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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION/ORDER

IND NO.: [REDACTED]
[REDACTED]

Defendant.

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MATTHEW A. SCIARRINO, JR., J.

The defendant is charged with Attempted Murder in the Second Degree and other related charges. Pursuant to CPL § 245.20[1][c], entitled "Automatic discovery," defense counsel is entitled to "[t]he names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense." In place of providing actual phone numbers, the People offered the use of the WitCom system as to two of their witnesses. Yes, there is an app for that!

On January 30, 2020, defense counsel objected to the use of this system claiming it does not provide adequate contact information in contravention of the plain meaning of CPL § 245.20[1][c] and *People vs. He*, 34 NY2d 956 [2019].¹ Following defense counsel's objection, this court issued a Preliminary Order requiring defense counsel to make attempts to use the WitCom system and to file a report, detailing attempts to use the WitCom system and highlighting any perceived deficiencies in the system. The court gave the People an opportunity to comment on defense counsel's findings.

¹ The court notes that in arguing that WitCom does not provide adequate contact information, defense counsel states that not every witness has a cell phone and that cell phone numbers often change. This argument seems to suggest defense counsel is requesting no less than the physical address of the witnesses. However, nothing in CPL § 245.20 requires the People to disclose the addresses of their witnesses unless good cause has been shown (CPL § 245.20[1][c]). As this has not been addressed by either party, the court does not reach the issue of good cause.

On January 31, 2020, defense counsel filed her report. The People responded on February 14, 2020. Defense counsel filed a reply on February 19, 2020.

WITCOM BACKGROUND

WitCom is an app available for smartphones developed by Lex Loci Labs. According to the company website, “WitCom facilitates communication between defense attorneys and witnesses without revealing either party’s contact information.”² Currently it is being utilized by the New York County and Kings County District Attorney’s Office. Once a prosecutor registers their witnesses in the WitCom system, a link is sent to the witness’ cell phone introducing them to WitCom and providing a virtual phone number for assigned defense counsel which the witness can then add to their phone’s contacts. Defense counsel, in turn is **required** to download the WitCom app. Once registered with the app, WitCom serves as a portal, which allows counsel to view the names of witnesses that pertain to a relevant case without revealing the witness contact information. Defense counsel may then text or call the witnesses through the WitCom app. Upon doing so, the defense attorney’s virtual WitCom number is displayed to the witness who then may accept or decline the phone call or ignore or reply to the text message.

ATTORNEY UTILIZATION OF WITCOM

In her Attorney Affirmation made pursuant to the Preliminary Order, defense counsel recounted making one phone call and sending one text message to each of the witnesses listed in the WitCom system. She stated that she did not receive a return phone call or text back from either of the witnesses. In their response, the People stated that after defense counsel’s phone calls their witnesses did in fact call counsel back. In her reply, defense counsel stated that one witness reached out via WitCom on February 10th, stating that “the lawyer” told her to call. Defense counsel denied ever speaking to a second witness through WitCom. Rather, she stated that also on February 10th, a second witness called her directly on her cell phone from the witness’ personal cell phone. Defense counsel also stated that the attorney for the second witness indicated that the assigned prosecutor contacted him three times in one day regarding the witness reaching out to defense counsel. In short, counsel argues that the WitCom system only “worked” because the

² Witcom, <http://www.witcom.io> [accessed February 14, 2020]

assigned prosecutor actively prompted, encouraged and manipulated the witnesses to use the system.

DISCUSSION

The People argue that the WitCom system is adequate because the witnesses did in fact eventually respond to defense counsel. The court disagrees. What may be adequate in one circumstance may not be adequate in another. When a witness or witness statements are in conflict as to material facts, the defense must be given an opportunity to investigate those facts and must be able to contact the witnesses. In *He*, the Court of Appeals Court held that it **would not be adequate for the prosecutor to contact the witnesses and simply give the defense attorney's contact information to them**. Is it then any different for the prosecutor to provide their witness with a virtual phone number of defense counsel and instruct them that counsel may contact them through that number? Now, in some situations, using a third-party app or service may be allowed by the court.³ In some situations, the third-party app or service may even encourage communication between the witness and defense attorney and the court feels that sometimes being legally right may in reality hurt. The witness may feel more comfortable in using an anonymized number, and may respond, when they may otherwise have ignored and/or blocked the call.

However, in other situations, the very use of WitCom subsumes the investigative role of defense counsel and short circuits the adversarial process by inserting the prosecutor (or their app) as an intermediary between defense counsel and witness. Defense counsel is forced to rely on the witness' willingness to interact with counsel through a virtual number on their personal smart device, or on the prosecutor to prompt said witness. Moreover, use of the WitCom app is contrary to the plain meaning of the statute which calls for the People to provide contact *information*. WitCom – although a novel approach to witness communication – stands for a lack of information, putting defense counsel at an unfair disadvantage.

In today's day and age, adequate contact information is an *active* and *verified* cell phone number or email address, no more and no less.⁴ In requiring such disclosure, the witness is free to choose which phone number or email at which they can be contacted. Adequate contact

³ For example, when the People have applied for and are granted a protective order pursuant to CPL § 245.70 that orders the use of a virtual number or app.

⁴ See, *People v. Adams*, Sup Ct, Queens County, February 7, 2020, Morris, J., Ind. No. 1263/19

information does not force an attorney to install an app provided by the District Attorney's Office, allowing the prosecutor to assume a role as the gatekeeper between counsel and witness. To argue that the court should accept the WitCom app because millions of people use Uber, Lyft, Grubhub, etc., is ludicrous. Those apps are voluntarily downloaded as a first-world convenience for the consumer. They are in no way akin to forcing an adversarial party to litigation to use an app absent a court order. Even when the defense attorney makes little or no effort to make contact through the app, one cannot say that a third-party app is "adequate contact information." Public defenders, by necessity and their nature, are distrustful of the government. This court, an agent of the government, does not believe that forcing a public defender or other defense attorney to accept an app, paid for by the District Attorney's Office, another arm of the government, meets the intent of the criminal justice reforms that went into effect this year or the holding of *People v. He*. While this court does not in any way, shape or form believe that the District Attorney's Office has any intentions aside from alleviating the worries of their witnesses and allowing defense counsel to do their job, forcing the defense attorney to use the prosecutor's method does not satisfy *People v. He*. Clearly the parties, on their own, may agree to use WitCom – or another means of communication – and as previously discussed, this may in fact result in more actual contact, but that does not mean that use of the app meets the legislative mandate.

This court genuinely believes that the WitCom app could result in more communication, but that is a decision to be made by the defendant's lawyer. Some may choose to use it. However, absent good cause that shows that the app would be needed to protect the witness from contact via cell phone or email, this court will not accept its use.

Accordingly, it is hereby:

ORDERED that the People's use of the WitCom system did not provide adequate contact information; and it is further

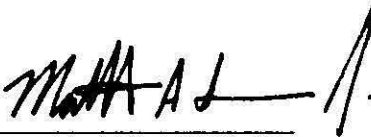
ORDERED, that the People are directed to disclose an active and verified email address and cell phone number for their witnesses to defense counsel; and it is further

ORDERED, that this decision is stayed for thirty (30) days.

This case is scheduled next for March 23, 2020.

This opinion shall constitute the Decision and Order of the Court.

Dated: February 20, 2020


Matthew A. Sciarrino, Jr.
Acting Justice, Supreme Court