitations, but five are now sitting with Vance, awaiting his decision on whether to issue an indictment. If Weinstein winds up in handcuffs, it will be in no small part because Osgood made sure the police covered every base.

One day not long ago, Osgood was sitting in his office, talking with several current and retired members of his team. Behind his desk hangs a print of the iconic painting *Washington Crossing the Delaware*. "I put that up there about 12, 14 years ago," Osgood says. "And of course, the detectives said, 'Oh, that's Osgood leading the Hate Crimes Task Force.' "

Everyone laughs. "The first Osgood mobilization!" says Anthony Caban, a retired

detective with the hate-crimes unit.

"That's not what it is," Osgood replies with a grin. "Emanuel Leutze was a German artist who came to America in the 1820s. He was amazed at the individual liberty he saw, so he paints this picture. I have it there because when you look in this boat — which is an incorrect boat, it's not the type of boat they used — there are all these different identities ..."

"Oh, you're giving her so much of a yarn here, you don't even know," says James Byrne, an NYPD spokesman, to more laughter.

"And what Emanuel Leutze was trying to say ..." Osgood plows on.

"Some of this stuff I think he makes up as he goes along," injects Deputy Inspector Paul Saraceno, Osgood's right-hand man.

"There are people of Scottish identity, Irish. There's an African-American in there, there's a person that looks somewhat female. The night when Washington crossed the Delaware, he was crossing it not for any one group — he was crossing for individual liberty, because all these different identities fought in the fight for independence. So I have it there to signify that in the United States, the right to identity safety is a core American principle. It's an extension of individual liberty, and that's what that represents."

Osgood finishes. Drums his fingers on the tabletop. Gestures to the other cops in the room. "Even if these guys feel otherwise," he says. More laughter.

Osgood knows he still has a lot of work to do at Special Victims. In 2015, the division's reputation took a hit when the head of its Manhattan unit was forced to resign after his partner was accused of groping a rape victim during an investigative trip the two men took to Seattle. SVD remains seriously short-staffed, with each detective working as many as 130 cases a year. The interview rooms for victims are dingy and uncomfortable, and in most offices can be reached only by parading past a roomful of cops. And too many victims still don't trust the police enough to come forward to report the abuse they've suffered. "This is probably the most important thing I can say, after doing 90,000 sexual-assault cases, 14,000 rapes, and 2,000 stranger rapes," Osgood emphasizes. "Sexual assault is the hidden scourge on the American landscape. And it's hidden because there's such a vast underreporting of rape."

He pauses, considering the high-profile investigation he has just completed and what it will take to confront the true scope of sexual assault. "Harvey Weinstein may be a watershed moment in the country," he says. "We're at a point in our history that it's time for us to find a way to interdict this behavior. You can't have tens of thousands, hundreds of thousands of silent victims out there. I've learned the depth of the trespass and the damage this action causes. It's time for us, as a people, to go out there and mobilize."

This article appears in the March 19, 2018, issue of New York Magazine.
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The NYPD Investigator Who's Determined to Bust Weinstein

EXHIBIT 6

THE NEW YORKER

HARVEY WEINSTEIN'S SECRET SETTLEMENTS

The mogul used money from his brother and elaborate legal agreements to hide allegations of predation for decades.

By Ronan Farrow November 21, 2017

On April 20, 2015, the Filipina-Italian model Ambra Battilana Gutierrez sat in an office in midtown Manhattan with an eighteen-page legal agreement in front of her. She had been advised by her attorney that signing the agreement was the best thing for her and her family. In exchange for a million-dollar payment from Harvey Weinstein, Gutierrez would agree never to talk publicly about an incident during which Weinstein groped her breasts and tried to stick his hand up her skirt.

"I didn't even understand almost what I was doing with all those papers," she told me, in her first interview discussing her settlement. "I was really disoriented. My English was very bad. All of the words in that agreement were super difficult to understand. I guess even now I can't really comprehend everything." She recalled that, across the table, Weinstein's attorney was trembling visibly as she picked up the pen. "I saw him shaking and I realized how big this was. But then I thought I needed to support my mom and brother and how my life was being destroyed, and I did it," she told me. "The moment I did it, I really felt it was wrong."

Weinstein used nondisclosure agreements like the one Gutierrez signed to evade accountability for claims of sexual harassment and assault for at least twenty years. He used these kinds of agreements with employees, business partners, and women who made allegations—women who were often much younger and far less powerful than Weinstein, and who signed under pressure from attorneys on both sides.

Weinstein also hid the payments underwriting some of these settlements. In one case, in the nineteen-nineties, Bob Weinstein, who co-founded the film studio Miramax with his brother, paid two hundred and fifty thousand pounds, roughly six hundred thousand dollars today, to be split between two female employees in England who accused Harvey Weinstein of sexual harassment and assault. The funds came from Bob

Weinstein's personal bank account—a move that helped conceal the payment from executives at Miramax and its parent company, Disney, as well as from Harvey Weinstein's spouse.

In an interview, Bob Weinstein acknowledged the personal payout but said that his brother had misled him about the reasons behind it. "Regarding that payment, I only know what Harvey told me, and basically what he said was he was fooling around with two women and they were asking for money," Bob Weinstein told me. "And he didn't want his wife to find out, so he asked me if I could write a check, and so I did, but there was nothing to indicate any kind of sexual harassment." A former senior Miramax executive said that it was implausible that Bob Weinstein did not know about the nature of the allegations, which were reported to the company.

It has become common practice to use nondisclosure agreements to resolve allegations of sexual misconduct. Some legal experts, including the victim's-rights attorney Gloria Allred, who is representing some of Weinstein's accusers, stress that victims may actually prefer such agreements. Allred told me that her firm had represented "thousands" of people who have entered into confidential settlements and said, "some people don't want their parents, their friends, members of their community to know."

But recent revelations of sexual abuse by powerful men in entertainment, politics, journalism, and other fields have raised questions about whether the use of these agreements should be curtailed, particularly when there is a stark power imbalance between the accuser and the accused. In numerous cases, such agreements have allowed abuses to continue unabated, sometimes for decades. The comedian Bill Cosby and the television personality Bill O'Reilly both repeatedly used secret settlements to resolve allegations of sexual misconduct. Last week, Congresswoman Jackie Speier disclosed that the House of Representatives had paid more than seventeen million dollars to settle two hundred and sixty claims of harassment over the past twenty years (a figure that includes sexual offenses as well as harassment based on race, age, or other factors). Speier is working with a bipartisan group of politicians to introduce federal legislation that would overhaul the way Congress handles harassment claims, including offering better legal counsel to employees with allegations, and removing a long-standing requirement that they sign nondisclosure agreements.

"The category of cases where I think we have a problem is the heavy hitters, the rainmakers," Samuel Estreicher, a professor of law at New York University whose work focusses on employment issues, told me. In cases like Weinstein's, Estreicher said, "repeat offenders are able to operate under a cloak of silence with the help of nondisclosure agreements."

Zelda Perkins, a former assistant to Harvey Weinstein, was one of the women involved in the sexual-harassment and assault settlement that was underwritten by Bob Weinstein. Even twenty years ago, when the settlement was signed, Perkins recognized that Weinstein was engaging in a pattern of behavior. She fought for—and obtained—requirements specifically intended to prevent Weinstein from continuing to victimize women. The settlement mandated that Weinstein receive treatment from a psychiatrist of Perkins's choice and that Disney be notified of future harassment settlements made by him. Nonetheless, Weinstein's misconduct continued, in secret, for decades. "What I want to talk about at this point is not what Harvey did," Perkins told me. "It's more about the system that protected him and that enabled him, because that's the only thing that we can change. Money and power enabled, and the legal system has enabled. Ultimately, the reason Harvey Weinstein followed the route he did is because he was allowed to, and that's our fault. As a culture, that's our fault."

Harvey Weinstein's criminal-defense attorneys, Blair Berk and Ben Brafman, said in a statement, "Because of the pending civil litigation and related investigations, it is inappropriate to respond specifically to each of the unsupported and untruthful insinuations contained in this article. Suffice it to say, Mr. Weinstein strongly objects to any suggestion that his conduct at any time has ever been contrary to law. Be assured that we will respond in any appropriate legal forum, where necessary, and fully expect that Mr. Weinstein will prevail against any claim of legal wrongdoing. Mr. Weinstein categorically denies ever engaging in any non-consensual sexual conduct with anyone and any suggestion that he acted improperly to defend himself against such claims is simply wrong."

Gutierrez told me that she had grown up watching her Italian father, whom she described as a "Dr. Jekyll-and-Mr. Hyde person," beat her Filipina mother. When Gutierrez tried to intervene, she was beaten as well. (Gutierrez's father could not be reached for comment.) As an adolescent, Gutierrez became the caretaker of her

family, supporting her mother and distracting her younger brother from the violence. "Because of trauma in my past, being touched for me was something that was very big," she said. Her first concern, she said, was protecting other women from violence. She only signed her secret settlement after her options for criminal justice were shut down.

After Gutierrez contacted the police, Weinstein drew upon a network of high-powered defense lawyers, former law-enforcement officials, and private investigators who help the wealthy try to thwart criminal investigations. Unbeknownst to her, Weinstein's attorneys hired K2 Intelligence, a firm founded by the corporate-intelligence magnate Jules Kroll, and tasked its agents with insuring that the Manhattan District Attorney, Cyrus Vance, did not press charges against Weinstein. One of Weinstein's defense lawyers, Elkan Abramowitz, whose clients include New York Governor Andrew Cuomo and who is a partner at the firm that formerly employed Vance, oversaw K2's work. The intelligence firm hired Italian private investigators to dig up information on Gutierrez's sexual history, according to three individuals with knowledge of its work. (A spokesperson for K2 said that the firm's work in the Gutierrez case involved only online and public-records searches regarding her past.)

The investigators discovered that, as a young contestant in the Miss Italy beauty pageant, in 2010, she had attended a "Bunga Bunga" party hosted by Silvio Berlusconi, who was then the Italian Prime Minister, where he was accused of having sex with prostitutes. The Italian investigators also claimed that Gutierrez engaged in prostitution. (Asked if she was comfortable with *The New Yorker* printing those allegations, Gutierrez said, "Absolutely." She flatly denied ever engaging in prostitution. She said she quickly left Berlusconi's party and later testified as a witness against him when Berlusconi was charged with abuse of power and having sex with a minor. He was acquitted on both charges but later was found guilty in a separate bribery case.)

Current and former K2 employees, all of whom had previously worked at the District Attorney's office, relayed the private investigators' information about Gutierrez in calls to prosecutors. Two K2 employees said that those contacts were part of a "revolving door" culture between the D.A. and high-priced private-investigation firms. Lawyers working for Weinstein also presented a dossier of the private investigator's findings to prosecutors in a face-to-face meeting. (Joan Vollero, a spokesperson for Vance's office, said that such interactions with defense attorneys are standard procedure.)

When Martha Bashford, the head of the District Attorney's sex-crimes unit, subsequently questioned Gutierrez, she grilled her about Berlusconi and her personal sexual history with unusual hostility, according to two law-enforcement sources. "They went at her like they were Weinstein's defense attorneys," one of the law-enforcement sources told me. (A source from the D.A.'s office who was present for the questioning acknowledged that the meeting focussed on Gutierrez's past in Italy but said that Bashford was "professional" and not hostile.) Gutierrez remembers being baffled by the line of questioning. She had found the N.Y.P.D. supportive and, at the request of police investigators, had participated in a sting operation in which she met Weinstein and secretly recorded a conversation in which he admitted that he had groped her. "It was weird," she told me. "I'm, like, 'What is the connection? I don't understand. Just listen to the proof.'"

On April 10, 2015, two weeks after Gutierrez reported Weinstein to the police, the D.A.'s office announced that it wasn't going to press charges. Two law-enforcement sources told me that the N.Y.P.D. was troubled by the decision, and, shortly afterward, the department's Special Victims Division conducted an internal review of the last ten criminal complaints in Manhattan stemming from similar allegations, of groping or forcible touching. "They didn't have a quarter of the evidence we had," one law-enforcement official said of the other cases. "There were no controlled meets, and only rarely controlled calls." Yet, the source said, "All of them resulted in arrests." (Vollero said that many of the arrests cited in the review involved subway groping, including some that were witnessed by police. "Cases involving sex abuse on the subway typically have many more witnesses than other types of misdemeanor sexual abuse," she said.)

Before and after the D.A.'s decision not to press charges, several of Weinstein's attorneys made donations to Cyrus Vance's campaigns. All told, Abramowitz, who presented the K2 dossier to the D.A.'s office, has contributed $26,450 to Vance since 2008. In an interview, Abramowitz said that the donations were appropriate. "Cy and I were friends and partners long before Harvey Weinstein came into my life," Abramowitz told me. "My contributions to his campaign were based on my belief that he is a solid choice for District Attorney."

David Boies, another member of Weinstein's legal team, donated ten thousand dollars to Vance's reëlection campaign in the months following Vance's decision not to press

charges. "The idea that my contributions to Cy Vance's campaign had any relationship to that investigation, I think, is absurd," Boies told me, adding that he had a close relationship with Vance but never called him about the Gutierrez case. Boies argued that Vance's office had made a reasonable decision and accused Gutierrez of engaging in prostitution in Italy. "There were transcripts of Italian proceedings where it was described how for years she had performed various sexual acts for various specified amounts of money," Boies told me.

Gutierrez said that any records of the type Boies referred to were a product of her testimony against Berlusconi, who she said used his power to smear her and others involved in the case. "They said that I was a Bunga Bunga girl, that I was having affairs with sugar daddies," Gutierrez said. "What the hell else were they going to say, that I killed someone? Anyone who knows me knows those things are completely fake."

Gutierrez said that the decision not to press charges shocked her. "We had so much proof of everything," she recalled. "Everyone was telling me, 'Congratulations, we stopped a monster.'" She began to worry about her future. "I couldn't sleep, I couldn't eat," she told me. New York tabloids, including the New York *Post*, to which Weinstein had fed stories in the past, had been publishing lurid reports about Gutierrez that mirrored the information in K2's dossier. "What did I do wrong?" Gutierrez said. "The only thing I did was exposing something bad that happened to me." The coverage sometimes included photos from Gutierrez's modelling career. It was as if "just because I am a lingerie model or whatever, I had to be in the wrong," Gutierrez said. "I had people telling me, 'Maybe it was how you dressed.'" (Gutierrez had dressed in professional office attire to meet Weinstein, with thick tights because of the cold weather.) Gutierrez, who still supports her brother financially, began to worry that she wouldn't be able to make a living. "My work depends on image, and my image was destroyed," she said.

Attorneys that Gutierrez consulted advised her to accept a settlement. "I felt pressured," she told me. "I said no at first." Eventually, however, she relented. "I was forced by the fact that newspapers completely bashed me, by the fact that I was alone, by the fact that I was twenty-two years old," Gutierrez told me. "I knew if he could move the press in this way, I couldn't fight him." Gutierrez said that she knows that

many people will judge her harshly for taking the money. "A lot of people are not empathetic," she said. "They don't put themselves in the situation."

Gutierrez's settlement, a copy of which I reviewed, bears Weinstein's signature and orders the destruction of all copies of audio recordings of Weinstein admitting to the groping. Gutierrez agreed to give her phone and any other devices that might have contained copies of the recording to Kroll, another private-security firm retained by Weinstein. She also agreed to surrender the passwords to her e-mail account and other forms of digital communication that could have been used to spirit out copies. A sworn statement, pre-signed by Gutierrez, is attached to the agreement, to be released in the event of any breach. It states that the behavior Weinstein admits to in the audio tape never happened. "The Weinstein confidentiality agreement is perhaps the most usurious one I have seen in decades of practice," an attorney familiar with the agreement told me.

After the contract was signed, Gutierrez became depressed and developed an eating disorder. Eventually, her brother, who was concerned, came to the United States. "He knew I was really bad," she said. He took her to Italy and then the Philippines "to start again." She told me, "I was completely destroyed."

Harvey Weinstein had been using similar tactics with women for more than twenty years. Zelda Perkins, the assistant who signed a nondisclosure agreement with Weinstein twenty years ago, in the U.K., said that she also regrets her decision. In recent weeks, she has begun talking to the press, flouting an agreement that she now feels is unjust. "I think it's a really important symbolic thing to do right now," she said. "To stand up and question its legitimacy publicly."

Perkins said that while working for Weinstein she experienced nearly constant sexual harassment. "From my very first time left alone with Harvey, I had to deal with him being present either in his underpants or totally naked," Perkins said. She told me that she had to buy condoms for him and clean up after his hotel-room encounters. "We had to bring girls to him," she said. "Though I wasn't aware of it at first, I was a honeypot." Weinstein, she said, never succeeded in pressuring her into sex or any physical contact, but she called the barrage of advances "exhausting."

In 1998, Perkins hired an assistant of her own. She warned candidates for the job that Weinstein would make sexual advances, and rejected "very overtly attractive" applicants. In the end, she chose a "prodigiously bright" Oxford graduate, who asked not to be named in this story because she fears legal retaliation. In 1998, during the Venice Film Festival, the new assistant emerged from her first meeting alone with Weinstein distraught, saying that he had sexually assaulted her in his hotel room. "She was shaking and she was crying," Perkins recalled.

Perkins confronted Weinstein immediately. "He stood there and he lied and lied and lied," Perkins recalled. "I said, 'Harvey, you are lying,' and he said, 'I'm not lying; I swear on the lives of my children.'" The assistant was too frightened to go to the police, especially in a foreign country. After returning to England, Perkins notified Donna Gigliotti, a producer who worked with them on the Academy Award-winning film "Shakespeare in Love." Gigliotti, who recalled Perkins coming to her about the incident, told me that she was an outside contractor and "could not report it internally."

Perkins and the assistant resigned from Miramax and sent notice of impending legal action to Weinstein. Their letter set in motion frantic meetings at Miramax, according to former employees, and a fusillade of calls directed at Perkins and the assistant. Perkins said that the night after she resigned she received seventeen calls from Weinstein and other executives with "increasing desperation." Perkins played me some of the messages, recorded on her answering machine and preserved because she thought she "might need them as protection." In them, Weinstein veers between anxious pleading and terse demands. "Please, please, please, please, please, please call me. I'm begging you," he says in one.

Perkins and the assistant hired lawyers from the London-based firm Simons Muirhead & Burton. Perkins said that, in hindsight, the attorneys seemed intent on foreclosing any outcome except a settlement. The lawyers told the women that because neither had gone to the police immediately after the incident, reporting the attack at that time was "very clearly not an option." Perkins said that she asked about reporting the incidents to Michael Eisner, the C.E.O. of Disney, which at the time owned Miramax, because she knew that Weinstein's relationship with Eisner was under strain. The lawyers dissuaded her from that, too. "They just said, 'No way. Disney will crush you. Miramax will crush you. They will drag you, your family, your friends, your pets through the mud

and show that you are unreliable, insane. Whatever they need to do to silence you.'" Perkins said that she felt trapped. "I was, like, 'Right. O.K. So, we can't go to police because it's too late. We can't go to Disney 'cause they don't give a shit. So who do we tell? Where's the grownup? Where's the law?'" (Razi Mireskandari, the managing partner at Simons Muirhead & Burton, declined to comment on the negotiations or the final settlement, saying that the terms of the agreement barred him from discussing it.)

Perkins initially pushed back on accepting what she called "blood money," saying she wanted a donation made to a charity for rape victims. Her attorneys told her that the idea was a nonstarter. "I was a twenty-three- or twenty-four-year-old girl sitting in a room with often up to six men telling me I had no options," she told me. (She did note that one of her own lawyers was a woman.) "That's just downright wrong."

In the end, the women's attorneys agreed on the settlement of two hundred and fifty thousand pounds to be evenly split between the two former employees. Unbeknownst to Perkins, the money came from Bob Weinstein's personal bank account. While Bob Weinstein said that he had no knowledge of the purpose of the payments and has previously maintained that he and the rest of the board found the allegations against his brother to be an "utter surprise," several former employees said that they found the idea that he lacked any knowledge of the misconduct implausible. "Bob may not have done the things, but he was complicit in covering it up for years," one said. (Last month, *Variety* reported that a female showrunner who worked on the Weinstein Company drama "The Mist" accused Bob Weinstein of sexual harassment in 2016. He denied the claim.)

The agreement that Bob Weinstein underwrote with Perkins and the assistant required the women to have any of their lawyers, accountants, and therapists who might become aware of the settlement sign their own nondisclosure agreements. One clause required that they personally make calls "to tell people to shut up," as Perkins put it. But Perkins also successfully demanded that provisions be added to the contract that she hoped would change Weinstein's behavior. The agreement mandated the appointment of three "handlers," one an attorney, to respond to sexual-harassment allegations at Miramax. Miramax was obligated to provide proof that Weinstein was receiving counselling for three years or "as long as his therapist deems necessary." Perkins had to approve the

therapist and attend the first session. The agreement also required Miramax to report Weinstein's behavior to Disney and fire him if a subsequent sexual-harassment settlement was reached in the following two years.

But Miramax, Perkins said, "stalled and stalled and stalled." The company implemented the human-resources changes, but other parts of the agreement were not enforced. She pressed for months, then gave up. "I was exhausted. I was humiliated. I couldn't work in the industry in the U.K. because the stories that were going around about what had happened made it impossible," she said. In the end, Perkins moved to Central America. "I'd had enough," she said.

After Perkins decided to go public with her story, some law firms she approached for advice were reluctant to represent her, she told me. One said it worried that doing so would undermine confidence in its own nondisclosure agreements. "It appears fraternizing with me may put these other 'big hitter' law firms into a conflicted position," she said. She has only been able to obtain a few pages of her own legal agreement. Both her former law firm and Weinstein's continue to adhere to a stipulation that she never personally possess a full copy.

Weinstein's agreements appear to have become more restrictive over time. Prior to his agreement with Perkins, Weinstein reached a hundred-thousand-dollar settlement with the actress Rose McGowan, who has publicly claimed that Weinstein raped her, in 1997, at the Sundance Film Festival. Notably, the agreement did not include a nondisclosure provision, but McGowan signed away her right to sue Weinstein. She said that she wanted to pursue charges at the time, but that her lawyer instead convinced her to sign the agreement. "That was very painful," McGowan said. "I thought a hundred thousand dollars was a lot of money at the time, because I was a kid."

Weinstein also regularly used nondisclosure agreements in his business dealings. Early this year, in a story first reported by the *Times*, a dispute arose among members of the board of amfAR, a foundation focussed on AIDS, over allegations that Weinstein improperly used six hundred thousand dollars in proceeds from foundation fund-raising to underwrite his own theatrical productions. Weinstein offered the foundation a payout of a million dollars in exchange for every member of the board signing a restrictive nondisclosure agreement, which would ban members from

speaking not only about the amfAR matter but also about Weinstein's "personal" activities. In an e-mail, Kenneth Cole, the chair of the board, pressed the rest of the board members to sign, warning that they might be sued if they didn't. (In an interview, Cole said that he viewed Weinstein's directing of amfAR funds to a theatrical nonprofit "legitimate," and that he encouraged others to sign the N.D.A., which he considered a "risk-free proposition," after consulting an attorney.)

Weinstein's employees were, and are, bound by confidentiality agreements included in their employment contracts with Miramax and the Weinstein Company. While nondisclosure agreements are a standard feature of employment contracts, the clauses in Weinstein's included a special provision about information "concerning the personal, social or business activities" of "the co-Chairmen"—namely, Harvey and Bob Weinstein. Estreicher, the expert on employment law, told me that the nondisclosure clause regarding the personal lives of both Weinstein brothers was unusual. "That's not generally found, the personal conduct of an individual being part of a contract like that."

Many employees I spoke with said that these contractual provisions made it impossible to talk about suspicious behavior they witnessed at the company. Irwin Reiter, who worked for Weinstein for nearly three decades and is currently the Weinstein Company's executive vice president for accounting and financial reporting, had previously declined requests to participate in stories. "I hope there's no reprisal," he told me, referring to legal action against employees. He said that he was nevertheless going public because he felt the culture of silence at the company deserved further scrutiny. Weinstein, he told me, "was so dominant that I think a lot of people were afraid of him, afraid to confront him, or question him, and that was the environment." Reiter also raised doubts about the fairness of lifetime nondisclosure agreements. "A forever N.D.A. should not be legal," he told me. "People should not be made to live with that. He's created so many victims that have been burdened for so many years, and it's just not right."

These contractual constraints are perfectly legal. Allred, the victim's-rights attorney, said that courts usually enforce them and view efforts to break them as "buyer's remorse." But in recent weeks lawmakers and legal experts have called for reforms to this system. Estreicher has proposed that the Equal Employment Opportunity

Commission, the government body that oversees workplace discrimination, track sexual-misconduct-related settlements and investigate employers who use them repeatedly. In addition to Congresswoman Jackie Speier's legislation regarding congressional employees, state lawmakers in New York and California are pushing legislation to curtail the use of nondisclosure agreements in sexual-abuse cases. "These secret settlements perpetuate the problem. They allow rich men to continue to be sexual predators," Connie Leyva, the California state senator who has announced legislation in that state, told me. "I hope that we can get this done in California, and that it will spread like wildfire around the country."

Allred raised concerns about the potential reforms, which she feared could limit victims' options. She noted that "anyone who agrees to enter into a settlement has a choice" and accepts both the costs and the—sometimes considerable—benefits. Good attorneys, she argued, explain the full implications of such agreements. "And then the client makes an informed choice."

Gutierrez, Perkins, and other women who signed agreements with Weinstein told me that they felt their consent was far from informed. Gutierrez said that she wished she had been aware that Weinstein had faced similar allegations in the past. When, after the fact, she learned that his behavior with her was part of a pattern, she was filled with guilt. "I couldn't even think of that person touching someone else," she told me. "It made me have chills." Gutierrez said that she wants to warn people of the risks of silence. "People need to really change right now," she said. "To listen and speak. That was the worst thing—people not speaking."

Ronan Farrow is a contributing writer to The New Yorker and a television anchor and investigative reporter whose work also appears on HBO. He is the author of the book "War on Peace: The End of Diplomacy and the Decline of American Influence." Read more »

EXHIBIT 7

AFFIDAVIT OF AMBRA GUTIERREZ BATTILANA

AMBRA GUTIERREZ BATTILANA, after being duly sworn and under penalty of perjury, hereby declares:

1. I first met Harvey Weinstein on March 26, 2015 at an event hosted at Radio City Music Hall. At that time, I made arrangements -- through my agent -- to visit him on March 27 at his offices for a professional meeting.

2. On the evening of March 27, I met Mr. Weinstein in his offices to discuss my future business plans as a model and actress.

3. During the meeting, Mr. Weinstein provided me professional advice concerning my career. We also engaged in casual discussion and banter about Italy, the film industry and my upcoming photo shoot with the Victoria's Secret company. I showed Mr. Weinstein my modeling portfolio and also discussed a role in a television program he was producing in Italy called "Gomorra." Mr. Weinstein's stated belief that he behaved appropriately is reasonable, and the meeting was cordial and ended amicably.

4. I reported my interactions with Mr. Weinstein to the police due to poor advice I received from friends and representatives. I regret how the events transpired and were portrayed in the media.

Ambra Gutierrez Battilana

Sworn before me
this 20 day of April 2015

Notary Public

DAVID KOLKER
Notary Public, State of New York
No. 02KO6266445
Qualified in New York County
Commission Expires July 30, 2016