

42

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT OF MASSACHUSETTS  
SUFFOLK SUPERIOR COURT

COMMONWEALTH	)
	)
V.	)
	)
ALVIN R. CAMPBELL JR.,	)
	)
Defendant	)

DOCKET NO. 2084CR00220

2022 NOV - 1 PM 4: 49

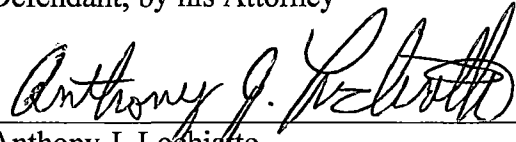
**MOTION TO DISMISS**

The Defendant in the above-referenced matter, pursuant to Mass. Rule Crim. Pro. 13 and other applicable rules and authorities moves this Honorable Court to dismiss numerous indictments in this case as requested more specifically in the memorandum in support. As grounds therefore, the Defendant states:

1. The Commonwealth did not present sufficient evidence to the grand jury to support a finding of probable cause that the Defendant committed numerous indictments in this case.
2. The integrity of the grand jury process was impaired.
3. This Court lacks jurisdiction over certain indictments or this Court is not the proper venue for certain indictments.
4. The Defendant's due process rights under state and federal law were violated.
5. As further grounds, the Defendant relies upon the Affidavit in Support and exhibits, including grand jury minutes and, Memorandum in Support all of which are submitted herewith or to be submitted and made a part hereof and any argument, evidence, or authorities to be presented at hearing. The Defendant reserves the right to supplement.

WHEREFORE, the Defendant requests this Court to grant this Motion.

Respectfully submitted,  
Defendant, by his Attorney



Anthony J. Lochiatto  
BBO #: 555033  
221 Lewis Wharf  
Boston, MA 02110  
(617) 557-0088  
anthonylochiatto@msn.com

**Certificate of Service:** I certify that I served a copy of this foregoing to counsel for the Commonwealth by electronic mail on 11/01/2022. APX.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT OF MASSACHUSETTS  
SUFFOLK SUPERIOR COURT

COMMONWEALTH )  
 )  
V. )  
ALVIN R. CAMPBELL JR., )  
Defendant )

DOCKET NO. 2084CR00220

2022 NOV - 1 PM 4: 4

**AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS**

I, Anthony J. Lochiatto state that I reference the following as Exhibits. This list does not include every single exhibit presented to the grand jury. I intend to submit an electronic copy of these exhibits under seal in the coming week. I reserve the right to supplement.

Exhibit A: Grand Jury Minutes; A1-Volume 1, Testimony/ A2-Volume 2 instructions

Exhibit B: E.W. Video/Audio Introduced as Grand Jury Exhibit 13;  
B1 / IMG 3266.MOV / Comm. ref. EW1.MOV  
B2 / IMG 3267.MOV / Comm. ref. EW2.MOV

Exhibit C: E.W. Recorded Statement transcript;

Exhibit D: K.W. Recorded Statement, transcript;

Exhibit E: K.W. Video/Audio introduced to the grand jury;  
E1 / IMG\_4912.MOV  
E2 / IMG\_4913.MOV  
E3 / IMG 4921.MOV

Exhibit F: E.C. Recorded Statements Volume 1 &2, transcripts;

Exhibit G: E.C. Video/Audio Introduced as Grand Jury Exhibit;  
G1-IMG\_3346.MOV  
G2-IMG\_3347.MOV  
G3-IMG\_3348MOV  
G4-IMG\_3349.MOV  
G5-IMG\_3350.MOV  
G6-IMG\_3351.MOV

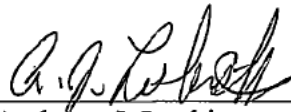
Exhibit H: D.S. Grand Jury Minutes from 2017;

Exhibit I: D.B. Grand Jury Minutes from 2017;

- Exhibit J: Interoffice Memorandum dated 10/24/2017 concerning D.S. & D.B.;
- Exhibit K: D.B. & D.S. Video/Audio & texts submitted to grand jury;  
K1 / D.B.1.MOV  
K2 / D.S.1MOV  
K3 / Texts between D.S. & Defendant
- Exhibit L: S.M. Recorded Statement, transcript;
- Exhibit M: S.M. Video/Audio introduced as grand jury exhibits;  
M1 / S.M. 1.MOV  
M2 / S.M. 2.MOV  
M3 / S.M. 3.MOV
- Exhibit N: C.M. Recorded Statement, transcript;
- Exhibit O: C.M. Video/Audio/ introduced as grand jury exhibits  
Ex. O1 / IMG\_4422.MOV  
Ex. O2 / IMG\_4424.MOV  
Ex. O3/ IMG\_4425.MOV  
Ex. O4 / IMG\_4426.IMG

Signed under penalties of perjury.

Respectfully submitted,  
Defendant, by his Attorney



Anthony J. Lochiatto  
BBO #: 555033  
221 Lewis Wharf  
Boston, MA 02110  
(617) 557-0088  
anthonylochiatto@msn.com

**Certificate of Service:** I certify that I served a copy of this foregoing to counsel for the Commonwealth by electronic mail on 11/01/2022. *C. J. T.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT OF MASSACHUSETTS  
SUFFOLK SUPERIOR COURT

COMMONWEALTH )  
)  
V. )  
)  
ALVIN R. CAMPBELL JR., )  
)  
Defendant )

DOCKET NO. 2084CR00220

2017 NOV -1 PM 4:49

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

**STATEMENT OF THE CASE**

**The charges for each alleged victim**

The Defendant, Alvin R. Campbell, Jr., has been indicted on 32 counts with respect to seven alleged victims on the above docket. The Defendant is charged with committing rape against six alleged victims and assault with intent to rape against one. Two of the rapes are charged as aggravated rape, aggravated by kidnapping. The Defendant is also charged with kidnapping two counts, videotaping individuals nude without their knowledge and with habitual offender enhancements. A list of alleged victims, identified by initials only, dates of offense and list of charges is as follows:

1. D.S. date of incident 02/09/2017, 5 counts as follows:
  - a. Rape, G.L. c. 265 §22(b); mouth upon vagina;
  - b. Rape as habitual offender, G.L. c. 279 §25;
  - c. Rape, G.L. c. 265 §22(b);
  - d. Rape as habitual offender, G.L. c. 279 §25;
  - c. Recording unsuspecting nude person, G.L. c. 272 §105(b);

2. D.B. date of incident 02/09/2017, 3 counts as follows:
  - a. Assault w/ intent to rape, G.L. c. 265 §24;
  - b. Assault w/ intent to rape as habitual offender, G.L. c. 279 §25;
  - c. Recording unsuspecting nude person, G.L. c. 272 §105(b)
  
3. K.W. date of incident 11/23/2019, 6 counts as follows:
  - a. One count of aggravated rape, aggravated by kidnapping, G.L. c. 265 §22(a);
  - b. Aggravated rape as habitual offender, G.L. c. 279 §25;
  - c. Kidnapping G.L. c. 265 §26, “did forcibly confine or imprison, K.W.”;
  - d. Kidnapping as habitual offender, G.L. c. 279 §25;
  - e. Recording unsuspecting nude person, G.L. c. 272 §105(b);
  - f. Recording unsuspecting nude person, G.L. c. 272 §105(b);
  
4. E.C. date of incident 5/21/2017, 9 counts as follows:
  - a. Aggravated rape, aggravated by kidnapping, G.L. c. 265 §22(a);
  - b. Aggravated rape as habitual offender, G.L. c. 279 §25;
  - c. Kidnapping G.L. c. 265 §26, “did forcibly confine or imprison, K.W.”;
  - d. Kidnapping as habitual offender, G.L. c. 279 §25;
  - e. Indecent A&B G.L. c. 265 §13H; mouth to mouth;
  - f. Indecent A&B as habitual offender;
  - g. Indecent A&B G.L. c. 265 §13H; mouth to breast;
  - h. Indecent A&B as habitual offender;
  - i. Recording unsuspecting nude person, G.L. c. 272 §105(b);
  
5. C.M. date of incident 12/21/2017, 3 counts as follows:
  - a. Rape under G.L. c. 265 §22(b);
  - b. Rape as habitual offender, G.L. c. 279 §25;
  - c. Recording unsuspecting nude person, G.L. c. 272 §105(b);
  
6. S.M. date of incident 9/27/2019, 3 counts as follows:
  - a. Rape under G.L. c. 265 §22(b);
  - b. Rape as habitual offender, G.L. c. 279 §25;
  - c. Recording unsuspecting nude person, G.L. c. 272 §105(b);
  
7. E.W. date of incident, 04/03/2017; 3 counts as follows:
  - a. Rape under G.L. c. 265 §22(b);
  - b. Rape as habitual offender, G.L. c. 279 §25;
  - c. Recording unsuspecting nude person, G.L. c. 272 §105(b);

### **Relief Requested by the Defendant**

The Defendant moves to dismiss all counts other than six counts charging recording of an unsuspecting nude person. The Defendant moves to dismiss certain counts for lack of probable cause. The Defendant moves to dismiss all other counts because the Commonwealth impaired the integrity of the grand jury process and violated the Defendant's due process rights under the U.S. Constitution and Massachusetts law by submitting incomplete and misleading information, and for failure to introduce exculpatory evidence which distorted the evidence and likely impacted the grand jury's decision to indict and for other grounds as described herein. The Defendant also argues that the Commonwealth failed to sufficiently instruct the grand jury. The Defendant also moves to dismiss aggravated rape and kidnapping charges relating to K.W. and E.C. involving incidents that took place out of the Commonwealth or out of Suffolk County for lack of jurisdiction and improper venue.

### **Summary of Factual Background**

The alleged rapes do not include allegations of violence or threats. The theory of rape appears to be lack of consent because the alleged victims were too intoxicated to consent and were allegedly unaware of or forgot what had happened. Two alleged rapes in this case, those involving E.C. and K.W., are charged as aggravated rapes based on allegations that they were committed during the commission or attempted commission of a kidnapping. The "kidnappings" involve allegations that E.C. and K.W. voluntarily entered the Defendant's car but with regard to E.C. she ended up at the Defendant's apartment in Framingham, Massachusetts rather than Natick, Massachusetts where she lived. K.W. allegedly arrived at the Defendant's residence in Rhode Island. The

Defendant allegedly drove E.C. home. K.W. took an Uber home. In neither situation did the alleged victim protest about arriving at a place other than their own residence.

D.S. and D.B. went to police in 2017 and both were examined at a hospital. Both testified before a grand jury in 2017 but the incidents relating to D.S. and D.B. were withdrawn and not presented for indictment at that time. Although there are indications that D.S. and D.B. provided recorded statements in 2017, the Commonwealth cannot locate those statements. An internal memorandum between prosecutors that has been provided through discovery states: *“It does not seem as if we would be able to prove rape for Ms. (name deleted) [D.S.], because, even by her own account, she is not sure whether she actually said no. It would be nearly impossible to prove lack of consent, due to incapacitation because [D.S.] has some memory of what happened.”*

Aside from the cases of D.S. and D.B., all cases involved the police reviewing videos obtained through search warrants of the Defendant's smart phone and contacting the women depicted on the videos. The women knew they were being contacted by detectives in the sexual assault units. Some, if not all, of the women were aware of the Defendant's arrest on similar charges in the media before they spoke with police. At least one learned that the Defendant was being investigated for other incidents during the police interview. Police also contacted D.S. and D.B. in 2020 and revived the previously withdrawn investigation.

The charges on this docket were presented to the grand jury on September 15, 2020. None of the alleged victims testified before the grand jury. Instead, police detectives testified about their interviews with the women and introduced exhibits including video and audio allegedly extracted from the Defendant's phone. Neither the



audio recordings nor transcripts of the interviews were entered as evidence. The Commonwealth was ordered on July 05, 2022 to provide a bill of particulars by September 01, 2022 but has not complied.

#### **List of Exhibits**

- Exhibit A: Grand Jury Minutes; A1-Volume 1, Testimony/ A2-Volume 2 instructions
- Exhibit B: E.W. Video/Audio Introduced as Grand Jury Exhibit 13;  
B1 / IMG 3266.MOV / Comm. ref. EW1.MOV  
B2 / IMG 3267.MOV / Comm. ref. EW2.MOV
- Exhibit C: E.W. Recorded Statement transcript;
- Exhibit D: K.W. Recorded Statement, transcript;
- Exhibit E: K.W. Video/Audio introduced to the grand jury;  
E1 / IMG\_4912.MOV  
E2 / IMG\_4913.MOV  
E3 / IMG 4921.MOV
- Exhibit F: E.C. Recorded Statements Volume 1 &2, transcripts;
- Exhibit G: E.C. Video/Audio Introduced as Grand Jury Exhibit;  
G1-IMG\_3346.MOV  
G2-IMG\_3347.MOV  
G3-IMG\_3348MOV  
G4-IMG\_3349.MOV  
G5-IMG\_3350.MOV  
G6-IMG\_3351.MOV
- Exhibit H: D.S. Grand Jury Minutes from 2017;
- Exhibit I: D.B. Grand Jury Minutes from 2017;
- Exhibit J: Interoffice Memorandum dated 10/24/2017 concerning D.S. & D.B.;
- Exhibit K: D.B. & D.S. Video/Audio & texts submitted to grand jury;  
K1 / D.B.1.MOV  
K2 / D.S.1MOV  
K3 / Texts between D.S. & Defendant
- Exhibit L: S.M. Recorded Statement, transcript;

Exhibit M: S.M. Video/Audio introduced as grand jury exhibits;  
M1 / S.M. 1.MOV  
M2 / S.M. 2.MOV  
M3 / S.M. 3.MOV

Exhibit N: C.M. Recorded Statement, transcript;

Exhibit O: C.M. Video/Audio/ introduced as grand jury exhibits  
Ex. O1 / IMG\_4422.MOV  
Ex. O2 / IMG\_4424.MOV  
Ex. O3/ IMG\_4425.MOV  
Ex. O4 / IMG\_4426.IMG

## ARGUMENT

### **Applicable Standard for Probable Cause**

The Supreme Judicial Court has stated that “at the very least the grand jury must hear sufficient evidence to establish the identity of the accused and probable cause to arrest him for the crime charged. Commonwealth v. Moran 453 Mass. 880 (2009) quoting Commonwealth v. McCarthy, 385 Mass. 160 (1982); See also Commonwealth v. Truong Vo Tam, 49 Mass.App.Ct. 31 (2000). The grand jury evidence must include information to support probable cause as to “*each essential element*” of the offense. Commonwealth v. Hanright, 466 Mass. 303 (2013); Commonwealth v. Humberto H., 466 Mass. 562, 566 (2013). The standard of probable cause is defined as whether the Grand Jury was presented reasonably trustworthy evidence sufficient to warrant a reasonable or prudent person in believing that the defendant committed or was committing a crime. Id. “*A grand jury finding of probable cause is necessary if indictments are to fulfill their traditional function as an effective protection ‘against unfounded criminal prosecutions’*”. Commonwealth v. McCarthy supra at 163. Probable cause may be established by circumstantial evidence and reasonable inferences. Commonwealth v. Umberto H., supra at 566.

### **Standard For Dismissal for Impairment of the Integrity Grand Jury Proceeding**

Where the integrity of Grand Jury proceedings is impaired, the indictment should be dismissed. Commonwealth v. Drumgold, 423 Mass. 230, 235 (1996). An indictment should be dismissed where the Commonwealth withholds exculpatory evidence and causes a distorted view of the evidence. Commonwealth v. O'Dell, 392 Mass. 445 (1984). Although the Commonwealth is not required in every instance to reveal all exculpatory evidence to a grand jury, a prosecutor is obligated to do so when the evidence would greatly undermine either the credibility of an important witness or the evidence is likely to affect the grand jury's decision. Commonwealth v. Hunt, 84 Mass.App.Ct. 643 (2013). A prosecutor is not required to present all possibly exculpatory evidence to a grand jury. But a prosecutor cannot be permitted to subvert the integrity of grand jury proceedings by “selling” the grand jury “shoddy merchandise” without appropriate disclaimers. Commonwealth v. Connor, 392 Mass. 838, 854 (1984).

An indictment should be dismissed, where a defendant can show that a mistake or omission impaired the process and substantially influenced the grand jury's decision to indict, even if there is sufficient evidence of probable cause. Commonwealth v. Fernandes, 483 Mass. 1, 7 (2019). The mistake or omission need not even be intentional. Reckless behavior is sufficient. Commonwealth v. Silva, 453 Mass. 503, 509 (2009) citing Commonwealth v. Mayfield, 398 Mass. 615, 620-622 (1986). The Supreme Judicial Court has observed: "*We must deal with such a question case by case. It is unlikely that we could devise a satisfactory, comprehensive statement of what conduct does, and what conduct does not, impair the integrity of the grand jury process.*" Commonwealth v. Mayfield, supra at 620 (1986). Dismissal is the appropriate remedy

where the improper or misleading presentation of evidence probably influenced the grand jury's decision to indict. Id at 621. See also Commonwealth v. Fernandes, supra at 8.

The Commonwealth also has a duty to advise and instruct the grand jury in appropriate circumstances, although there is no general duty to instruct in all cases absent a request. Commonwealth v. Walczak, 463 Mass. 808, 823 (2012). See also Commonwealth v. Fernandes, supra at 7 (2019). Where a duty to instruct exists the Commonwealth must instruct accurately. The instructions to a grand jury need not have the same precision as instructions to a petit jury at trial. Id at 835, citing People v. Calbud, Inc., 49 N.Y.2d 389, 394 (1980). The Supreme Judicial Court announced a decision in 2017 to create a grand jury committee. Commonwealth v. Grassie 476 Mass 202 (2017). In June of 2018, the Committee submitted a Proposed Best Practices for Use by Prosecutors Making Presentments to the Grand Jury. With regard to instructing the grand jury the Best Practice No. 3 starting on page 21 states in relevant part:

3. Prosecutor's Instruction on the Law
  - A. The prosecutor should advise the grand jury of the relevant law whenever required by law, requested by a grand juror or otherwise necessary to the grand jury's determination whether probable cause exists with regard to the charges under consideration.
  - B. The prosecutor should also ensure that the grand jurors understand that they have a right at any time to request to be instructed on the law concerning the charges being considered, including the essential elements of the offenses.

### **Elements Of Rape, Aggravated Rape and Kidnapping**

It is not enough for the Commonwealth to establish that the alleged victims were so impaired as to render them “incapable” of consent. The Commonwealth must also *“prove that the defendant knew or reasonably should have known that the complainant's*

*condition rendered her incapable of consenting to the sexual act.”* Commonwealth v. Blache, 450 Mass. 583, 595 (2008). Intoxication by itself does not necessarily mean that an individual is incapable of providing or refusing consent. Id. at 590.

MCLE Superior Court Jury Instructions, §3.1 Rape, Section 3.1.1 of the Supplemental Model Jury Instructions on rape provides:

“(c) *Complainant Unconscious or in a Stupor*

In this case, there has been evidence that (the complainant/name) [had consumed alcohol; had consumed drugs; was unconscious; etc.]. If, because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, intellectual disability, or helplessness), a person is so impaired as to be incapable of consenting to sexual intercourse, then intercourse occurring during such incapacity is without that person's consent.

Regarding kidnapping, G.L. c. 265 §26 states:

Whoever, without lawful authority, forcibly or secretly confines or imprisons another person within this Commonwealth against his will, or forcibly carries or sends such person out of this Commonwealth, or forcibly seizes and confines (or inveigles) another person, with intent either to cause him to be secretly confined or imprisoned in this Commonwealth against his will, or to cause him to be sent out of this Commonwealth against his will or in any way held to service against his will, shall be punished.

Both indictments for kidnapping in this case alleged that the Defendant:

**“without lawful authority, did forcibly confine or imprison one [K.W. or E.C.] within this Commonwealth against her will.”** See indictments.

To establish elements of kidnapping as indicted, the Commonwealth is required to prove that the Defendant forcibly confined or imprisoned the alleged victim(s). See Commonwealth v. Lent 46 Mass. App. Ct. 705, 709 (1999).

Force as defined for kidnapping involves the use of actual force or the display of potential force. Commonwealth v. Boyd, 73 Mass. App. Ct. 190, 193 (2008).

Confinement means any restraint of a person’s movement. Id. citing Commonwealth v.

Lent, 32 Mass. App. Ct. 216, 222 (1992). Against a person's will means without their consent. Commonwealth v. Travis, 408 Mass. 1, 8 (1990).

For the purpose of kidnapping, confinement is "secret" in nature "when it serves to isolate or insulate the victim from meaningful contact or communication with the public, that is, when the confinement is in a place or in a manner which makes it unlikely that members of the public will know or learn of the victim's unwilling confinement within a reasonable period of time". Commonwealth v. Rivera, 460 Mass. 139, 142 (2011).

Regarding aggravated rape, based on kidnapping, the restraint or confinement necessary to support a charge of kidnapping must be more than that necessary to accomplish rape. Commonwealth v. Kastner, 76 Mass. App. Ct. 131, 141 (2010). The Commonwealth has the burden of proving that the alleged rape was "*committed during the commission or attempted commission of an offense....*" [kidnapping]. G.L. c. 265 §22(a). The rape and kidnapping must constitute a continuous episode and course of conduct. Commonwealth v. McCourt, 438 Mass. 486 (2002).

#### **ARGUMENTS AND STATEMENT OF FACTS WITH RESPECT TO EACH ALLEGED VICTIM**

##### **The Commonwealth Did Not Present Sufficient Evidence of Probable Cause and Impaired the Integrity of the Grand Jury Process.**

The Commonwealth failed to present sufficient evidence of probable cause to support charges. More specifically, the Defendant argues that the charges of kidnapping, aggravated rape, with kidnapping as the aggravating factor, and various counts of rape and other charges are not supported by probable cause as argued herein. The Commonwealth also impaired the grand jury process with respect to all charges for

reasons discussed herein including failure to properly present exculpatory evidence and presenting evidence in a conclusory and misleading way. The Commonwealth also should have provided some instruction to the grand jury regarding elements of certain charges. Concepts of consent and the elements of kidnapping and aggravated rape are not intuitive concepts. If the Commonwealth had instructed the grand jury on elements of the crimes, it is likely that would have resulted in a different decision. Furthermore this Court lacks jurisdiction for certain charges and Suffolk County is the wrong venue for other charges. An analysis with respect to all alleged victims follows.

### **Description of Evidence and Argument for Each Alleged Victim**

#### **E.W. Date of Incident 4/03/2017 (Grand Jury pages 53-59)**

Although it was not referenced in testimony to the grand jury or played for the grand jury, there is an audio section of the video exhibit where E.W. explicitly states, "I want to f\_\_k you right now", prior to engaging in sex which is the subject of the rape charge. (Exhibit B1, video/audio of E.W. introduced as Exhibit 13 to grand jury, audio portion at minutes approximately 37 seconds). There is further discussion where she tells the Defendant that she wants to make love to only him. (Exhibit B1). Neither of these critical statements is referenced in the Commonwealth's presentation to the grand jury. Both of these statements by E.W. are highly exculpatory. The Commonwealth buried this evidence in such a way that it is unlikely the grand jurors were even aware of it.

Detective Gregory Waldrip testified before the grand jury in relation to E.W. on pages 53-59. (Exhibit A, G.J. p 53-59). Det. Waldrip testified that E.W. told police that she "*had no recollection of any sexual conduct or contact that night*". (Exhibit A1, G.J. Vol. 1, p. 57, lines 4-6). Detective Waldrip testified that E.W. told her cousin that the

Defendant made sexual advances, but she does not even remember saying that to her cousin. (Exhibit A1, G.J. p. 56 line 23-p. 57, line 3). E.W. provided her number to the Defendant. (Exhibit A1, G.J. p. 56, line 15-17) and had his number in her phone (A1, G.J. p. 57, line 14-14). E.W. contacted the Defendant shortly after being dropped off in her hotel after the alleged incident, when she discovered that her keys and underwear were missing. The Defendant returned the keys, but the underwear was not recovered.

Detective Waldrip described the videos, allegedly recovered from the Defendant's phone. He mentions how in one video, the Defendant digitally penetrates E.W. and encourages her to touch herself in her genital areas. (A1, G.J. p. 55, lines 1-16.). He testifies that E.W. appears intoxicated.

Detective Waldrip testifies that the exhibit introduced as evidence contains a video of approximately 13 minutes, but he fails to reference the critical audio portion where the Defendant asks E.W. what she wants to do, and she explicitly states, "**I want to f\_\_k you right now**". Prior to that the Defendant says he wants to see her and visit her, and she responds with sounds that appear indicate agreement. Detective Waldrip does not reference the contents of this audio portion in any way. Nor does he mention the audio only portion of the video where E.W. states that she wants to make love to only the Defendant. Rather, he states:

"That's about a thirteen minute video, where [E.W. name deleted] is in the back of the vehicle with Alvin Campbell, where he is digitally penetrating her vagina. She appears to be intoxicated. At some point in the video, he's encouraging her to touch herself in, like the genital area as well". (G.J. p. 55 lines 1-7).

The audio portion of E.W. providing **explicit consent** to sex is in the initial minute of the video which Detective Waldrip describes and the Commonwealth introduces in support of the rape charges. The digital penetration occurs about 5 minutes



later. The discussion which contains the consent is done in soft voices and is easily missed, especially if a viewer is only looking for video and where hours' worth of video on this and other incidents was entered as evidence. Detective Waldrip does not mention of the audio only portion of the exhibit and refers to it only as a video. The video was not played for the grand jury but simply provided as an exhibit. To the extent the jurors even viewed it, it is likely they would have viewed only the visible portions and never heard the audio where E.W. says she wanted to have sex with the Defendant. That section of the video is critically important and appears to totally exonerate the Defendant, yet it is ignored and virtually hidden. It is clear that the grand jurors were never aware of it.

Furthermore, even the video portion itself demonstrates that E.W. as an active participant. While Detective Waldrip testifies that the Defendant encouraged E.W. to touch herself. He fails to mention that she responds to this encouragement. This is further evidence of active participation that was glossed over.

There is a second video where E.W. is fully clothed and speaking with the Defendant. Detective Waldrip states his opinion that she appears intoxicated.

Police introduced additional video from the cousin of E.W. showing that she appeared intoxicated at the concert and after. E.W. was thrown out of the concert and went to a pizza restaurant where she is temporarily reunited with her cousin before separating again.

Detective Waldrip also testified to his conversation with E.W. on May 07, 2020. Detective Waldrip does not mention that ADA Riley participated in the interview and that she had called E.W. the day before or that E.W. was already aware of the identity of Alvin Campbell and a prior charge against him from media exposure. Police contacted

E.W. when they saw text messages between the Defendant and her after searching the Defendant's phone and viewing certain text messages where E.W. considered the Defendant a rapist. She still did not recall what happened, but the Defendant informed her they had sex. A copy of the recorded interview was not presented to the grand jury.

The statement by E.W. says she wants to make love to only the Defendant and the statement that E.W. wanted to F \_\_k the Defendant are highly exculpatory Neither of these critical statements is referenced in the Commonwealth's presentation to the grand jury. Where there is powerful evidence of explicit consent, the Commonwealth should have referenced it. Instead the Commonwealth did not mention it, show it or reference that this evidence existed. Contrast other minor details such as text messages from approximately a year after the incident where E.W. says she consider the Defendant a rapist. Detective Waldrip explicitly references that specific message out of context.

The single count of rape and the habitual offender enhancement should be dismissed for lack of probable cause. These counts should also be dismissed because the Commonwealth failed to mention and for all practical purposes, hid exculpatory evidence of explicit consent, which impaired the integrity of the grand jury proceeding.

Furthermore, in the circumstances of this case the Commonwealth had a duty to clarify the appropriate standard and instruct grand jurors. Where rape is alleged in circumstances where the alleged victim lacked capacity to consent, because of intoxication, the Commonwealth must prove the lack of capacity and the Defendant knew about the lack of capacity. It is not enough to prove that the Defendant had sex with an intoxicated person. In a situation such as the present one, where the Defendant asks EW what she wants to do and she says that she wants to "F - - K" him "right now," it is

important that grand jurors know the applicable standard. It is hard to imagine how the Defendant was supposed to know about an alleged lack of capacity after hearing those words. The lack of instruction, combined with the Commonwealth's failure to present the words of consent and instead practically hiding it, tainted the proceeding.

The failure of the Commonwealth to present this highly exculpatory evidence most likely affected the decision to indict on charges related to E.W. and also affected the decision to indict on all other charges. With these charges and remaining charges the Commonwealth did not provide sufficient instruction on the elements of the crimes.

**K.W. date of incident 11/23/2019 (Exhibit A, Grand Jury 1, pages 28-34)**

K.W. did not testify before the grand jury. Instead, Detective Goff answered questions and summarized the video evidence that was obtained from the Defendant's phone. The videos do not depict any sexual activity. The videos show K.W. apparently passed out and naked from the waist down in a vehicle allegedly driven by the Defendant. There are also videos of K.W. in the shower, in Rhode Island, the next day, engaging in conversation. Although she appears naked, not the video depicts K.W. mostly with a view of her back from the waste up. Her intimate areas are not depicted. Her memory was limited but she recalled going to the Defendant's home. She called an Uber to get home after showering. Detective Goff told K.W. about charges against other women. K.W. told him that she had already learned about the Defendant in the media.

Detective Goff testifies that the Defendant talked K.W. into entering his car for a ride. They ended up in Rhode Island, but she does not recall ending up there. (Exhibit A1, G.J. p. 31). She had intermittent and fragmented memories (Exhibit A1, G.J. p. 31, line 15). She recalls that at some point they were having sex and he was inside of her. (A1,

G.J. p. 31, line 15-21). When she woke up in Rhode Island, she felt ejaculate inside of her. K.W. ordered an Uber to return home the next morning. (A1, G.J. p. 31, line 25). Although the Commonwealth does not elicit testimony about where the sex allegedly took place, it clearly happened in Rhode Island. In her recorded statement, K.W. makes clear to police that the sex took place at the Defendant's house. (Exhibit D, K.W. recorded interview, p. 7). The Commonwealth introduced evidence that K.W. appeared intoxicated the next morning and did not appear aware of where she was because she asked how far the Uber ride would be. The issue of consent is described to the grand jury in summary fashion. Detective Goff is asked if K.W. consented to the Defendant inserting his penis inside her and Detective Goff answers "No." (Exhibit A1, G.J. p. 34, lines 5-7). The prosecutor also asks Detective Goff whether K.W. consented to being driven to Rhode Island and he answers "no". (A1, G.J. page 34, lines 13-15). He also answers "no" to a question about whether K.W. consented to being filmed naked. It is the Defendant's position that these conclusory responses are inaccurate and misleading when compared to her recorded statement, on which the testimony is based in large part.

Detective Goff testifies to the contents of the recorded conversation with K.W. However the Commonwealth does not introduce the transcript of the conversation and gives a limited and distorted view. At one point during her recorded interview, when referring to sex with the Defendant, K.W. said "**I am pretty sure I agreed to it**". (Exhibit D, K.W. Recorded Interview p 9, line 10). Detective Goff follows up on her statement about being pretty sure she agreed to sex. He asks why she is pretty sure she agreed to it. K.W. responds, "*Because I don't remember like ever telling him to stop. I think I just, what I do remember is that I was so drunk that I didn't really care what was*

*happening.*" (Exhibit D, K.W. Recorded Interview page 9, lines 11-15). At another point in her interview, K.W. said regarding sex, *"I am sure that we had sexual intercourse and I wasn't coherent at all. So if I said yes, it's because I didn't know what else to say"*. (Exhibit D, K.W. interview p. 6-7). She also commented that *"He was very nice the whole time"* (Exhibit D, P. 7, line 4-5).

Regarding getting a ride K.W. commented that *"everything was pretty much "consensual"*. She said,

He's like, it's okay, like, do you live close? I'm like, yeah. He's like, I can just give you a ride. And I was obviously hammered. So I'm like, okay, that's fine. And so I was in the car with him. And I don't remember what he said but I just remember being in the car with him. And then I'm pretty sure we like stopped somewhere and I think, I was like, um, like I was, what's the term? Um, it was like I agreed to the things he was talking about, consensual.

(Exhibit D, K.W. interview p. 5 lines 12-22.)

When Detective Goff asked her what she meant, she replied,

*"Like if he would ask me like if we wanted to stop on the side of the road or talk or something, I'm so drunk, I was like, yeah, let's talk."* (Exhibit D, K.W.

interview p. 5 line 24-p. 6 line 3).

None of this was mentioned to the grand jury.

The grand jury received only the Detective's summary conclusion that there was no consent. The grand jury did not hear directly from K.W. and did not hear her statements to police that she was **"pretty sure she agreed to it"**. While the issue of whether consent was valid is arguable, the grand jury should have been provided the complete statement, especially where K.W. herself did not testify.

Regarding kidnapping, the indictment charges that the Defendant:

*“On or about November 23, 2019, without lawful authority, did forcibly confine or imprison one K.W. within this Commonwealth against her will”.*

The Commonwealth was ordered to provide a bill of particulars regarding these charges by September 01, 2022 but has not yet done so. The Defendant argued that this was particularly important with regard to charges of kidnapping and aggravated rape.

There is no evidence to support the elements of kidnapping. Regarding aggravated rape, based on kidnapping, the restraint or confinement necessary to support a charge of kidnapping must be more than that necessary to accomplish rape. Commonwealth v. Kastner, supra. The Commonwealth has the burden of proving that the alleged rape was *“committed during the commission or attempted commission of an offense....”* [kidnapping]. G.L. c. 265 §22(a). The rape and kidnapping must constitute a continuous episode and course of conduct. Commonwealth v. McCourt, supra. 438 Mass. 486 (2002). There was no use or force or apparent force that caused K.W. to be held against her will. In her statement, K.W. indicates that she recalls entering the Defendant’s home. There is no evidence of any force or threats. Even assuming that the Defendant drove an intoxicated individual to his residence and that person does not remember the entire ride and did not comprehend where they were, this does not amount to kidnapping. There was insufficient evidence to support the charge of kidnapping. Furthermore the charge of kidnapping should be dismissed because the Commonwealth failed to present relevant exculpatory evidence.

The relevant evidence includes statements by K.W. that she recalls entering the Defendant’s home, that everything was pretty much consensual.

Where kidnapping is not supported by the evidence, the portion of the indictment charging that the rape was “aggravated,” based upon kidnapping, must also be dismissed.

The entire charge, even so much as alleged the lesser included offense of rape must also be dismissed for lack of probable cause and failure to present the same exculpatory evidence of consent.

It is not enough for the Commonwealth to prove that K.W. was intoxicated and had sex. The Commonwealth must also prove that the Defendant knew or should have known that K.W. was too intoxicated to consent.

The Commonwealth provided a conclusory response of a non-percipient police detective who interviewed K.W. The prosecutor asked merely whether K.W. consented to having sex and the Detective said no. The description of the events by K.W. herself show a different reality by her following statements.

*“I’m pretty sure I agreed to it;”*

*“I don’t ever remember telling him to stop”*

*“So if I said yes, it’s because I didn’t know what else to say.”*

None of these statements were presented to the grand jury. While the Commonwealth could argue that these statements show diminished capacity, the true version of the story related by K.W. stands in great contrast to a police detective’s summary conclusion that K.W. did not consent. The grand jury should have been provided this evidence. Such exculpatory evidence probably would have made a difference. Dismissal is the appropriate remedy where the improper evidence probably influenced the grand jury’s decision to indict. Commonwealth v. Mayfield supra at 620, See also Commonwealth v. Fernandes, supra at 8 (2019).

Not only should the prosecutors have introduced the exculpatory evidence, but they should have instructed the jury on relevant issues of consent. Best Practices cited above state:

*The prosecutor should advise the grand jury of the relevant law whenever "...necessary to the grand jury's determination whether probable cause exists with regard to the charges under consideration."*

The charges of kidnapping, aggravated rape and rape when a person is allegedly too intoxicated to consent are complex and have elements which are not understood by all. The failure to include exculpatory evidence, failure to instruct and misleading presentation all contributed to impair the integrity of the grand jury process.

**Various charges related to K.W. should be dismissed for lack of jurisdiction.**

The charges of rape, kidnapping, aggravated rape all allegedly took place outside the Commonwealth of Massachusetts. The SJC has held that "*It is elementary that it must be shown that jurisdiction lodged in the courts of Massachusetts before the defendant can be found guilty of the offence charged.*" Commonwealth v. Combs, 480 Mass. 55, 60 (2018) quoting Commonwealth v. Fleming, 360 Mass. 404, 406 (1971).

In the present case, K.W. entered the Defendant's vehicle voluntarily. Although the Commonwealth avoids asking specifically where the alleged sex took place, it is clear that the sexual activity took place in Rhode Island and not Massachusetts. This Court has no jurisdiction over the charges related to K.W. other than filming an unsuspecting person.

The charges of rape, aggravated rape, kidnapping and habitual offender enhancements should be dismissed.



**E.C. date of incident 5/21/2017, (Grand Jury pages 10-17).**

Police testified before the Grand Jury that, E.C.

“had gone out with friends to a bar in Boston, probably The Harp, Ned Devine’s or both, and she got very drunk. She actually said that she had never had a blackout like that before. And she has a vague memory of a sort of black male with a bald head who’s about thirty-four years old or so and a large SUV. And thought there were other people in the car too. She thought it was an Uber. She had a vague recollection of possibly stopping somewhere to use the bathroom. And then she woke up the next morning in Alvin Campbell’s apartment, naked from the waist down and wearing somebody else’s shirt and no bra, and had no idea what had happened. And was that apartment in Framingham? Yes”

(Exhibit A1, G.J. p 16 lines 2-15)

The recorded statement of E.C. was similar in that she had a vague memory of being in a Black SUV. She was a bit more specific and stated

*“I think I might have said I live in Natick and I need or I need a ride home or I’m getting a ride home going to Natick and he was going to Framingham, so he might have offered a ride home but, since he lived close.”*

She added that in her “*mind*” she was heading to her home in Natick.

In the recorded statement she was more specific about getting out of the car to use someone’s bathroom and then entering again.

She did not realize where she was until the next morning.

Regarding sex, E.C. has no memory. However she felt like someone had sex with her based upon how her body felt.

Detective Goff describes certain video and audio recordings recovered from the Defendant’s phone as follows:

“He then suckles her breasts and he pans down and takes a very close shot of her vulva and places the tip of his penis at or against the opening of her vagina. Then the camera cuts away. So, there’s no video, but there’s about six minutes worth of audio and you don’t hear much. Again, the victim was apparently passed out or asleep on unconscious. And then he cuts back to show himself and the victim in the frame again and he has now -- their positions have now shifted, he’s on

his back and she's sort of draped over him, and he films himself, like, licking the outer aspect of her hip and buttocks. (Exhibit A1, G.J. p. 12, lines 3-16)

The video evidence is described in different ways. Detective Goff accurately states, that the video depicts the penis "at or against" the vagina. At one point the prosecutor asks, "*And also when he zooms in on her vulva and puts his penis **against** to her vagina; is that accurate?*" [Emphasis added]. Detective Goff answers "Yes."

Detective Goff accurately refrains from stating that the video shows actual penetration because it does not. Yet, the Commonwealth asks:

*Q. Did she consent to him placing his penis next to **and into** her vulva/labia while she was passed out? A. No* [emphasis added]. (Exhibit A1, G.J. p. 17, lines 4-6). The Commonwealth consistently described E.C. as unconscious or asleep, where other descriptions might be more accurate.

Regarding the kidnapping charge the evidence was very conclusory.

The Commonwealth asks, "*Did she consent to him transporting her from The Harp in Downtown Boston to his address in Framingham? A. No.*" ( Exhibit A, G.J. p. 17 lines 9-11).

Although E.C. did not remember getting into the vehicle, she thinks that she may have said she lived in Natick and needed a ride home. (Recorded statement Vol. 2 page 15). In fact EC was in and out of the vehicle at least once. According to her recorded statement, she recalled vaguely leaving the vehicle to use the bathroom in the apartment of other occupants of the vehicle. (Exhibit F2, statement of E.C. vol. 2, page 12). She then entered the vehicle again alone. She ended up in Framingham and has no recollection of how she got there. The Defendant drove her to her home, in the next town over in Natick the next morning.

E.C. does not specifically recall having sex but made that conclusion from the way her body felt. The video does not show actual penetration, although it does show the state of E.C. and sexual behavior.

There is insufficient evidence to support the charges of kidnapping and aggravated rape and rape.

With regard to kidnapping E.C. herself believes she asked for a ride home to Framingham and knew that the driver lived in Framingham. She left the vehicle that was occupied by others and actually used someone's bathroom before getting back into the vehicle. There is no evidence that the Defendant forcibly confined or imprisoned E.C. as is a required element Commonwealth v. Lent 46 Mass. App. Ct. 705, 709 (1999). Nor is there lack of consent since E.C. got into the vehicle voluntarily more than once. The evidence does not support the charge of kidnapping. Since there is no kidnapping the charge of aggravated rape, aggravated by kidnapping and habitual offender enhancements related to those charges also unsupported.

The charges of rape, kidnapping and aggravated rape should also be dismissed where the integrity of the grand jury proceeding was impaired for failure to provide exculpatory evidence in relation to other named victims, as described previously and to be described and mischaracterization of evidence in relation to E.C.

**Charges relating to E.C. and K.W. Should be Dismissed for Lack of Jurisdiction and Improper Venue.**

The alleged sexual assaults on E.C. took place in Framingham in Middlesex County. Massachusetts generally follows the common law rule that an indictment must be found, and the trial must take place in the county where the crime occurred.

Commonwealth v. Duteau, 384 Mass. 321, 323 (1981).

Dual venue may only occur pursuant to G.L. c. 265 §24A where the conveyance of an alleged victim is done in connection with the crime. Commonwealth v. Dineen, 70 Mass. App. Ct. 1, (2007). Connection with the crime means that the destination county has a relation to, association with, or connective link to the county from which the conveyance originated. Id. This is not such a situation. Although E.C. got into the vehicle in Suffolk County, there were others in the vehicle. She even left at one point at an undetermined location to use a bathroom at someone's apartment. She then entered the vehicle again voluntarily. The sexual activity allegedly took place in Framingham.

In different circumstances the Commonwealth might have a right to petition this Court to conduct the trial in Suffolk County. G.L. c. 277 §57A which states:

A defendant shall not be discharged for want of jurisdiction if the evidence discloses that the crime with which he is charged was actually committed without the county or the territorial jurisdiction of the court in which he is being tried; provided, that the attorney general or the district attorney petitions to the court before proceeding with the trial for leave to proceed, stating that he is in doubt from the state of the evidence then in his possession as to whether or not the crime was committed within the county or the territorial jurisdiction of the court, and the court after hearing said petition orders the trial to proceed.

Section 57A allows a prosecutor seek permission to proceed in a different county where *“there is doubt from the state of the evidence...as to whether or not the crime was committed within the county or territorial jurisdiction of the court.”* This is not such a situation since the alleged sexual assault and other allegations took place outside Suffolk County.

**C.M. date of incident 12/21/2017 (Grand Jury pages 17-28)**

Detective Goff testifies about this incident and C.M. does not. There is video evidence of C.M. being digitally penetrated. Despite not having a clear memory at the

time of her interview years later, she was aware of being digitally penetrated the next morning. C.M. commented on it to a friend in text messages the next morning stating:

*“I have no idea what happened, how did I end up with a black man? Anna, I appalled. He was fingering me in his car, I literally almost got raped”* (Exhibit A, G.J. p. 25, lines 21-24).

C.M. further comments that although the evening was foggy, she is scared at herself for what she did and planned to go out the next night:

*“Actually, I don’t want to know, and I don’t want to tell anyone that I was sitting in a black man’s truck for three hours. TG we have plans tonight. And then Ann says, tonight will be fun. And then C.M. [first name deleted] says, **ugh, no, I’m honestly like really scared at myself for doing that and don’t want anyone thinking I hook up with random black men. I am appalled. But it’s fine. I’m going to forget. Last one. I’m going to forget about it. Last night took an L, but tonight I bounce back.*** (Exhibit A1, G.J. p.27, lines 16-21). [Emphasis added].

The Commonwealth asks Detective Goff in conclusory fashion if C.M consented to being digitally penetrated to which Detective Goff answers “No.”

*“Q. Did she consent to him putting his fingers inside of her?”*

*A. No.”*

(Exhibit A1, G.J. p. 27, lines 7-9).

As with other alleged victims, C.M. did not testify but gave a recorded interview with police. The recorded interview was **not** introduced into evidence. During the recorded interview on May 05, 2020, C.M. did not recall being penetrated digitally. She describes her level of intoxication as follows:

*“In terms of being passed out, I mean I wasn't even near that. I was still, you know, making coherent sentences, functioning normally -- I mean not normally but able to function. I think it was just a period of very intoxicated.”*

(Exhibit N, C.M. recorded statement, p. 7, Lines 3-7).

Regarding sexual activity she did not recall but did recall the person hitting on her but not forcing anything.

*“And in terms of anything sexually, I truly don't recall anything like that being forced upon me at all. I remember him maybe trying to have turned it into something like that, but I was not having any of that, and he was not vicious or anything of that nature.”*

(Exhibit N, C.M. Recorded Statement page 11, Lines 2-8).

Regarding cooperating with an investigation, C.M. said she was not interested in pressing any charges but was willing to help others.

*“I'm not likely interested in pressing any charges against this man, I mean in any kind of legal way. I think my purpose would be to help with the current case.”* (Exhibit N, C.M. recorded statement, p. 20, Lines 17-21).

Police did not question C.M. about her text messages in the recorded interview. Just like in most other cases, C.M. did not initially contact police to complain about any criminal activity. The police contacted her to let her know that they considered her a potential victim. Police also told her that the Defendant was indicted for rape and kidnapping of another woman and that they have identified other women who have been similarly assaulted. (Exhibit N, C.M. Interview, Page 14, Lines 7-15).

Police told C.M. that they reached out to her as part of that ongoing effort. She responded, "*I'm glad that I -- you have because I, I was not aware of this.*" (C.M. recorded statement page 14, Lines 20-22)

In her interview, C.M. asks if the Defendant was unclothed and penetrated her in another way, apart from digital penetration, wondering if the Defendant penetrated her with his penis. The exchange, including the police response follows:

I know it looked like his fingers were in me, but did any, I mean, did it look like he was raping me any other way or was he unclothed at all? Or was there anything of that nature, I mean?

Police: So that, my answer to that would be based on the totality of the circumstances for the video or the recording, which I said was mostly audio only... But given what we know about him and his other documented activities, coupled with the soundtrack and the brief glimpses we got, you know, we can't, it's a reasonable conclusion to draw that he had intercourse with you.

Police then asked if she felt anything out of the ordinary and she said no.

Do you remember, the next day do you remember, you know, feeling anything off about your body or did you notice, you know, anything, anything about your body that you, you know, that you associate with, with like post, you know, post-coital behavior or feelings or, you know, signs or symptoms?

A. Um, no, no, to be honest, not at all.  
(Exhibit N, C.M. Recorded Statement Page 15, Lines 1-15).

C.M. commented further indicating that she believe no rape by intercourse occurred.

I've had boyfriends and I've obviously had sex in my life and I think when, when you have sex, you can almost tell. I mean, you know, you can tell when that occurs and when something like that is happening to you and aggressively especially, I think. That's why I'm, you know, hesitant to think that that kind of rape occurred. Obviously my memory wasn't remembering a lot of what occurred, so. (C.M. Recorded Statement Page 16, Lines 1-8).

With respect to C.M. there is video provided which shows that C.M. was digitally penetrated. Although the evidence was allegedly seized from the Defendant's phone C.M. never made an identification and it is unclear how identification was made.

There is insufficient evidence that C.M. was raped or that digital penetration took place without consent. In her own words C.M. tells her friend the next morning that a Black man "*was fingering me in his car.*" She mentioned twice to a friend that she was scared at herself for what she did, including her statement "*ugh, no, I'm honestly like really scared at myself for doing that and don't want anyone thinking I hook up with random black men.*" (Exhibit A1, G.J. p.27).

There is no evidence that she resisted or objected to what was happening. While she may have been under the influence of alcohol there is insufficient evidence that she was unable to consent, and that the Defendant knew she was incapable of consenting as is required under the law. The video evidence shows that she was aware of what was happening. The text messages of C.M. the next morning confirm that she knew what happened, and she was scared at herself for doing it. The video evidence and her statements demonstrate her awareness of what was happening. At one point, C.M. seemed aware of being filmed as she turned away from the camera while getting dressed.

With strong evidence of consent, the Detective had no grounds to make a conclusory statement to the grand jury that C.M. did not consent. This conclusory statement was misleading.

The statement of C.M., taken years after the incident does nothing to support the Commonwealth's position regarding lack of consent. Quite to the contrary, the recorded statement includes potentially exculpatory material and exposes that the Detective had no



basis for the conclusory statements about lack of consent made by police to the grand jury. Portions of the statement as quoted above establish the following. Although C.M. recalled being digitally penetrated the morning after the incident and being scared at herself for participating, she had no memory of this when she was interviewed. When she was interviewed, about 2 & ½ years after the incident, C.M. recalled that nothing was forced on her sexually. The videos of the C.M. incident, referenced as Exhibit O, confirm that C.M. was aware of what was happening and that nothing was forced.

When she asked about whether the Defendant had intercourse, because nothing was on video, they told her that “*given what we know about him and his other documented activities, coupled with the soundtrack and the brief glimpses we got, you know, we can't, it's a reasonable conclusion to draw that he had intercourse with you.*” However when they asked about her body and whether she felt anything she said no. For the above reasons, probable cause is lacking, and the integrity of the grand jury proceeding was impaired. The charges of rape, and habitual offender enhancement should be dismissed.

It appears that the digital rape is the basis of the indictment, even though the indictment does not specify. The Defendant moved for a bill of particulars and the Court ordered the Commonwealth to provide the bill of particulars by no later than September 01, 2022. The Commonwealth has not complied. The rape charge and habitual offender enhancement related thereto with relation to C.M. should be dismissed since they are not supported by probable cause. These charges should also be dismissed because the Commonwealth impaired the integrity of the grand jury process in its presentation related to C.M. and other alleged victims that affected the decision to indict on these charges too.

**S.M. date of incident 9/27/2019 G.J. pages 37-43**

As with other cases in this indictment, S.M did not testify before the grand jury. Detective Goff contacted S.M. and conducted a recorded interview on May 04, 2020. Detective Waldrip testified about the evidence before the grand jury. Investigators identified S.M. by a name tag they saw in a still shot from hotel video. Detective Goff informed her in her recorded interview that he was from the sexual assault unit.

S.M. had a vague memory of walking when a Black male gave her a ride to her hotel. She did not remember much until waking up in bed with the male in the morning. She asked if they had sex, and he did not really answer. He drove her to the airport.

Detective Waldrip testified that a video clip depicted a male, later identified as the Defendant, using his left hand to digitally penetrate S.M. while she is unconscious. (A1, GJ p. 39 lines 3-6). He testified that S.M. did not know she was being filmed or consent to it. The video shows a woman face down. The actions with the left hand are recorded for brief seconds. While S.M. does not appear to be moving from the waist down during those brief seconds, the rest of her body, including her head or face is not depicted, making it hard to make any determination regarding her level of consciousness. While the video appears to depict penetration, this cannot be confirmed.

S.M. did not have any sexual testing done and was on birth control.

Detectives tell S.M. that they would set up a Zoom meeting for her to speak with the prosecutor.

The Defendant argues that since S.M. has no recollection of the events, the video is inconclusive and insufficient to support a finding of probable cause on the charges of

rape. The Defendant also argues that where the integrity of the grand jury proceeding was tainted in respect to evidence relating to other named victims, that affected the decision to indict on these charges too.

**D.S. and D.B., date of incident, February 09, 2017 (Grand Jury pages 43-53).**

Neither D.S. nor D.B. testified before the Grand Jury in 2020. Police summarized their version of events. Unlike in other cases, both D.B. and D.S. testified before a prior grand jury in 2017 in an investigation that was withdrawn.

Detective Waldrip summarized prior grand jury testimony and the Commonwealth provided copies of the prior transcripts, with some redactions on a USB drive. Detective Waldrip testified to the grand jury in 2020 as follows:

19. Q. Okay. What is Ms. Santos' next recollection?

20 A. Her next memory is waking up in her bed with Alvin Campbell, the man she met at the bar, with his penis inserted in her vagina.

Q Did she state how she, her body felt at that time? A. She described it has her body felt like Jello.

25 Q What is the next memory that Ms. Santos stated of the incident? A Yes. Ms. Santos stated that she woke up again in the morning, where Alvin Campbell was attempting to have sex with her again. And she said, no, no, and was trying to push him away. And then he attempted to have oral sex with her. Okay. Was he successful in touching his tongue to her vagina? A Yes.

(Exhibit A1, GJ pp 50-51).

In her grand testimony in 2017, years earlier, D.S. testified that she did not remember whether she said no in relation to intercourse. She testified as follows:

“Do you remember getting into your bedroom?

13 A No.

14 Q Alright. What’s the next memory that you do have?

15 A The next memory I have is I think being in my bed with Alvin also in my bed and he was engaging in sexual contact at that point.

18 Q Can you describe what you mean by sexual contact?

19 A He was having sex with me, penetration.

20 Q And, when you say having sex, do you mean penis to 21 vagina or fingers to vagina or something else? 22 A Penis to vagina.

23 Q Okay. And, did you have any recollection of him in your apartment prior to you remembering that he was having sex with you? A No.

Q Do you remember saying anything to him?

**A I remember trying to get him to stop at that point, but I don’t nec -- I don’t know, I don’t remember, like, verbalizing anything. Q Okay. So you’re not sure if you said anything to him because you don’t remember? A Yeah.**

Q Is that what you’re saying? 10 A Yeah. 11 Q Or is it a little different? 12 A And, I remember trying to get it to stop and I feel 13 like I was saying, I said no at some point, but I also just re -- remember my body feeling kind of like jello 15 and so whether that was, that trying to stop was more in my mind or physically, I, I don’t really know. Q Alright. What do you remember after that? A The next thing I remember was waking up the next morning and he was in my bed, we were both naked.

(Exhibit H, G.J. D.S. 2017, p. 13, line 13-p. 14, line 19)

The Commonwealth entered flirtatious texts between D.S. and the Defendant (Exhibit K3). There was testimony that D.S. assumed the Defendant was a bouncer. The Commonwealth also entered video evidence obtained from the Defendant's phone where he made statements about performing oral sex on D.S. "**again**" and is shown kissing her buttocks area while she appears asleep and minimally responsive.

The Detective's summary of testimony from 2017 is different than the actual testimony with regard to at least one important fact. In her original testimony, D.S. did not know whether she told the Defendant to stop. In a police summary presented to the grand jury in 2020, the Detective testified that D.S. was saying "no, no" in relation to sex. The testimony about D.S. saying no was in relation to the morning where the Defendant tried to touch her vagina and was briefly successful before stopping. However it seemed like it related to the intercourse.

The 2020 testimony of Detective Waldrip is contradicted by an internal memorandum of the prosecutor's office in relation to the 2017 investigation into this same incident where the investigating prosecutor writes:

"It does not seem as if we would be able to prove a rape charge for Ms. [D.S.], because, even by her own account, she is not sure she actually said no. It would be nearly impossible to prove lack of consent due to incapacitation because [REDACTED] [REDACTED] has some memory of what happened." (Exhibit J, Interoffice memo).

The Commonwealth has indicated that although there are references to recorded statements of D.S., the Commonwealth is not in possession, custody or control of any such statements.

Likewise with regard to D.B., police summarized her prior testimony. However they left out important information where D.B. stated that she tried to lure the Defendant into the room of D.S. by suggesting they have a threesome. (Ex. I, 2017 Grand Jury pp

15, and Ex. J, Interoffice memo). D.B. remembers putting D.S. to bed and putting her on her side in case she vomited. Police testified that the next thing D.B. remembers is that the Defendant and she were naked on a couch in the kitchen, and she was trying to get away. (Ex. A1, G.J. p.47). She suggested a threesome to distract the Defendant. In summarizing the testimony of D.B., Detective Waldrip testified to the hearsay version of the events but left out that DB had suggested a threesome with her roommate. Rather, Detective Waldrip testified that D.B went into the room of D.S. to try and wake her but when the Defendant entered, D.B started screaming at him not to touch her. (A1, G.J. pp 48). Once the Defendant went into the room of D.S., D.B. went back into her own room and went to sleep. D.B. left the room of D.S. where the Defendant was, goes to her own room and then falls asleep without making any effort to call police. D.B. woke up the next morning, took a shower and got ready for work. (A1, G.J. 48-49). She remembers seeing the Defendant still in the apartment the next morning. In 2017 a grand juror asked D.B. about where the Defendant slept, and she was instructed not to answer. ( Ex. I, 2017 G.J., D.B. p.21). However in a preceding question D.B. was asked whether D.S. told her that the person they identified on Facebook was the same person who entered her bedroom, and she was allowed to answer. (Exhibit I, 2017 G.J. D.B. p. 20)

The Commonwealth has not provided recorded statements from 2017 and indicates they are no longer available if they existed.

Defendant argues that there is insufficient evidence of rape with regard to D.S. The Defendant further argues that the Commonwealth left out potentially exculpatory evidence of how D.B suggested a threesome. While she did that, in her own words to trick the Defendant to get help, that she would even suggest a threesome after fighting off

attacks suggests a drastically different version of events. It is also difficult to understand how she would return to her own room, fall asleep without calling police and get up the next morning to shower and get ready for work.

There are other important omissions and variations from prior testimony. Detective Waldrip gave the impression that D.S. said “no no” with relation to rape, while her own testimony from 2017 and the Commonwealth’s comments about her statement were no conclusive on that issue. These omissions impaired the integrity of the grand jury proceeding. The presentation on these charges was also affected by the omissions and misleading information provided in relation to other named victims as described herein.

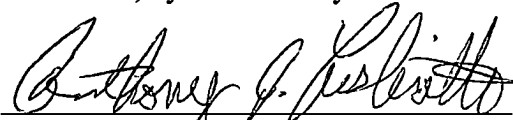
All charges except filming without consent should be dismissed.

The Defendant reserves the right to supplement this motion and supporting documentation once all discovery is provided.

Conclusion:

For the above reasons, this motion should be granted.

Respectfully submitted,  
Defendant, by his Attorney



Anthony J. Lochiatto  
BBO #: 555033  
221 Lewis Wharf  
Boston, MA 02110  
(617) 557-0088  
anthonylochiatto@msn.com

**Certificate of Service:** I certify that I served a copy of this foregoing to counsel for the Commonwealth by electronic mail on 11/01/2022. A.J.L.