

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Ind. No. 2538/2011

SAMUEL KELLNER,

**NOTICE OF MOTION
TO DISMISS IN THE
INTEREST OF JUSTICE**

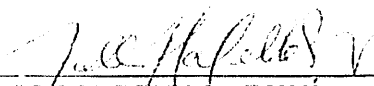
Defendant.
-----X

GREETINGS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of NIALL MACGIOLLABHUI, counsel for defendant SAM KELLNER, and upon all of the proceedings heretofore had herein, the undersigned will move this Court, Part: TAP, at the Courthouse located at 320 Jay Street, Brooklyn, NY 11201, on the 29th day of July, 2013 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order granting the following relief:

1. Dismissal of Counts 7 to 10 of the Indictment in furtherance of justice, pursuant to CPL §§ 210.20(1)(i) and 210.40; and
2. Any further relief that the Court deems proper.

Dated: New York, New York
July 26, 2013



NIALL MACGIOLLABHUI
LAW OFFICE OF MICHAEL G. DOWD
Attorneys for Defendant Kellner
425 Park Avenue, 26th Floor
New York, NY 10022
(212) 751-1640

TO: Clerk of the Court
Supreme Court of the State of New York
County of New York
320 Jay Street
Brooklyn, NY 11201

Assistant District Attorneys Nicholas J. Batsidis & Joseph P. Alexis
District Attorney's Office, Kings County
350 Jay Street
Brooklyn, NY 11201

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Ind. No. 2538/2011

SAMUEL KELLNER,

Defendant.

**AFFIRMATION IN
SUPPORT OF
MOTION TO DISMISS**

-----X

NIALL MACGIOLLABHUI, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms the following under penalties of perjury:

1. I am an associate attorney in the Law Office of Michael G. Dowd, attorneys of record for Defendant Sam Kellner. As such, I am fully familiar with the facts of this case and make this affirmation in support of Defendant Kellner's motion to dismiss annexed hereto.

2. Unless otherwise specified, all allegations of fact are based upon inspection of the record of this case, conversations with the Assistant District Attorneys assigned thereto, independent investigation and research.

3. Defendant Kellner is charged herein with one count of Conspiracy in the Fourth Degree (Count 1); five counts of Attempted Grand Larceny in the Second Degree by Extortion (Counts 2 to 6); two counts of Perjury in the First Degree (Counts 7-8), and two companion counts of Criminal Solicitation in the Fourth Degree (Counts 9-10).

4. According to Count 1 of the Indictment, between March 2008 and March 2010, Defendant Kellner is alleged to have made repeated demands to Meyer Lebovits, the son of

Baruch Lebovits (who, during the period alleged, was a criminal defendant accused of molesting Defendant Kellner's son and raping two other children), for payments in excess of \$50,000, in exchange for which defendant Kellner would (1) cause the dismissal of the pending charges against Baruch Lebovits, through his control of the three complaining witnesses, (2) direct an additional alleged victim of Baruch Lebovits not to make a complaint, and (3) cause the publication of Lebovits' alleged abuse of children within the community to cease. In this regard, Defendant Kellner is alleged to have been aided by five unindicted co-conspirators – namely, Leizer Wolf Hager, Yakov Leizer Horowitz, Simon Taub, Yidel Wolf, and Wolf Wertzberger.

5. The overt acts alleged to have occurred in furtherance of the charged conspiracy consist of five extortionate demands made to Meyer Lebovits, on Defendant Kellner's behalf, one by each of the five co-conspirators (Overt Acts 1-5), solicitation by Defendant Kellner of Moshe Friedman to act as a further emissary for his extortion (Overt Act 6), payments by Defendant Kellner to one of the complaining witnesses, Mr. T..., to secure false testimony in separate Grand Jury proceedings against Baruch Lebovits (Overt Acts 7-8), and a conversation in May 2009 between Defendant Kellner and Meyer Lebovits in which the former re-iterated the earlier extortionate demands made by his co-conspirators (Overt Act 9). Counts 2 to 6 of the Indictment arise from Overt Acts 1-5. Counts 7 to 10 arise from Overt Acts 7 and 8.

6. The Indictment is based entirely on testimony given to the Grand Jury by three people: Meyer Lebovits, Mr. T..., and Moshe Friedman (the first two are considered by the prosecution to be the "core" witnesses). Counts 7 to 10, which are the subject of the present motion to dismiss, are based entirely on T... testimony.

7. Each one of the three above witnesses lied and perjured themselves before

the Grand Jury. T..., however, can be excused by reason of extenuating circumstances. He is a victim of childhood rape perpetrated by Baruch Lebovits who, after finding the courage to report his abuser, was intimidated into ending his cooperation with the prosecution. Later, when Lebovits and his associates were unable to prevent another victim, Y..., from testifying, T... was coerced and manipulated into claiming that Lebovits (by this time a convicted pedophile) was innocent and that Defendant Kellner had paid him to lie. Inexplicably, the District Attorney – whose sex crimes prosecutors received multiple offers to plead guilty from Baruch Lebovits with respect to T... and remained convinced of T... original complaint to the extent of trying to compel his testimony after he stopped cooperating – suddenly decided to accept without question (and behind the backs of his sex crimes prosecutors) the manufacture and delivery to him by counsel for Baruch Lebovits of T... incredible about-turn.

8. On July 8, 2013, when trial in this matter was supposed to begin, the ugly and appalling truth of M... T... debasement was publicly exposed. Obviously, his part in the case against Defendant Kellner is at an end. The damage inflicted upon him is incalculable, the injury of the abuse he suffered compounded by the insult of his abandonment by the District Attorney to the machinations of his abuser and supporters. He has suffered enough. He deserves, in the interests of justice, to be released from the agony of this case without further delay.

9. Meyer Lebovits and Moshe Friedman, on the other hand, deserve no such release. Their lies, and the connivance of others, in service of a convicted pedophile, deserve to be comprehensively exposed.

FACTUAL BACKGROUND

Sam Kellner's son is molested

10. Sam Kellner's ordeal began in early 2008, when his son was molested by Baruch Lebovits. His son reported the incident to his yeshiva teacher, Rabbi Chaim Hager, who instructed him that Lebovits was a respected person and that he was forbidden from speaking further of the incident. Rabbi Hager also threatened to expel him from the yeshiva. He confided in his father, who decided to report the incident to the police. However, within Sam's community – the Satmar Hasidic community – he was obliged to first obtain the permission of a rabbi. He sought permission from Rabbi Chaim Flohr, a highly respected rabbi who presides over a rabbinical court in Monsey. Rabbi Flohr contacted the Williamsburg Va'ad HaTznius (modesty committee) as well as the Borough Park Va'ad HaTznius, entities that receive reports of sexually inappropriate conduct within the community, and learned that Baruch Lebovits was known for decades as a notorious pedophile. Sam was given permission to make the report.

11. Shortly afterwards, Sam met with ADA Christopher Laline, who interviewed Mr. Kellner's son, but informed him that the District Attorney would not proceed with a prosecution, primarily because the alleged offense was a misdemeanor and there were no other known victims. Unhappy with this outcome, Sam spoke to Henna White, the District Attorney's liaison to his community, who put him in contact with Detective Steve Litwin, a longtime investigator of sexual abuse of children. Detective Litwin interviewed Sam's son and concluded that Baruch Lebovits was a serial offender. He told Sam that a case against him would be viable if other victims could be found and encouraged to report their abuse. Thus began a working relationship that would last several years.

12. Sam was soon given the name of Michael [redacted] a victim of Baruch Lebovits who had reported being raped by him as a child, by the Williamsburg Va'ad HaTznius. Sam met Michael [redacted] and encouraged him to report his abuse to Detective Litwin, which he did. In March 2008, Michael [redacted] and Sam's son testified before a Grand Jury, and Baruch Lebovits was indicted. Michael [redacted] described how Lebovits started following him when he was 12 years old, and then, for the next four years, perpetrated countless horrific acts of oral and anal rape upon him. (Sam is now charged under Counts 7 and 9 of the present Indictment with Perjury and Criminal Solicitation, respectively, on account of Michael [redacted]'s testimony.)

13. Subsequently, Sam was given the name of another victim of Lebovits, Yehuda [redacted], whom he also helped to report his abuse to Detective Litwin. In September 2008, under Detective Litwin's supervision, Rabbi [redacted] recorded a conversation he had with Lebovits, in which he tells Lebovits that he was contacted by a member of Dov Hikind's office who found out he was a victim of abuse. He further tells him that he believes a witness to the abuse may have spoken about it. Lebovits instructs him as follows: "You'll say you were alone, you had nobody with you"; "You'll deny it"; [The witness] "didn't see anything."

14. In November 2008, Michael [redacted] testified a second time before a Grand Jury, along with Rabbi [redacted] which resulted in a superseding indictment being filed against Baruch Lebovits. (Michael [redacted]'s testimony on this occasion is the basis for the second set of charges of Perjury and Criminal Solicitation, in Counts 8 and 10 of the Indictment, respectively, against Sam.)

15. By this time, Sam was experiencing severe harassment and intimidation in his community for "informing" on Baruch Lebovits. Substantial monetary offers were also being

made to him by various people to drop his son's case. He rejected all of them. The pressure then took a different form whereby it was demanded that he submit to adjudication in a Beit Din, or rabbinical court. One rabbi in particular, Rabbi Yisroel Makavetzky, who presides over a Beit Din in Monroe, was relentless in his pursuit of Sam, demanding that his son's case against Baruch Lebovits be adjudicated before him. Sam, knowing that to live in his community means to live according to its rules, agreed in principle to go the Beit Din but set two pre-conditions: Rabbi Flohr (who had given him permission to report his son's abuse) and Michael Dowd, Esq., would be allowed to attend, and he would not be responsible for any expenses or legal fees charged by the court and Mr. Dowd. One of the alleged co-conspirators in this matter, Wolf Wertzberger, became involved and promised to pay Sam's share of the expenses and fees. However, Sam's other pre-conditions were rejected. Sam then received a bill from Makavetzky in the amount of \$1,800 for the Beit Din's work "in the matter between Shlomo Aaron Kellner and the Lebovits family related to damages to his son" (attached hereto as Exhibit "A"). When Sam asked Wertzberger to honor his promise to pay the bill, Wertzberger told him that he was merely a front for Baruch Lebovits's son, Meyer, whom he would need to ask directly.

16. Before Sam met Meyer Lebovits, he received another payoff offer from Moshe Friedman, a first cousin through marriage of Baruch Lebovits. For decades, Friedman was the right hand man of Rabbi Moshe Teitelbaum, the leader of the Satmar Hasidic community until his death in 2006. Friedman is someone of huge power and influence, both inside and outside of his community. In 2009, a profile of him described "many senators and politicians flocking to his door throughout the year, especially before elections." He is also the editor of the main Satmar newspaper, Dcr Yid. Friedman contacted Sam offering him a job selling

advertising for Der Yid, which Sam accepted, and began making calls on the paper's behalf. (At least one recipient of these calls is prepared to testify on Sam's behalf.) Friedman demanded that Sam drop his son's case against Baruch Lebovits, and told him that the family was willing to offer \$250,000. Sam refused the offer, and the job ended.

17. Throughout this time, Sam kept Detective Litwin apprised of the various attempts to buy him off. He also met with ADA Rhonnie Jaus and ADA Miss Gregory – Chief and First Deputy Chief of the Sex Crimes Bureau, respectively – and ADA Laline, and informed them about what was taking place. (The District Attorney accepts this meeting occurred, but claims that no notes were taken.)

Tape recorded meeting

18. In May 2009, Sam met with Meyer Lebovits concerning the Beit Din bill from Makavetzky. Lebovits secretly recorded the meeting. The recording was initially proclaimed by the District Attorney to be a “smoking gun” until it became apparent that it was not played in front of the Grand Jury, was translated by someone unfamiliar with the religious references used by the speakers (which provide much of its context), and, when read in its entirety (even without the un-translated religious references), not only confirms Sam's innocence but squarely contradicts Meyer Lebovits' perjured testimony to the Grand Jury.

19. Hella Winston, who has reported at length on this case, described the tape in an article published in The Jewish Week in January 2013 (attached hereto as Exhibit “B”), as follows:

The DA's transcript of the tape (in Yiddish with an English translation) was reviewed for The Jewish Week by a native Yiddish speaker. Without context,

the meaning of many of the exchanges is ambiguous at best; to someone with knowledge of the back story, it becomes clear that the discussion is not about attempts by Kellner to extort Meyer Lebovits using emissaries, but rather is about the beit din and those involved in it, Kellner's desire to see Baruch Lebovits plead guilty in his son's case, and attempts by others to get Kellner to drop the charges. (The reviewer also determined that many of the exchanges critical to the overall meaning of the conversation were distorted in the translation.)

20. The recording was also recently addressed in an article by Michael Powell of the New York Times (attached hereto as Exhibit "C"), in response to a description by ADA Batsidis of it as "the key evidence" in the case, and the following claim: "'When you have an audiotape where Kellner is warning him that he's going to bring other victims, it speaks for itself," Mr. Batsidis said." According to Powell:

That explanation sounds better than the tape itself. The transcript reveals a conversation soaked in ambiguity, and rendered in overwrought language. It depicts Mr. Kellner as a tortured father trying to find justice. The younger Mr. Lebovits at times seems to accept that his father committed some acts of abuse.

21. The explanation of ADA Batsidis is based on a fundamental misunderstanding of the conversation's context. Part of the reason for this misunderstanding is that the translation the prosecution is relying upon was prepared by a translator without knowledge of the religious references and phraseology employed during the conversation, with the result that a key phrase uttered by Meyer Lebovits is missing. At the same time, however, the translation indicates unmistakably that, far from Sam warning Meyer Lebovits that he was going to bring victims forward, it is Meyer Lebovits who complains bitterly to Sam that he didn't warn

him before he reported his father to the police. The basis for his complaint is his missing phrase, taken from the Torah: "You cannot punish a person unless you warn him."

22. Meyer Lebovits assures Sam that had he approached him instead of reporting the matter to the police, "[t]he problem would have been taken care of," and "[w]e would have handled the [problem], we would have done everything." (Translation, p. 12). Lebovits continues: "If somebody did what was done to your child, I would have wanted to kill him." (Translation, pp. 25-26). Nonetheless, he stresses, Sam was wrong to report the matter to the police: "Why didn't you call me, 'Meyer, I heard your father is going to be in trouble. We should have seen what could have been done.'" (Translation, p. 26). According to Lebovits, Sam violated the command of the Torah by not warning him about his father in advance of the police report, and states indignantly: "There is no justification for that. In this crime I don't forgive anything. Nothing. Am I some bum? Should such things be done?" (Translation, p. 27).

23. Sam then tells Lebovits that he asked Yidel Wolf, one of his alleged co-conspirators, to "[t]ell Baruch Mordechai [Lebovits] to leave my child alone," meaning that Baruch Lebovits should not force him to testify. Sam believes his son should not be forced to testify because he "went through enough." (Translation, pp. 28-29). Sam's true motivation couldn't be farther from the alleged extortionate one: "How am I going to prevent my son taking the stand." (Translation, p. 43). Sam knew that his son would bear a stigma for the rest of his life in his community, and suffer accordingly, if he was forced to testify.

24. Later, Sam speaks about being pressured and threatened to attend the rabbinical court proceedings presided over by Rabbi Yisroel Makavetzky. Lebovits is initially evasive about these proceedings: "I wasn't told anything. It's not coming from me." (Translation,

p. 49). However, when Sam reminds him that he was directly involved – “[j]ust a minute. I spoke with you on the phone. You called me on the phone ... [Makavetzky] told me, ‘I’m transferring you to Meyer’” – Lebovits admits he was there: “I remember I was talking from Makavetsky’s.” (Translation, p. 49). Sam describes Makavetzky as follows: “Here is Rabbi Makavetsky who’s been chasing me so long, telling me I should drop the case...” (Translation, p. 50). Meyer Lebovits takes a very different view of him: “He is a good man, Makavetsky” (p. 145).

25. Later in the conversation, Sam states the origin of the issue between them: “After all, my child was hurt”; “True,” Lebovits responds. (Translation, p. 69). Lebovits says that he “thought we’ll settle it, we’ll settle the matter...” (Translation, pp. 69-70). Sam expresses his objection to the threats he was receiving to force him into dropping his son’s case, by analogy with a person who breaks into the home of another, and then, after being arrested, threatens the person whose home he broke into that “if you don’t back off, I’ll fix you.” (Translation, p. 70). Meyer Lebovits pleads ignorance of the threats – “Who wants to fix you?” – but then justifies his actions: “I must defend myself.” (Id.)

26. Sam points out that had Baruch Lebovits pleaded guilty in the case of his son, he would not face time in jail. Meyer Lebovits responds: “He wanted to plead guilty.” (Translation, p. 71). However, it is then clarified that Baruch Lebovits wanted to plead guilty in both Sam’s son case and in the case of T..., but only if he was given an overall non-jail disposition; Meyer Lebovits concludes: “They didn’t give him what he wanted.” (Translation, p. 72). At the end of the conversation Lebovits reiterates that he can’t forgive Sam, “not because

you put [Baruch Lebovits] in jail,” asking instead: “Why didn’t you come to us?” (Translation, p. 148).

27. The tape recording was disclosed by counsel for Baruch Lebovits to the sex crimes prosecutors prior to his trial but dismissed as worthless. The District Attorney’s office was still not giving Baruch Lebovits what he wanted. That would soon change.

Trial and conviction of Baruch Lebovits

28. By November 2009, Torenheim’s case had been severed from that of R1 . ADA Gregory spoke to T , and noted that he was ready to proceed to trial. Later that month, she received a call from attorney John Lonuzzi, informing her that Tc was suddenly no longer cooperating with the prosecution of Baruch Lebovits. No reason was given. ADA Gregory’s notes at the time reflect attempts to subpoena the testimony of Tc . (Ultimately, however, that course of action was not pursued and the case was dismissed.)

29. The Lebovits family and their supporters were unable, though, to stop R1 from testifying against Baruch Lebovits. Because of that testimony, in March 2010, Lebovits was convicted; he was sentenced the following month to a term of 10 2/3 – 32 years in prison. Counsel for Lebovits argued that R1 had fabricated the allegations as part of an extortion plot. The truth was obvious to the jury, which needed only a few hours to reach its verdict.

30. During the trial, the jury heard of efforts by the sole defense witness, Berel Ashkenazi, to pay off R – a former pupil of his – and stop his testimony. Contemporaneous notes from Detective Litwin detail these efforts, as well as Sam’s counter-

efforts to assure R[edacted] – who suffered from a serious drug addiction and was in dire financial straits – that he would receive support and compensation without having "to sign anything" – i.e. without agreeing to drop the case. R[edacted] later reported being similarly advised by ADA Gregory that he was entitled to pursue a civil case separate from the criminal one. When Berel Ashkenazi took the stand, he was confronted with a rabbinical court ruling that forbade R[edacted] from reporting Ashkenazi's attempts to bribe him and stop him from testifying, while allowing Ashkenazi to "help" R[edacted] if he removed "himself altogether from the courts of the goyim." Ashkenazi had no answer to what was blatant evidence of witness tampering and attempted bribery. Regardless, he faced no further consequence or sanction (careful note of which appears to have been taken by his brother, Zalmen, as will be seen below).

"Justice" for Baruch Lebovits

31. Following the conviction, Baruch Lebovits and his supporters began an intensive campaign to overturn it by any means possible. In their quest, they found an ally in the last place imaginable: the office of the same prosecutor that sent Lebovits to jail.

32. Help was also forthcoming from Simon Taub, a prominent member of Sam's community whom he had asked for assistance in the past with regard to the harassment and intimidation he and his family were facing. Later, Sam told him that Taub's son had reported being molested by Meyer Lebovits. Instead of going to the police, however, as Sam had done, Taub used the information to demand money from Meyer Lebovits. Horrified, Sam reported Taub's plan to Detective Litwin and to Rabbi Nuchem Rosenberg, a prominent community activist against the sexual abuse of children who maintains a "hotline" providing information on topics of concern to the community. In an effort to deter Taub, Rabbi Rosenberg

broadcast on his hotline that someone was attempting to extort money from an alleged molester, and that both would be arrested. The effort was successful. On April 27, 2010, Taub contacted Meyer Lebovits and told him that he was no longer pursuing him for money.

33. The Lebovitses still saw an opportunity for profit. Later that day, counsel for Baruch Lebovits met with Rackets Bureau Chief Michael Vecchione. A meeting was arranged in counsel's office that night at 9pm with Assistant Chief Investigator George Terra and Detective Investigator Stephanie Green-Jones of the District Attorney's office, and Chaim Lebovits, another son of Baruch Lebovits. According to the notes of DI Green-Jones, Chaim Lebovits "requested that we assist him in trying to bring justice for his family." It was a remarkably brazen request, considering that little more than a month has passed since Baruch Lebovits had been convicted of raping a child.

34. Even more remarkable (to the point where it can scarcely be believed), within 45 minutes of the meeting having begun, the effort by the District Attorney to assist the Lebovits family and the convicted child rapist was underway, with a direction that Chaim Lebovits re-instigate contact with Simon Taub. As a result, Taub resumed his plan to obtain money from the Lebovits family, which led ultimately to his arrest. The Lebovitses made the preposterous claim that Sam and Rabbi Rosenberg were acting in concert with Taub (even though the latter broadcast Taub's plan on his hotline), and that Taub was originally threatening to make a report to the police that Meyer had abused Sam's son, as opposed to his own.

35. In quick succession, an affidavit materialized, signed by a person named Sholem Weisner, claiming to be a friend of R[edacted]. According to Weisner, R[edacted] told him that he (R[edacted]) had been paid off by Sam, that he was making it "big time" financially,

and that he had perjured himself at the Lebovits trial. Next, an affidavit signed by Moshe Friedman originated from the same source and, a week later, yet another one, signed by [redacted] and faxed to the District Attorney by counsel for Baruch Lebovits, in which [redacted] stated that he had been “brainwashed” and paid \$10,000 by Sam to make his complaint. [redacted] was interviewed in September 2010. Nobody asked why he had not made these claims when he stopped cooperating less than a year earlier. Nor did anyone question why Baruch Lebovits had offered repeatedly to plead guilty with respect to heinous sexual offenses against a child of which he was now supposedly innocent. The investigating prosecutor had been conveniently banned from speaking to his colleagues in the Sex Crimes Bureau while, behind their backs, their conviction of a child rapist was being hollowed out.

36. In December 2010, [redacted] was interviewed by the District Attorney’s office, and he stated unequivocally that he did not lie and was not paid for his testimony. On March 24, 2011, on the eve of the Grand Jury presentation, [redacted] was interviewed again. He stated that he had recently been invited to Florida by Sholem Weisner had given a number of video-recorded interviews. The District Attorney chose to ignore this information and proceed with Sam’s indictment. Had he bothered to follow-up, he would have learned – as his sex crimes prosecutors learned afterwards – that [redacted] was lured to Florida by Weisner on the pretense of making a movie about his life. After [redacted] was plied with drugs, Weisner tried repeatedly, but in vain, to make him implicate Sam. It is very obvious from the recordings that Weisner is speaking to him for the first time about Sam; in particular, there is no reference to the statements Weisner claimed in his affidavit that [redacted] made to him about being paid off by Sam, making it “big time” financially, or lying at trial. After [redacted] meeting with the

District Attorney in December 2010, Weisner was obviously given the instruction that the attempt so far to discredit Rabin hadn't worked and more was required. Rabin, on the other hand, entirely oblivious of the malign forces plotting against him, simply tells the truth throughout the recordings.

37. When Rabin is asked why did Tish "get out" of the Lebovits case, he replies that "[t]hey scared him, they scared him," that the "Lebovitses" did this." He continues: "They, they terrorized him. You have no idea what they did to him." More specifically, "they came to tell him that, 'If you're coming to court to testify against my father you're going to be arrested for the cases in which you molested two children.'" Rabin also states that "they" paid for Tish's lawyer and promised him money, which he never got.

38. When asked whether Sam ever tried to "shut him up," or offer him money to drop the case, Rabin responds, "No ... [Sam] always told me, [Rabin], go to court, you're going to tell the truth, tell the truth." Sam, he says, "let me go the truthful way. I proceeded truthfully and honestly." He also recounts Baruch Lebovits attempting "to manipulate [his] father" along with numerous attempts to pay him off, including a payment of \$50,000 in "forgiveness" money, and his initial reaction: "Wow, I don't know, \$50,000, and I don't have a penny to my name." He didn't accept it, nor would he accept any amount: "My blood is not for sale ... my blood has no price." A lonely island of integrity, about to be flooded by a heaving sea of corruption.

Grand Jury presentation

39. The attempt to turn Rabin inside out having failed, the case against Sam before the Grand Jury had just three witnesses: Tish, Meyer Lebovits, and Moshe

Friedman (ADA Gregory also provided background information about the cases against Baruch Lebovits).

40. T testified that Sam paid him \$10,000 to falsely testify twice in Grand Jury proceedings that Baruch Lebovits, whom he knew “[f]rom the synagogue,” molested him.

41. Meyer Lebovits testified that he was approached on Sam’s behalf by each of the five alleged co-conspirators. He testified that he spoke to Yakov Leizer Horowitz at the “beginning of November, end of October” 2008, with Simon Taub in October and November 2008, and with Yidel Wolf in November 2008, and that each of them conveyed a threat by Sam to bring a third victim by the name of R forward unless Sam’s monetary demands were met. The testimony was obviously staged to correspond with the time R testified against Baruch Lebovits before the Grand Jury in November 2008. However, R reported his abuse to Detective Litwin two months earlier, meaning he had already come forward long before Sam was supposedly threatening, according to Meyer Lebovits, to bring him forward. An obvious lie, with many more to follow.

42. Meyer Lebovits testified that, by early 2009, an amount of \$225,000 had been agreed, yet in the recorded conversation in May 2009 it is obvious that there was never any agreement. Lebovits is questioned as to whether Sam specified any amount of money during their recorded conversation, and responds: “For that he referred to the messengers.” A seemingly clever answer, except that the recording reveals it’s entirely false. Sam never makes a reference to money being sought by anyone. Lebovits also testified that Sam told him that his plan was that “I should come to him and pay him off.” Another lie, again nowhere to be found in the

recording. Lebovits testified that Sam said “he controls both of [T] and R [redacted].”

Yet another lie, once again nowhere to be found in the recording. Lebovits testified that Sam “started telling me that he has a fourth case.” In fact, Sam states clearly to Lebovits in the recording: “They have the two, two witnesses and there aren’t anymore.” (Translation, p. 82).

43. Possibly the biggest lie is one of omission: Makavetsky, the central figure in the interactions between Sam and the Lebovits family, whose unpaid bill was the cause of the recorded conversation in May 2009, is nowhere to be found in Lebovits’s account to the Grand Jury. How, it must be asked – assuming the translation of the recording was actually read prior to the Grand Jury presentation – could the District Attorney have allowed Makavetsky and all the other lies to slip away unnoticed?

44. Finally, Moshe Friedman testified. He was asked how he knew Baruch Lebovits, and answered only that they “went to school together,” neglecting to mention that he is Lebovits’ first cousin by marriage. He also testified that he was the “community leader” and that Sam asked him in March or April 2009 to act as an emissary. The scenario advanced by Friedman was commented upon recently in *The Jewish Week* by Rabbi Yosef Blau, the spiritual adviser at the rabbinical seminary of Yeshiva University: “The whole situation doesn’t make sense ... The idea that major players like [Moshe Friedman] would be doing Sam Kellner’s bidding is mind-bogglingly absurd to [anyone familiar with how that community works].”

45. Friedman’s testimony was largely superfluous. Nonetheless, it served a very important purpose. When the chief “fixer” and political liaison within Sam’s community came to give testimony against him, it meant the fix was in.

46. On April 12, 2011, Sam Kellner was arrested. A news conference held personally by the District Attorney followed, and Sam was paraded in front of the media. The next day, Lebovits was released on \$250,000 bail pending the appeal of his conviction and placed under house arrest. (On April 25, 2012, Lebovits' conviction was overturned by the Second Department and a new trial required because of the prosecution's untimely disclosure of certain Rosario material.)

The case against Kellner begins to fall apart – Torenheim's manipulation is revealed

47. In May 2012, the District Attorney was told by a woman named Natalie, described as Torenheim's best friend, that he fled to Israel "out of fear". She also "recalled the conversation she and Torenheim had prior to the [Lebovits] trial when he told her that [Lebovits's] oldest daughter called (Torenheim) and told him that if he testifies against her father, he (Torenheim) would immediately be arrested for molestation." According to Natalie, Lebovits's "daughter said they would bring in the two little boys Torenheim molested as witnesses against him."

48. In September 2012, the District Attorney obtained travel and bank records that showed that Torenheim did in fact go to Israel and that his flights were being paid for by a felon, convicted a number of years ago of bank fraud, named Zalmen Ashkenazi, who just happened to be the brother of Berel Ashkenazi, the sole defense witness at the Lebovits trial who tried to pay Rabin off (and faced no sanction for doing so). Again, no further action was taken by the District Attorney, and the information was not supplied to defense counsel in breach of the prosecution's Brady obligation.

49. In May 2013, defense counsel became aware of a recording of conversations with Tc made by an acquaintance of his who, being aware of Sam's case, began recording their conversations upon the realization that a grave injustice was being perpetrated (see article attached hereto as Exhibit "D"). On the tape, Tc states that he first disclosed his abuse by Baruch Lebovits to people within his community around the time he was 16 or 17, several years before he ever met Kellner. He also reveals that Zalmen Ashkenazi "got him out" of testifying against Lebovits, hired an attorney for him, and "made him" go against Sam.

50. Defense counsel met with Tc's acquaintance, who described a number of conversations he had with Tc about his abuse by Baruch Lebovits – including one immediately after Lebovits was sentenced to prison, when Tc called to express his relief and elation. Discussions followed with the prosecutors, who wished to meet the acquaintance and listen to the tape. Neither could be arranged because the acquaintance felt unable to trust the District Attorney and feared his identity would be revealed to the Lebovitses and their supporters. At that point, I suggested to the prosecutors that they simply put the allegations directly to Tc on the assumption that Tc, who sounded relatively unsophisticated on the tape, would not be able to maintain the deception. The prosecutors never mentioned that they had already looked into the Zalmen Ashkenazi connection.

51. On July 2, 2013, I wrote to ADA Batsidis, stating my belief that significant Brady material related to Tc was being withheld from the defense. On July 5, 2013, the defense was provided with redacted notes of interviews by prosecutors of Tc on June 26 and July 1, 2013, respectively, along with the aforementioned Ashkenazi travel and bank records

from September 2012. It was also indicated that other Brady material existed but was being withheld due to a protective order, which it later emerged was obtained on July 3, 2013, the day after my letter was sent.

52. In the interviews, Tc , though he would not name the person(s) threatening him, conceded that he fled to Israel for fear of possible child molestation charges. He initially denied knowing Zalmen Ashkenazi, before claiming he barely knew him, and then admitting that he has known him and his family, including Berel, since childhood. Moreover, he stated that “Zalmen Ashkenazi has supplied funds for Mr. Tc s attorney, his airfare to and from Israel, his apartment in Israel, and his school fees,” and that he “needs Zalmen Ashkenazi’s permission to return to the US when he’s in Israel.” He no longer claimed that Sam had paid him \$10,000, claiming now that he had either not paid him an agreed-upon fee or not fulfilled a promise to finance his wedding. Bizarrely, he stated that he “had never seen Baruch Lebovits in his life,” that Lebovits “could have molested me. [I] can’t really say,” and that he told others that Lebovits “really molested him.”

53. In court on July 8, 2013, the prosecutors claimed that they were investigating Ashkenazi and the Lebovitses, and that they would report on the progress of this investigation on July 29, 2013, as well as on the investigation covered by the protective order (which, on information and belief, concerns more unfounded allegations manufactured on behalf of Baruch Lebovits – this time attacking Detective Litwin – that the District Attorney helpfully forwarded to the Internal Affairs Bureau of the NYPD).

ARGUMENT

54. CPL § 210.40 provides that an indictment or any count thereof may be dismissed in furtherance of justice, when such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice. Furthermore, in determining whether such compelling factor, consideration, or circumstance exists, the court must, to the extent applicable, examine and consider, individually and collectively, the following:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
- (g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
- (h) the impact of a dismissal on the safety or welfare of the community;
- (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

55. The discretionary power to dismiss an indictment or any count thereof in the interest of justice is to be “exercised sparingly” (People v. Martinez, 304 A.D.2d 675, 676 (2nd Dept. 2003), “in those rare cases where there is a ‘compelling factor’ which clearly demonstrates that prosecution of the indictment would be an injustice” (People v. Anthony C., 269 A.D.2d 402 (2nd Dept. 2000). It is properly directed at “the unusual case that cries out for fundamental justice beyond the confines of conventional considerations of legal or factual merits of the charge or even on the guilt or innocence of the defendant.” People v. Belge, 41 N.Y.2d 60, 62-63 (1976) (Fuchsberg, J., concurring) (internal citations and quotation marks omitted).

56. The present case, and in particular, the counts of the Indictment that relate to Tc – which are the subject of the present motion – is exactly the kind of rare or unusual case contemplated by CPL § 210.40 that cries out for fundamental justice. Indeed, the utter collapse of Tc’s credibility as a witness against Sam, in and of itself, presents a compelling reason to dismiss those counts of the Indictment based solely upon his testimony before the Grand Jury, as was made clear by the court in People v. Santoro, 63 N.Y.S.2d 615 (Co. Ct., Kings County, 1946):

Where the evidence is legal, competent and sufficient, the Court will not, ordinarily, upon motion, inquire as to the credibility of the witnesses and the truth of their testimony, especially where conflicting views concerning its credence are expressed by the parties to the action. It is not the function of the court, nor has it the authority, to assume the role of a trier of the facts and thereby invade a province which is peculiarly that of the petit jury upon a trial. However, where the evidence is patently false, or where its falsity is

conceded by the prosecutor, the court is bound, upon motion, to dismiss the indictment to prevent a perversion of justice.

Id., at 619.

57. For this, however, Tc is not to blame. It is sickeningly clear he was the victim of horrific sexual abuse and that, after he reported the abuse, he was terrorized and intimidated by his abuser and his abuser's supporters to the point of dropping the case. Worse again, he was then manipulated into denying the abuse ever happened, and into falsely implicating Sam, a manipulation that the District Attorney accepted without question for over three years, until the prospect of the utter shamefulness of it all being exposed at trial was unavoidable. Every day that Tc remains in this case is another day that his abuse and this shamefulness continues.

58. Regarding the other factors to be considered by the Court under CPL § 210.40, most have already been covered. There is not a single credible piece of evidence against Sam. Indeed, at this point, the case hangs by the slenderest of threads: the testimony of Meyer Lebovits, son of the pedophile trying to secure his father's release from prison – testimony that is wholly contradicted by the tape he made of his conversation with Sam in May 2009.

59. Regarding law enforcement misconduct, there are many questions that arise from a situation in which a District Attorney is enlisted by a convicted pedophile and his supporters to oversee a blatant campaign of lies, manipulation and witness tampering in order to overturn his conviction and secure his release back into the community. Amongst these questions are the following:

1. Why did the District Attorney cooperate with a scheme to secure the release from jail of a

notorious, decades-long, convicted pedophile?

2. Why were the sex crimes prosecutors sidelined?
3. Why was Tc _____'s recantation accepted without question?
4. Why was the recantation accepted when Baruch Lebovits had offered repeatedly to plead guilty with respect to abusing Tc _____?
5. Why was Baruch Lebovits not charged with witness tampering despite being recorded in the act in September 2008?
6. Why was Berel Ashkenazi never pursued for his attempts to bribe R. _____ and stop his testimony?
7. Why was Sholem Weisner not prosecuted for swearing falsely in an affidavit that R. _____ had admitted fabricating his trial testimony and being paid for it?
8. Why was no investigation carried out into the Lebovits family after multiple reports were received that they threatened T _____ and forced him to flee to Israel?
9. Why were records evidencing Zalmen Ashkenazi's control of T _____ not turned over to the defense in September 2012 when they were obtained by the District Attorney (a clear Brady violation)?
10. Why was Brady material covered by the protective order belatedly obtained on July 3, 2013, not previously turned over?
11. Why was Meyer Lebovits not challenged about the content of the recording of his

conversation with Sam in May 2009?

12. Why were Yisroel Makavetzky and his Beit Din not investigated?
13. Why was Detective Steve Litwin, known as a tireless champion of victims of childhood sexual abuse, referred to Internal Affairs based on more spurious allegations concocted by Lebovits and his supporters?

60. Each of these questions is prompted by pervasive evidence of serious investigative and prosecutorial misconduct. It is a searing portrait of shame. Mi To was abused over and over again, and then failed utterly by those that were charged with his protection. Justice demands that he be set free from his continued abuse and that the counts in the Indictment that rely upon his continued debasement be dismissed. The confidence of the public in the criminal justice system requires no less.

WHEREFORE, it is respectfully requested that the Court grant the relief sought.

Dated: New York, New York
July 26, 2013



NIALL MACGIOLLABHUI