SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 77

THE PEOPLE OF THE STATE OF NEW YORK,	:	
- against -	:	DECISION AND ORDER
KYRIACOS PIERIDES et al.,	:	Ind. No. 732/18
Defendants.	:	

MICHAEL OBUS, J.:

Defendant Kyriacos Pierides' motion to dismiss the indictment is granted.

Introduction

Defendant Kyriacos Pierides and others, including Ifeanyi ("Manny") Madu, are charged in the above-entitled indictment with corrupting the government in the first degree, PL 496.05. In addition, defendant Pierides alone is indicted for bribery in the first degree, PL 200.04(2), and Madu alone for bribe receiving in the first degree, PL 200.12(b).

In this prosecution, and several related indictments, the People allege that for as long as a decade spanning from 2007 to 2017 – the time period alleged in the present indictment – the various defendants, executives of local engineering and construction management companies, bribed Madu, a mid-level New York City Department of Environmental Protection ("DEP") manager, in exchange for confidential "RFP" information useful in preparing bids for DEP construction contracts.[1] Defendant Pierides, between 2008 and 2015 an engineer serving as an associate vice-president at the Kansas-based firm Black & Veatch, is alleged to have provided Madu with a "stream of benefits," the

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[1] Other corrupt schemes alleged in some of these and yet other related indictments are not outlined here. As stated, defendant Pierides is charged with the bribery scheme alone.

scope of which the parties dispute, in exchange for confidential information regarding upcoming RFPs: cash, "perks" and jobs for those close to Madu, as the People contend, or "several modest lunches and dinners," and perhaps a Black & Veatch internship for "Madu's brother's colleague's daughter," as defendant contends. For his part, Madu, who was charged in each indictment, ultimately entered guilty pleas whereby he agreed to cooperate in the prosecutions.

Preocedural Context

On April 18, 2018, the various defendants were arraigned before Justice Robert M. Stolz, to whom the cases were initially assigned. At arraignment, Assistant District Attorney Diana Florence, the prosecutor who handled all of the cases until recently, disclosed to the defendants numerous documents, including a "statement of facts," charts, Grand Jury exhibits, thousands of pages of emails, government certification applications, DEP records, and bank records for Madu and a company he controlled that was implicated in some of the schemes, "CIMC." In addition, ADA Florence provided redacted search warrants, and supporting affidavits, targeting Madu, Madu-related companies and "HAKS," a separately indicted company. The emails involving defendant Pierides were obtained from Madu's email account, not from Black & Veatch. Consistent with her position that she was conducting open file discovery, and had disclosed most of the evidence she intended to present at the defendants' trials, ADA Florence offered to separately meet with defendants to show and explain additional documents other than Grand Jury testimony, such as individual defendant's bank records.

On June 11, 2018, the parties appeared before Justice Stolz to discuss the status of discovery and to set motion schedules. After another defendant's attorney inquired

about certain Brady material,[2] Justice Stolz "remind[ed] [the prosecutor] of [her] Brady obligations." The prosecutor responded that she was aware of her obligations, that the attorney could tell her about anything specific and continued, "Right here this moment I don't know of any Brady, anything that could be construed as Brady. I turned [over] every bit of evidence I expect to use in the case." Another defendant's attorney, Jeremy Temkin, then raised the issue of emails:

> MR. TEMKIN: I do believe there were searches done, electronic searches. So email servers and Cloud service providers. Both of my client's company and also of Mr. Madu's email server. I don't believe that those materials were included in the disks that w[ere] provided with the discovery. So there has been a whole slew of data that has been downloaded both in emails, and in terms of, you know, word documents and assorted documents that are on the Cloud that were not included in the disk that was provided, and we made a request for that.
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> THE COURT: Is there another disk forthcoming?
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> MS. FLORENCE: So, Your Honor, what Mr. Temkin refers to – first off, Mr. Temkin represents Mr. Husam Ahmad. I am not sure what standing he could have to get Mr. Madu's email [en masse].
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> THE COURT: Somebody has standing.
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> MS. FLORENCE: Well, the email –
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> THE COURT: I don't want to quibble about this. It appears to be a rather unified defense here. So if it's good for one – unless there is a reason not to – if it's good for one defendant, it's good for everybody.
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> MS. FLORENCE: Your Honor, I turned over all of Mr. Madu's emails that I expect to use at trial. So with respect to

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[2] See Brady v. Maryland, 373 US 83 (1979).

the entire email account, I don't think that that is discoverable. Again, I already turned over all of the ones that were included in that disk. With respect to –

THE COURT: Wait a second. Are you saying that there is something that was seized from one of these defendant's phones or email accounts which you don't have an obligation to disclose?

MS. FLORENCE: Correct. Well, I disclosed that I did a search warrant, and Mr. Temkin is well aware we did a search of the entire inbox; however, we did key word searches, and the emails that we found relevant, we ended up using in the grand jury, and we already turned those over. Mr. Temkin is asking for all of Mr. Madu's emails. He is also asking for –

THE COURT: Well, would Mr. Madu be entitled to all of his emails if they were seized?

MS. FLORENCE: I would say, Your Honor, they already have access to their own emails.

THE COURT: Answer the question.

MS. FLORENCE: I don't believe it's the People's obligation to make a copy of a person's entire inbox. What our obligation is is to turn over all records that are relevant to this case.

THE COURT: Who is representing Mr. Madu?

MR. BACHNER: Your Honor, Mr. Bachner.

THE COURT: Do you want all your emails?

MR. BACHNER: I'm going to have that discussion with Mr. Florence. I believe I'm entitled to all emails.

THE COURT: I believe you are entitled to all of your client's emails.

You are going to give them to Mr. Temkin?

MR. BACHNER: I have no problem sharing, Your Honor.

THE COURT: I think we solved the problem here. Go on.

MS. FLORENCE: Your Honor, with respect to then [sic] Mr. Temkin is now asking for a copy of his server, the Cloud which Mr. Temkin has direct acess to. We did a search warrant. We made a copy so I am not sure why we need to now turn it over again.

THE COURT: It's a simple matter. Let's not talk about servers. Let's not talk about Clouds. All right. Do you have a disk which has Mr. Madu's emails on it? Yes or no?

* * *

MS. FLORENCE: His entire inbox? Sure.

THE COURT: That you have seized?

MS. FLORENCE: Yes.

THE COURT: Give it to Mr. Madu's lawyer.

MS. FLORENCE: Fine.

Justice Stolz and the parties then clarified that the People were to provide all of Mr. Madu's emails to his attorney, who could then, subject to withholding personal or irrelevant emails, share them with co-defendants' attorneys. Mr. Temkin then continued:

Mr. Temkin: By the same token, the D.A.'s office has downloaded all [of] my client's emails from his company account, and we can get all of those emails too.

Ms. Florence is right. We can try to replicate what it is they received; and quite frankly, you know, there could be information on those emails that were not included in the People's grand jury presentation that might be helpful to me in my presentation to the petit jury.

THE COURT: Understood. Let me lay out a principle here. The [p]eople are enitled to their own own emails if they were seized by the government. That's the principle.

> Whether one defendant is entitled to another defendant's emails is sort of a different question which I don't think I have to reach right now insofar as counsel are cooperating with each other. So everybody gets their own emails.
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> MS. FLORENCE: Your Honor, but if I may what Mr. Temkin –
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> THE COURT: No. You may not. It was very clear. Everybody gets their own emails.

When the prosecutor protested that the amount of data was large and that the defendants had access to the same information, Justice Stolz continued:

> THE COURT: I layed out a principle here. The principle is people should have their own emails, their own communications. The defendants in this case have ongoing access to their own computerized records, correct?
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> MR. TEMKIN: No.
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> THE COURT: Is that because the People seized physically the server?
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> MR. TEMKIN: It has to do with the current relationship with the companies. . . . I will talk with Ms. Florence about it.
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> THE COURT: . . . . If we have to have a discovery conference, we will work it out. But the guideline here is [p]eople are entitled to their own emails.[3]

In the following months, defendant Pierides filed a demand to produce and motion for discovery, requesting, inter alia, any relevant recordings, all of defendant's emails, and search warrant returns. He received some additional information, but only the few emails introduced before the Grand Jury in which he was the sender or recipient. According to

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[3] Emphases added to all quoted portions of June 11, 2018, transcript.

the People, defendant's counsel, unlike the other attorneys, did not provide them with requested data drives or "keywords" for additional searches. On October 3, 2018, defendant's attorney sent ADA Florence a letter requesting search warrant returns from Madu, including emails, and reminding her that Justice Stolz had ordered the disclosure of any emails in which a particular defendant was the sender, recipient, or copied. Again according to the People, shortly after that letter, defendant's counsel and ADA Florence had a telephone conversation in which she explained that the People did not directly possess all of defendant's emails because Black & Veatch, for whom defendant no longer worked, had not preserved his email inbox. Instead, the prosecutor continued, defendant's emails introduced before the Grand Jury were recovered from other defendants' accounts. Again, ADA Florence offered to search for additional emails if counsel provided her a list of keywords.

In March, 2019, Administrative Judge Ellen Biben, to whom the group of cases had been transferred, conducted a conference and, taking into account the trials of the other defendants and the schedule of counsel for Pierides, set defendant's trial for January 6, 2020. She met with the parties in May and on July 6, 2019, and confirmed the January date. Later in July, the prosecutor again requested a data drive and keywords, and provided additional discovery, including Grand Jury testimony disclosed as Rosario material and proffer notes for several then-targets of the Grand Jury's investigation, including Madu.

In September, 2019, ADA Florence began trying the first related case, involving defendant David Henley, but that trial abruptly ended due to a death in defense counsel's family. She then tried a second related case, involving defendant Henry Chlupsa, on

October 15, 2019, to verdict on November 12, 2019. Meanwhile, defense counsel for defendant Pierides was conducting an entirely unrelated trial before this Court between September 3 and November 15, 2019.

As the latter two trials proceeded, ADA Florence advised Pierides' attorney that counsel for defendant Henley would be conducting a federal trial in December, 2019, but would be available to try Henley in early January, 2020, and that a witness essential to defendant Pierides' trial was scheduled to undergo knee replacement surgery in mid-January, 2020. She thus wanted to postpone Pierides' trial until March or April, 2020, which, because of his own trial commitments after the slotted January, 6, 2020 date, counsel for Pierides could not accommodate. In late fall, 2019, ADA Florence and counsel for Pierides thus consulted with Justice Biben on several occasions, during which Florence sought to postpone Pierides' trial because of Henley's January re-trial, the Pierides witness' anticipated January surgery, and, at least as of a November 25, 2019, conference, ADA Florence's own fractured wrist. Aware that counsel for Pierides was scheduled to begin a nine month-long series of trials after Pierides' trial in January, including one with several co-defendants she directed to begin on March 2, 2020, Justice Biben declined to adjourn the trial date.

The parties' November, 2019, communications also involved further discovery disclosures. On November 18, 2019, the parties discussed outstanding Rosario material and ADA Florence stated that she would provide additional emails and voicemails in the coming weeks, and would further search all emails in the People's possession for further relevant emails. On November 22, 2019, counsel wrote to ADA Florence, with a copy to Justice Biben, again requesting all emails in which Pierides was the sender or recipient,

all voicemails related to Pierides, and all of Madu's emails obtained pursuant to a search of Madu's Yahoo account and from the DEP. To date, counsel noted, the People had disclosed only 13 emails in which Pierides was the sender, recipient or copied. On December 2, 2019, ADA Florence emailed counsel and Justice Biben, stating that counsel never provided keywords for searches; that defendant's own email account was not obtained pursuant to a search warrant, but that the People possessed instead emails sent to and from defendant from co-defendants' accounts; and that the People's search for additional relevant emails had been hindered not only by counsel's failure to suggest keywords, but by the District Attorney's office's migration between software platforms. The People expected to complete their migration and search by Christmas.

The following day, December 3, 2019, counsel wrote to ADA Florence, copying Justice Biben, again requesting all emails in the People's possession in which Pierides was a sender, recipient or copied, all of Madu's Yahoo and DEP emails in the People's possession, and the balance of any other outstanding discovery. In addition, counsel sought several categories of discovery material, including Rosario material, pursuant to the new discovery laws of CPL Article 245.

On December 6, 2019, Justice Biben agreed to adjourn the trial date from January 6 to January 21, 2020, to allow the People to assign another Assistant District Attorney to the case. On January 6, 2020, the date long scheduled for the commencement of trial, Justice Biben transferred the case to this Part for trial, with the understanding that the People needed some brief additional time to complete discovery. According to defendant, and a discovery log provided by the People, on January 6, 2020, and January 10, 2020, the People disclosed to the defense 14,000 or 15,000 pages of discovery and nearly three

dozen "folders," including checks, tax and financial records, arrest reports, emails, videos and photographs, transcripts, audio recordings, DEP reports, proffer and interview notes, CIMC records and Cellebrite reports from seven Madu-controlled electronic devices seized pursuant to warrants executed in April, 2017. Also included in those materials was a 38-minute sworn and taped pre-indictment statement by Madu to New York City Department of Investigation investigators assigned to the DEP, in which Madu swore that he broke no laws and accepted no bribes from contractors.[4] As characterized by defendant, most of these 14,000 or 15,000 items were in the People's possession before indictment, and certainly since defendant's July, 2018, discovery demand and motion; according to the People, most of those items are not relevant to defendant Pierides. As described below, much more material has been disclosed since those January dates.

As recounted by both parties, in addition to the 14,000 or 15,000 documents disclosed on January 6 and 10, 2020, on the latter date the People also turned over approximately 135,900 items, including emails and attachments, found in Madu's Yahoo account, Madu's DEP email accounts and computers, and the email accounts of two employees of HAKS, whose executive was separately indicted. According to the People, because the 135,900 emails were not obtained from defendant's accounts, they needed to be searched for responsiveness before disclosure. Moreover, the People have alleged, only about 850 emails or attachments were directly to or from defendant's email

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[4] Madu claimed the same in seven belatedly disclosed annual written statements to the NYC Conflicts of Interest Board between 2009 and 2015, affirming that he took no bribes and had no interests in any company doing business with New York City. Madu's cooperation agreement makes no mention of his lies to the Department of Investigation or possible perjury charges.

addresses, including some 700 when defendant was employed at Black & Veatch, and the remainder from the companies where he worked beforehand (Arcadis) and later (Amay Associates). Two additional batches of Black & Veatch emails – perhaps numbering 78,000 – received by the People on January 16 and 21, 2020, in response to their December 10, 2019, subpoena, were disclosed to defendant on January 24, 2020. Further emails were to be disclosed during the week of January 27, 2020, as well as the content of some nine Madu-controlled computers seized in April, 2017, which defendant estimates may contain as much as 1.5 terabytes of data, and which defense counsel expected would take weeks to load onto a software platform for review.

On January 13, 2020, defendant filed the present motion to dismiss on the basis of the People's discovery delays. In support of his motion, defendant cited a number of factors, including the reasons behind the firm January 6, 2020, trial date; the tremendous volume of the late discovery; the mandatory nature of much of the discovery, even under pre-2020 law; defendant's repeated requests for the materials; the lack of a coherent reason for the People's failures, which defendant characterizes as at least in part deliberate; and the prejudice to defendant, who must choose between a rushed review of an avalanche of data, and a long delay in resolving charges that prevent him from working on government projects. The People responded that defendant is not entitled to a remedy, let alone dismissal, under the new CPL 245.80(1) and (2) because there was no "order" mandating disclosure; that in any event their non-compliance, tardiness and omissions have not been deliberate; that much of the disclosures involved material outside of the People's possession and equally available to both parties; that defendant failed to facilitate discovery by providing empty drives and keywords for searches; that most of the late-

disclosed material is simply not relevant to a trial of the charges; and that a further adjournment would alleviate any possible prejudice to defendant. As discussed below, after weighing the competing interests and arguments, the Court concludes that this is among the rare cases in which dismissal is appropriate.

Discussion

As a preliminary matter, the Court rejects the People's argument – tellingly relegated to a footnote in their response to the motion to dismiss – that the Court is without authority, pursuant to CPL 245.80 and the new, expansive CPL Article 245, to remedy the People's discovery failures, because there was no court "order." As but two examples, Justice Stolz repeatedly made clear, at the June 11, 2018, appearance, that he was ordering the People to provide to each defendant copies of his own emails. As explained above, the People failed to comply with that order in significant fashion – notwithstanding the People's supplemental argument that Justice Stolz imposed no "deadline" for compliance. Further, as the People are undoubtably aware, the Chief Judge of the Court Appeals, Hon. Janet DiFiore, some years ago ordered the People to comply with their Brady obligations in every case, an obligation unquestionably applicable to the late-disclosed sworn statement of Mr. Madu denying any wrongdoing.[5] Having concluded that the People did violate discovery orders, this Court has the discretion to impose remedies and sanctions, including

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[5] The Court rejects the People's minimization of Madu's sworn denial of illegal conduct. Notwithstanding their argument in papers submitted today, February 5, 2020, that Madu's statement was at most Giglio material, the Court views Madu's denial that he accepted gifts and benefits from contractors to be Brady material, and would expect the defense to make ample use of that material before a jury.

"dismissal of some or all of the charges." CPL 245.80(2).[6]

The Court further concludes that dismissal, while drastic, is the appropriate sanction under the unique circumstances of this case. Nearly a year ago, in March, 2019, Justice Biben ordered the trial of this case to begin on January 6, 2020. She chose that date after conferencing and coordinating the related DEP cases with the many attorneys who represented the various defendants. In addition, she took into account the busy trial schedule of defendant's primary attorney, Marc Agnifilo, Esq., who was directed by Justice Biben to begin a multi-defendant trial on March 2, 2020, and who is committed to conduct other trials for much of the remainder of 2020. While the Court does not discount the People's reasons to seek a later trial date, and does not attribute to them bad faith in this regard, Justice Biben heard their arguments on several occasions and, for the reasons stated, adhered to the scheduled January date.

As stated, the discovery at issue was judicially-ordered, mandated by statute and caselaw, and necessary as a matter of fairness. It was also repeatedly requested by the defense, by demand to produce, motion for discovery, and through countless letters, emails, telephone calls and conversations. Whatever delay defendant may have caused by not promptly providing empty thumb or hard drives, as the People requested, did not

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[6] The Court can similarly dispatch another statutory argument raised by the People, that the predecessor discovery section, CPL 240.20(1)(f), mandating disclosure of "property obtained from the defendant, or a co-defendant to be tried jointly," did not apply to Madu's many cells, computers and other electronic devices because once he pleaded guilty and agreed to cooperate against defendant, he was no longer "a co-defendant to be tried jointly." At the time of the seizures and indictment, defendant's discovery motions, and some time thereafter, Madu was very much defendant's co-defendant. The People should not be permitted to neglect or unilaterally extend their statutory obligations, and then claim a change in circumstance.

excuse the People's failure to disclose the Brady recording of Madu's sworn denial of illegal conduct and other essential discrete documents, or their failure to conduct timely searches and analyses of Madu's myriad electronic devices. Likewise, any failure to provide keywords – an issue defendant does not concede – does not explain the People's failure to merely search with defendant's name and email addresses. Indeed, they were directly ordered to disclose all emails to or from each defendant and they simply did not do it.

The scope of the late disclosures is staggering. In November and December, 2019, on what should have been the eve of trial, the parties were still discussing outstanding significant discovery. Since January, not just thousands, but hundreds of thousands, of individual documents from Madu, the DEP, Black & Veatch and other entities have been disclosed.[7] A dozen and a half computers and electronic devices seized nearly three years ago have recently been imaged, analyzed and disclosed, yielding some 1.5 terabytes of information. And, as also noted, the late-disclosed materials include Brady material, that is, Madu's sworn statement and mutliple Conflicts of Interest Board documents; while of limited length, such items are essential to the development of a defense strategy. To their credit, defense counsel have sought to review and absorb these extensive materials as quickly as they have been disclosed, but the amount is overwhelming.[8]

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[7] The Court recognizes that certain Black & Veatch documents were not in the People's possession until recently.

[8] As the defense has reviewed the late disclosed emails, it has supplemented its motion to dismiss with arguments that some of the 13 or 14 emails introduced before the Grand Jury were out of context, and it submitted additional emails it believed changed the character of the introduced emails to exculpate defendant. The People, however,

While the Court rejects any characterization of the People's nonfeasance as an intentional or deliberate attempt to unfairly prejudice the defense, it finds much of the People's explanation troubling and inadequate.[9] The People offered only that they "inadvertently failed to analyze earlier" the many computers and electronic devices seized in early 2017 through an "oversight," that this obligation "fell off" the Assistant's "radar," and that this did not reflect "best practices." The People seek to deflect the reason for other delay onto the defense, an explanation the Court finds lacking. And despite much argument by the defense, the People have yet to offer any explanation for their delayed disclosure of the Brady material, other than to admit in their filing of today, February 5, 2020, that they possessed the material for some time but failed to realize they had it.

Finally, the Court concludes that the People's delays have prejudiced defendant, and are not properly remedied by further adjourning the trial. Indeed, rather than a sanction against the People, such a "remedy" would effectively grant them the adjournment

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submitted yet other emails, and provided further context, to argue that the original emails were in fact inculpatory.

Having itself now reviewed the Grand Jury minutes, this Court concludes that Justice Stolz correctly concluded that the case against defendant Pierides was legally sufficient – a conclusion that in any event is law of the case – and further, that the omission of the emails submitted by the defense did not impair the integrity of the Grand Jury proceedings. See People v. Bryan, 50 AD3d 1049 (2nd Dept. 2008); People v. Townsend, 127 AD2d 505, 507 (1st Dept.). lv. den. 69 NY2d 1011 (1987); CPL 210.35(5). Nevertheless, the Court believes that defendant's arguments reflect not an effort to mislead the Court, but rather defense counsels' struggle to quickly comprehend and integrate vast amount of emails and information.

[9] It is worth noting that the many disclosure obligations new to the 2020 discovery reforms are not at issue here. The items discussed in this decision were due under pre-2020 law.

they requested and were repeatedly denied by Justice Biben. Defense counsel is committed to try a nearly year-long series of cases, beginning, after this trial, with a multi-defendant case scheduled to commence on March 2, 2020. His client, Mr. Pierides, is an engineer whose firms work on DEP projects, and who has been banned, because of the nearly two-year pending indictment, from engaging in such work. While the People's guilty plea offer in his case, a misdemeanor and a conditional discharge, appears generous for a defendant indicted for a Class B felony, that conviction has been an unacceptable penalty to him: he contends it would disqualify him from further government-involved work, and he believes he is not guilty of the charged conduct and wants his day in court.[10] The People's late disclosures have thus placed the defense in an untenable position. On the one hand, they can continue to collate, absorb and explore vast amounts of documents and data in a matter of weeks, doing their best to conduct further investigations and issue subpoenas as they can, in order to try the case immediately. While the People assure the defense and the Court that much of the discovery is simply not relevant to defendant, it is counsel who must make those determinations and bear the consequences. On the other hand, to allow his attorneys to review the discovery material thoroughly and appropriately, defendant must wait another three quarters of a year for his trial to begin, foregoing further employment – the People's suggestion that he find another source of work notwithstanding.

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[10] Throughout their papers, the defense has suggested many reasons why defendant is not guilty, and the People, the opposite. As stated, although they presented a legally sufficient case before the Grand Jury, the People have nonetheless extended a very generous plea offer. In addition, the scope of Pierides' allegedly corrupt conduct, if established, appears to be substantially less than that of the other defendants involved in Madu's schemes.

As the People acknowledge, the remedy for discovery violations is a matter entrusted to the trial court's discretion. See People v. Jenkins, 98 NY2d 280, 284 (2002). While the remedy of dismissal may be unusual or extreme, so too are the facts of this case. Defendant's motion to dismiss the indictment is granted.

This opinion is the decision and order of the Court.

Dated: New York, New York
February 5, 2020

J.S.C.