Motion Practice in Criminal Trials

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Oneida County Public Defender
Criminal Division

Contents

Before We Begin

• BEWARE

- Sixth Amendment protections to plea bargaining process and INEFFECTIVE ASSISTANCE OF COUNSEL extended to plea bargaining

Missouri v. Frye, U.S. Supreme Court, March 21, 2012, NO. 10-444

AND

Lafler v. Cooper, 132 S.Ct. 1376, (March, 2012)

SEE APPENDIX FOR ANALYSIS

WHY?

Is there an increasing tendency for the courts to infringe on the attorney-client relationship and the right against self-incrimination?

Do *Frye* and *Lafler* infringe on the attorney-client privilege?

Does *Mendoza* trample on the 5th amendment prohibition against self-incrimination?

As every criminal lawyer knows, the law requires the judge hearing the case to view the evidence in "the light most favorable to the defendant. (*People v. Vecchio,* 240 A.D.2d 854, 855, 658 N.Y.S.2d 720 [1997]).

In reality, the Court's "reasonable view of the evidence" normally either

1. Sides with the prosecutor's view, or

2. Is "harmless error."

- Therefore, its not only required, but critical that a criminal defense attorney spend the time:
  - 1) Identifying the issues,
  - 2) Researching the issues, and
  - 3) Framing the issues

  BEFORE actually preparing the Omnibus Pretrial Motion

Introduction to Motion Practice in Criminal Cases

Where and How To Begin

Read the Complaint and Supporting Depositions CAREFULLY

INFORMATIONS, MISDEMEANOR AND FELONY COMPLAINTS

SUFFICIENCY

See Article 100 of the CPL

INFORMATIONS, MISDEMEANOR AND FELONY COMPLAINTS

- Must specify the name of the court,
- The title of the action,
- Must be subscribed and verified by the complainant,
  - Any person having actual knowledge,
  - Or upon information or belief
  - Of the offense or offenses charged.
- Must contain a factual and accusatory part

INFORMATIONS, MISDEMEANOR AND FELONY COMPLAINTS

- Accusatory portion:
  - Must designate the offense or offenses charged
- Factual portion:
  - Must contain a statement of the complainant
  - Alleging facts of an evidentiary character supporting or tending to support the charges
  - Based upon personal knowledge or information and belief

Motion To Dismiss: Defective

- 1. Made at or after Arraignment (CPL §170.30)
- 2. Made within 45 days of Arraignment
- 3. In writing
- 4. Upon reasonable notice
- 5. Motion should contain all grounds

- BEWARE: NEW CASE

COURT OF APPEALS: MAY 8, 2012 PEOPLE V. SUBER, NO. 81
Informations: Defendant's admission did not have to be corroborated in order to satisfy the prima facie case requirement.

DO NOT WASTE ANY TIME AFTER ARRAIGNMENT

TIME IS OF THE ESSENCE

WHERE TO BEGIN

- Interview the client
  - Let him tell his story the first time
- Re-interview the client
  - You ask the questions this time. Cross-examine.

DO NOT GO INTO ANY INTERVIEW WITHOUT A PLAN

1. Obtain a complete pedigree: Date & place of birth, mother and father's names and addresses, siblings, immigration status, etc.
2. Did he give any written or oral statements to the police or anyone else about the incident?
3. Who was present to witness the incident?
4. Who was present when he was arrested?
5. How much time elapsed during the incident?
6. Exactly where and when did the incident occur?
7. Exactly where and when did the arrest occur?
8. What were the lighting and weather conditions?
9. How was he dressed?
10. Does he have a nickname or an alias?
11. Does he have any tattoos, scars, disabilities?

Interview the client's family
INTERVIEW FRIENDS
Interview the Witnesses
Interview the Police Officers

VISIT THE CRIME SCENE

TAKE PICTURES

TAKE MEASUREMENTS

TALK TO PEOPLE IN THE AREA

TALK TO NEIGHBORS

VISIT NEIGHBORHOOD STORES

Obtain Records

- School and college records
- Medical records
- Mental health records
- Military records
- Jail records

HOW? - RELEASE OR SUBPOENA

THINK OF THIS AS PERFORMING A COMPLETE BACKGROUND CHECK ON YOUR CLIENT

The 45-Day Motion
CPL §190.80

A defendant is entitled to release from custody if he has not been indicted within 45 days of his arrest, unless failure to indict was:

1. Due to defendant's request, action, condition or consent,

2. People show good cause of a compelling fact or circumstance precluding grand jury action

3. Time runs from the time the client is HELD for the grand jury. *People v. Becker, 191 Misc. 2d 203 (citing Preiser's Commentary)*

45 Day Motion CPL 190.80

Reasons to Consent

1. Parole, Probation or Immigration Holds
   Client will remain in custody and lose time served

2. Client is being held on another offense

The Omnibus Pretrial Motion

CPL §255.20 (1)

- ***DUE: WITHIN 45 DAYS OF ARRAIGNMENT ON THE INDICTMENT AND BEFORE COMMENCEMENT OF TRIAL***

-EXTENSIONS-

1. Where an eavesdropping warrant and application have been furnished

OR

2. A §710.30 Notice has been served

OR

3. Defendant requests time to obtain counsel or have counsel assigned.

NOTE: Time DOES NOT run until Counsel APPEARS

Matter of Veloz v. Rothwax

65 NY 2d 902, (1985)

- *A trial court has no authority to shorten the period and require the defendant to serve the motion in less than the 45 days required by the statute.*

FAILURE TO FILE WITHIN 45 DAYS

- WAIVES ANY GROUND OTHER THAN JURISDICTION OF THE COURT
- WAIVER EVEN INCLUDES MOTIONS TO DISMISS ON STATUTE OF LIMITATION GROUNDS

PRACTICE TIP

At arraignment, set forth on the record the substance of each §710.30 Notice you have been served with

Substance of the Motion

CPL §255.20 (2) requires:

"*All pre-trial motions, with supporting affidavits, affirmations, exhibits and memoranda of law, whenever practicable, shall be included within the same set of motion papers, and shall be made returnable on the same date…"* ALTHOUGH

CPL §255.20 (3) requires:

"Notwithstanding the provisions of subdivisions one and two hereof, the court must entertain and decide on its merits, ***at any time before the end of the trial, an appropriate pretrial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified…"***

Any other pretrial motion made after the 45 day period maybe summarily denied, but the court, in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits.

COURTS RARELY WILL ENTERTAIN A LATE MOTION

Content

- **Notice of Motion.**

State of New York
County of Oneida — County Court

People of the State of New York,

-against-

Ely Torby,

Defendant.

Notice of Motion
For
Omnibus Pretrial Relief

Indictment No. 2011-330

PLEASE TAKE NOTICE that upon the annexed affirmation of Frank J. Nebush, Jr., Esq., Oneida County Public Defender, Criminal Division, and all prior pleadings and proceedings heretofore had herein, a motion will be made as follows:

DATE AND TIME OF MOTION:	December 1, 2011 at 9:30 a.m., or as soon thereafter as Counsel can be heard.
PLACE OF MOTION:	ONEIDA COUNTY COURT 200 Elizabeth Street Utica, New York 13501
MOTION MADE BY:	Frank J. Nebush, Jr., Esq. Oneida County Public Defender Criminal Division Attorney for Ely Torby
OBJECT OF MOTION:	Omnibus Pretrial Motion together with such relief as this Court deems just and proper.

Dated: Utica, New York
November 29, 2011

Yours, etc.,
Frank J. Nebush, Jr., Esq.
Oneida County Public Defender - Criminal Division
Attorney for Ely Torby
250 Boehlert Center
321 Main Street
Utica, New York 13501
Telephone: (315) 798-5870

To: Hon. Michael A. Arcuri
Oneida County District Attorney

Sharon A. Carraway
Oneida County Court Clerk

CPL §210.45, subdivision 1 governs the content of motions to dismiss

- *Must raise all known pretrial grounds for dismissal*
- *"If the motion is based upon the existence or occurrence of facts, the motion papers* ***must contain sworn allegations t****hereof, whether by the defendant or by another person or persons.*
- *Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief.*
- *The defendant may further submit documentary evidence supporting or tending to support the allegations of the moving papers."*

Subsequent Pretrial Motions

- After the submission of the Omnibus Motion, it may become necessary to submit a further motion if information has come to the attention of counsel of the defense or the district attorney that was not known at the time the original motion was made.

- The return date of that motion should be set by the moving party. CPL §60.10 provides that the rules of civil practice govern in the absence of a specific criminal procedure.

- In assessing the "reasonable notice" dictated by CPL §210.40 for setting a return date, it would seem that the CPLR would govern. Therefore eight (8) days should be deemed "reasonable notice." *For an in-depth discussion of the CPL and CPLR, consult the treatise by the Hon. David M. Davidowitz of the Bronx County Supreme Court entitled "The Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes."*

Notice of Supplemental Omnibus Motion

State of New York
County of Oneida — County Court

People of the State of New York,

-against-

Ely Torby,

Defendant.

Notice of Supplemental Motion
to
Omnibus Pretrial Motion

Indictment No. 2011-330

PLEASE TAKE NOTICE that upon the annexed affirmation of Frank J. Nebush, Jr., Esq., Oneida County Public Defender, Criminal Division, and all prior pleadings and proceedings heretofore had herein, a motion will be made as follows:

DATE AND TIME OF MOTION:	January 5, 2012 at 9:30 a.m., or as soon thereafter as Counsel can be heard.
PLACE OF MOTION:	ONEIDA COUNTY COURT 200 Elizabeth Street Utica, New York 13501
MOTION MADE BY:	Frank J. Nebush, Jr., Esq. Oneida County Public Defender Criminal Division Attorney for Ely Torby
OBJECT OF MOTION:	Supplemental Motion to Omnibus Pretrial Motion together with such relief as this Court deems just and proper.

Dated: Utica, New York
January 4, 2012

Yours, etc.,
Frank J. Nebush, Jr., Esq.
Oneida County Public Defender - Criminal Division
Attorney for Ely Torby
250 Boehlert Center
321 Main Street
Utica, New York 13501
Telephone: (315) 798-5870

To: Hon. Michael A. Arcuri
Oneida County District Attorney

Sharon A. Carraway
Oneida County Court Clerk

Affirmation in Support of Omnibus Pretrial Relief

All motions that can be made must be made in the Omnibus.

- *"The Legislature's purpose in enacting CPL 255.20 was to regulate pretrial proceedings by requiring a single omnibus motion to be made promptly after arraignment and thus to avoid the proliferation experienced under prior procedure in which a defendant could bombard the courts and Judges with dilatory tactics continuing right up to the eve of trial (see 1972 Report of N.Y. Judicial Conference Advisory Committee on the CPL, 1973 McKinney's Session Laws of N.Y., pp. 2076-2077).*

- *A 45-day period to make the motion was deemed reasonable and CPL 255.20 offered some flexibility for motions dependent on the outcome of prior motions or necessarily delayed for other good cause.*

Exceptions to the 45 Day Rule See CPL §210.20

1. Jurisdictional Defects,
2. Interests of Justice (anytime before end of trial),
3. Speedy Trial, BUT has to be made before trial or entry of plea of guilty.

WAIVER

- **<u>Issues not raised in the Omnibus are deemed waived</u>** if they are not pursued. Even when Counsel was not aware of certain facts or circumstances at the time he made his Omnibus Motion and later discovered an issue not covered in the Omnibus, failure to timely present the motion to the court ***may well be deemed a waiver of that issue.***

"…the defendant learned prior to commencement of jury selection of the allegedly perjured testimony by one of the witnesses before the Grand Jury. Since he did not timely move to dismiss the indictment on the ground that he now asserts, he is barred from now asserting any claims that there were defects in the Grand Jury proceeding (see, People v Lawrence, 64 NY2d 200; People v Iannone, 45 NY2d 589; People v Key, 45 NY2d 111; People v Sica, 163 AD2d 541; People v Miller, 121 AD2d 477)." **People v Jones, 204 A.D.2d 659, 614 N.Y.S.2d 222, (1994).**

The People's Response

The People's Answer must include sufficient denial and sworn allegations to controvert the essential allegations in the moving papers. *People v. Cole, 73 NY 2d 957 (1989*)

THE PREAMBLE

Since you are going to have a number of motions requesting relief for a number of various grievances, a chronological list of the legal events associated with the case serves as a preamble to the actual motions. This is a simple, dry recitation of all the legal events in the case. It serves to record all of the events in one document and becomes a source for the attorney to refer to by reference to a paragraph instead of reciting the entire event.

Sample Preamble

State of New York)
County of Oneida) ss.:

Frank J. Nebush, Jr., Esq., an attorney duly admitted to practice in the Courts of the State of New York and a duly appointed Public Defender, Criminal Division in and for the County of Oneida, the attorney of record for the above-named defendant, affirms, under penalty of perjury and pursuant to Rule 2106 of the Civil Practice Law and Rules, that the following facts are true:

1. I make this affirmation upon information and belief, said information having been obtained by my investigation of the case, conversations with the defendant and examination of the relevant documents herein.

2. My client was arrested in Davis County, North Carolina on June 10, 2009 by the Oneida County Sheriff's Department and charged with Murder in the Second Degree in violation of §125.25, subdivision 4 of the Penal Law of the State of New York for causing the death of her four month old daughter, Baby Jones, on April 17, 2008 in the Town of Floyd, Oneida County, New York.

3. Ms. Jones thereafter waived extradition from the State of North Carolina and was returned by the Oneida County Sheriff's Department to Oneida County and arraigned on the felony complaint on July 2, 2009 in the Local Criminal Court for the Town of Floyd before the Hon. Christopher C. Clarkin.

4. At the arraignment, your Affirmant was appointed to represent her, and a plea of not guilty was entered on her behalf.

STANDARD MOTIONS

- **Motion to Inspect the Grand Jury Minutes and Dismiss or Reduce the Indictment**
- **Motion for a Sandoval Hearing**
- **Motion for a Pretrial *Ventimiglia* Hearing**
- **Motion for *Rosario* Material**
- **Motion for Police Reports and Arrest Reports**
- **Motion for List of Persons Interviewed by Law Enforcement Personnel**
- **Motion for List of Witnesses**
- **Motion for Exculpatory Material**
- **Motion for Prior Statements of Witnesses**
- **Motion for Brady Material**

Indictment or Count Defective CPL §210.20 (1)(a)

CPL §210.25:

1. Does not conform to requirements of CPL Article 200, but must be amended,
2. Court does not have jurisdiction of the offense,
3. Statute is unconstitutional or invalid

Indictment Defined

CPL §200.10:

1. Written accusation of a grand jury,
2. Filed with a superior court,
3. Charging a person or persons,
4. With the commission of a crime or crimes.
5. Must be signed by Grand Jury foreman and filed with the court.

Definition includes a Superior Court Information

Motions to Dismiss or Reduce

CPL §210.20

- Indictment or count DEFECTIVE, (CPL § 210.20)
- Evidence before Grand Jury insufficient,
- Grand Jury proceeding defective, (CPL § 210.35),
- Defendant has immunity, (CPL § 50.20 or 190.40)
- Double jeopardy, (CPL § 40.20)
- Statute of limitations, (CPL § 30.10)
- Speedy trial,
- Jurisdictional or legal impediment* *See next slide*
- Interests of Justice (CPL § 210.40)*

Motions to Dismiss or Reduce

CPL §210.20

- If the motion is based upon the insufficiency of the evidence presented to the Grand Jury –
  - IT MUST BE ACCOMPANIED BY A MOTION TO INSPECT THE GRAND JURY MINUTES

CPL §210.30(1)

Usually these motions are made together

The Court MUST grant the motion to inspect

Motions to Dismiss or Reduce
CPL §210.20

If the Court dismisses or reduces, the Prosecutor must within 30 days:

1. Accept reduction and file a new accusatory, *(subject to speedy trial, see CPL §30.30, subd 5(e) and (f).*
2. Resubmit to same or another Grand Jury,(CPL 210.20, subd 4 requires the prosecution to apply to the court for permission to resubmit.
3. Appeal: Prosecutor can take an expedited appeal to the Appellate Division. *See CPL § 450.20 and 450.55*

Motions to Dismiss or Reduce: Grand Jury Proceeding Defective Under CPL §210.35

A Grand Jury is defective when:

1. It is illegally constituted,
2. Fewer than 16 grand jurors,
3. Fewer than 12 grand jurors concur in the indictment,
4. Defendant not afforded an opportunity to appear and testify,
5. Integrity of the grand juror is impaired and prejudice to defendant MAY result.

Motions to Dismiss or Reduce: Grand Jury Proceeding Defective Under CPL §210.35

People v. Williams, 73 NY2d 84, (1989)

Established 2 areas of defective grand jury proceedings:

1. Those that REQUIRE automatic dismissal of indictment, and
2. Others that impair the integrity of the grand jury by causing a risk of prejudice sufficient to warrant dismissal.

People v. Williams, 73 NY2d 84, (1989)

If CPL §210.35, subd. 1 – 4 are violated automatic dismissal is REQUIRED.

For example: Grand jury illegally constituted. *See CPL §190.20 and Judiciary Law Sections 500 and 510. Judiciary Law* §510 states juror requirements

1. *Must be citizen*
2. *Not less than 18 years old*
3. *Not have been convicted of a felony*
4. *Be able to understand and communicate in English.*

CPL §210.35, subd 5

Integrity of the grand jury is impaired and prejudice to the defendant MAY result

ACTUAL prejudice need not be established.

People v. Adessa, 89 NY2d 677 (1997); People v. Hill, 5 NY3d 772 (2005) BUT there must be "an indication of likely prejudice."

CPL §210.35, subd 5
Integrity of the grand jury is impaired and prejudice to the defendant MAY result

EXAMPLES

1. Special prosecutor was not authorized to act before the Grand Jury. *People v. DiFalco, 44 NY2d 482 (1978).*
2. Police office videotaping a child witness during her testimony before the grand jury was also a fact witness before it and therefore was an unauthorized person in the grand jury room. *People v. Sayavong, 83 NY2d 702 (1994)*
3. Defendant provided list of alibi witnesses to prosecutor who only read the names to the grand jurors who inquired if they were going to testify regarding the crime. Prosecutor said he didn't know. *People v. Hill, 5 NY3d 772 (2005)*

CPL §210.35, subd 5
Integrity of the grand jury is impaired and prejudice to the defendant MAY result

4. Prosecutor did not obtain leave of the Court to resubmit case to second grand jury.
People v. Wilkins, 68 NY2d 269

Motion to Reduce or Dismiss
CPL §210.20

Defendant Has Immunity
CPL §50.20 or 190.40

CPL §50.20 is the basic New York immunity statute.

CPL §190.10 deals with immunity before the grand jury.

Motion to Reduce or Dismiss
CPL §210.20

Double Jeopardy

CPL §40.20

People v. Murray, 168 Misc. 566 (1938)

☆ Defendants had been convicted of disorderly conduct prior to being indicted for Assault 2nd.

Motion to Reduce or Dismiss
CPL §210.20

Statute of Limitations

CPL §30.10

People v. Goldner, 70 Misc. 199 (1910)

NYC Superintendent of Sewers indicted for misappropriation of funds received as sewer fees. Indictment dismissed for charging two separate unrelated crimes and statute of limitations prevented resubmission.

Motion to Reduce or Dismiss
CPL §210.20

Speedy Trial Violation

People v. White, 81 AD2d 486 (1981)

Defendant charged with murder and 21 ½ month delay from indictment until pretrial hearings. Court ruled that each speedy trial determination requires "a sensitive weighing process of diversified factors."

1. Extent and reason of delay,
2. Nature of the charge,
3. Extended pretrial incarceration,
4. Any indication the defense has been impaired by the delay.

Motion to Dismiss

Jurisdictional or Legal Impediment

Examples:

- 2 counts of Criminal Possession of Weapon where one weapon was used.
- Crime committed in another county
- Field test found incorrect
- Re-presentation to second grand jury of charges contained in first indictment and second grand jury returned “no true bill.”

Motion to Dismiss
Interests of Justice

- Conviction of CSCS 3 and CPCS 3 based on the sale of the same vials to undercover officer and concurrent sentences imposed, Court vacated CPCS 3 as a non-inclusory, concurrent count.
  People v. Pinto, 235 AD2d 261 (1997)
  People v. Gaul, 63 AD2d 563, (1978)
  See CPL §300.30, subd 4

What is an “Inclusory Concurrent Count” for the purpose of the Motion to Dismiss in the Interest of Justice?

Defined at CPL §300.30, subd 4

“Concurrent counts are “inclusory” when:

1. The offense charged in one is GREATER than any of those charged in the others,

AND

2. When the latter are all lesser offenses INCLUDED in the greater.

ALL OTHER KINDS OF CONCURRENT COUNTS ARE “NON-INCLUSORY”

Motion to Dismiss in the Interests of Justice

There are 3 Components of an "Inclusory Concurrent Count"

- 1. It must be a concurrent count,
- 2. It must be an offense of a lower classification, and
- 3. It must be a lesser included offense

People v. Abrew, 95 NY2d 806 (2000)

Motion to Dismiss in the Interests of Justice

WHY IS "INCLUSORY" AND "NON-INCLUSORY" IMPORTANT?

See CPL §300.40: Court's Charge; Submission of the Indictment to Jury; Counts to be Submitted

- The Court may submit to the jury only those counts supported by "legally sufficient trial evidence."
- Any count not so supported MUST be dismissed.

Motion to Dismiss in the Interests of Justice –Inclusory/Non-Inclusory Concurrent Counts

As to those sufficient counts, CPL 300.40(2) requires submission of all CONSECUTIVE counts included in a multiple count indictment

Motion to Dismiss in the Interests of Justice –Inclusory/Non-Inclusory Concurrent Counts

- CPL §300.40, (3): Multiple Count Indictment containing CONCURRENT COUNTS

The Court MUST submit at least one count and MAY submit more than one count as follows:

Non-inclusory: May submit one or more or all

AS TO INCLUSORY

Motion to Dismiss in the Interests of Justice –Inclusory/Non-Inclusory Concurrent Counts

- SUBMITTING INCLUSORY CONCURRENT COUNTS
  - Must submit the greatest
  - Must or May pursuant to CPL §300.50, in the alternative only, one or more of the lesser included counts

  A verdict of guilty on the GREATEST Count is deemed a DISMISSAL of every LESSER count

Motion to Dismiss in the Interests of Justice –Inclusory/Non-Inclusory Concurrent Counts

A verdict of guilty upon a LESSER count is deemed an ACQUITTAL upon every GREATER count

Motion to Dismiss in the Interests of Justice –Inclusory/Non-Inclusory Concurrent Counts

CPL §300.50: Court's Charge; Submission of Lesser Included Offenses

"...in addition to submitting the GREATEST count which it is required to submit" may in its discretion "submit in the alternative any lesser included offense ***if there is a reasonable view*** *of the evidence which would support a finding that defendant committed" the lesser offense.*

Motion to Dismiss in the Interests of Justice –Inclusory/Non-Inclusory Concurrent Counts

BEFORE WE LEAVE THIS TOPIC

AN EXAMPLE

People v. Gaul, 63 AD2d 563, (1978)

Convictions of CSCS 3, CPCS 3 and CPCS 7. Since CSCS 3 and CPCS 3 are same grade, so CPCS 3 is not a lesser included offense of CSCS 3 NOR an inclusory concurrent offense. But there was ONE act and only concurrent sentences could be imposed.

People v. Gaul, 63 AD2d 563, (1978)
Continued

"*Thus in a case such as this where a conviction of selling requires a conviction of possession with intent to sell, if both counts are submitted, only concurrent sentences may be imposed…logic requires and the statute authorizes dismissal of the possession count in the exercise of discretion.*"

Motion to Dismiss in the Interests of Justice –Inclusory/Non-Inclusory Concurrent Counts

References

Preiser's Commentaries to CPL §300.40 provides examples that Judge Denzer who drafted the statute provided for each of the subdivisions.

Motion for a Sandoval Hearing

- **Understanding the Sandoval Motion.**

This motion is made under the auspices of *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974)

AND

CPL §240.43 *Sandoval* concerns an advance ruling by the Court on whether the district attorney will be permitted to cross-examine the defendant regarding past ***CRIMES.***

People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974)

- *"The nature and extent of cross-examination have always been subject to the sound discretion of the Trial Judge... We now hold that in exercise of that discretion* ***a Trial Judge may****, as the Trial Judge in this case did,* ***make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts*** *for the purpose of impeaching a defendant's credibility."*

CPL §240.43
Discovery; Disclosure of Prior Uncharged Criminal, Vicious or Immoral Acts

Directs the prosecution to *"...notify the defendant of all specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant."*

Notification must be made immediately prior to jury selection

Preiser's Commentary to CPL 240.43

"In summary, by discovery defendant may require the People to specify uncharged criminal conduct it hopes to use for impeachment on cross examination, while the Sandoval motion imposes upon defendant the obligation of specifying prior convictions plus pending criminal charges."

THE SANDOVAL HEARING

- **THE BALANCING TEST**

1) Probative Value

- ***Will the testimony to be elicited in cross-examination have a disproportionate and improper impact on the triers of fact?***

AND

2) Danger of Prejudice

- ***Will the apprehension of its introduction undesirably deter the defendant from taking the stand and thereby deny the jury or court significant material evidence?"***

Examples

- in the **prosecution of drug charges**, interrogation as to prior narcotics convictions (unless proof thereof is independently admissible) may present a special risk of impermissible prejudice because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders (*United States v. Puco*, 453 F. 2d, at p. 542, n. 9).
- **proof of prior convictions of perjury** or other crimes of individual dishonesty **should usually be admitted on trial** of another similar charge, notwithstanding the risk of possible prejudice, because the very issue on which the offer is made is that of the veracity of the defendant as a witness in the case.

People v. Williams
56 N.Y.2d 236 (1982)

For directions on how courts are to exercise that discretion *Williams* lists some factors:

- ***period of time since the conviction****,*
- ***the degree to which it bears on a defendant's veracity and credibility****, and the*
- ***extent to which any similarity between the prior conviction and the crime charged may "be taken as some proof of the commission of the crime charged***

HOW THE HEARING WORKS

- The *Sandoval* hearing will usually be held just before trial in the judge's chambers with a stenographer present. The district attorney will present the crimes or acts he wants to use to impeach the defendant should he decide to take the stand. Defense counsel will have the opportunity to make an argument as to each of the individual convictions or acts. The judge will place his ruling on the record.

THE BLIND SANDOVAL OR SANDOVAL COMPROMISE

In presenting prior convictions or prior bad acts, the district attorney seeks not only to ask whether:

1) Defendant was convicted of the charge,

BUT ALSO

2) The underlying facts of the conviction.

DEFENSE COUNSELS OPTIONS

- **1) Ruling prohibits use of the charge or prior bad act;**
- **2) Ruling allows the district attorney to use the charge and underlying facts;**
- **3) BLIND SANDOVAL or SANDOVAL COMPROMISE: District attorney can only ask if the defendant was convicted of a felony or misdemeanor without mentioning the specific crime or inquiring into the underlying facts.**

MOTION FOR A PRETRIAL *VENTIMIGLIA* HEARING REGARDING OTHER CRIMINAL ACTS

Basically, this motion is concerned about evidence of **prior uncharged crimes.** The issue was first addressed by the Court of Appeals in People v. Ventimiglia, *52 N.Y.2d 350 (1981).*

THE FACTS

- *As ultimately detailed before the jury it was as follows:*

"Benny said that they would take him [Mattana] to 'their spot'. Mario said, 'Yeah, it's a good idea, we'll take him over there.'

I had said, 'You mean you done it before?' and Benny said,

'Yeah, we did it before.'

Mario said, 'Yeah, just a couple of times' and like snickered.

Ben then said to me, 'Junior, we have a spot over by--you know where the Belt Parkway is?'

I said, 'Yeah'.

He said, 'Right over there by the dumps, we have a spot where we put people there and they haven't found them for weeks and months.' "

THE LAW

- *"Where defendants charged with murder, kidnapping and conspiracy have stated as part of their planning that they have a place for disposing of the body "where we put people * * * and they haven't found them for weeks and months",* ***the statement is admissible because its probative value as to premeditation of the murder and as to the plan of the conspiracy outweighs the prejudice resulting from the admission implicit in the statement that defendants have committed prior murders. In view of the potential for prejudice in such testimony, however, a prosecutor who intends to adduce it before the jury should first obtain a ruling from the Trial Judge by offering the testimony out of the presence of the jury, and the Trial Judge should exclude any part of it that is not directly probative of the crimes charged.***

No formal hearing is necessary!

- "*All that is required is that the People alert the court and defendant of the "prior crime" evidence intended to be introduced on their case-in-chief and identify some issue, other than mere criminal propensity, to which the evidence is relevant (see generally, People v Lewis, 69 NY2d 321, 325).*

People v. Holmes
260 A.D. 2d 292 (1999)

- "*On October 17, 1997 defendant, who **was suspected of having participated in a robbery earlier in the evening**, was observed in a department store in the Arnot Mall in Chemung County by a Deputy Sheriff. Upon being ordered to stop by the Deputy, defendant fled down one of the aisles and, upon observing a security guard crouched near a clothing display close to the store's entrance, pulled a gun from his waistband and fired a single round at point-blank range. The shot grazed the security guard's forehead and penetrated his right thigh. As a consequence, defendant was indicted for attempted murder in the second degree and criminal possession of a weapon in the second degree.*
- The defense contended that the trial court erred in allowing evidence of the earlier robbery, the defendant was prejudiced.
- COURT: Clearly admissible but subject to a hearing.

MOTION FOR *ROSARIO* MATERIAL – The Facts

- Luis Manuel Rosario was charged with Murder 1 for shooting the proprietor of restaurant during the course of a robbery in which he had two other accomplices. The prosecution had three witnesses and one of the three, Basilio Otero was about to leave the restaurant when Luis pointed his gun at him and ordered him into the bathroom. As he complied, he saw Luis' accomplices push the owner toward the rear of the restaurant and then heard a shot. Another witness, Josephine Rodriquez, was the girlfriend of one the accomplices who gave her his gun after the robbery stating that he and the others had robbed a restaurant and taken $75 shooting the owner when he wouldn't give them more. Luis' girlfriend, Jane Thompson was the third witness to whom Luis admitted shooting the owner telling her that "we had three guns and we shot together."

People v. Rosario
9 N.Y.2d 286, 173 N.E.2d 881, (1961).

During the trial, the three witnesses - including the two girlfriends of the perpetrators – testified. After their testimony, the defense counsel requested their prior statements for use on cross-examination.

"Instead, the statements were submitted to the trial judge for his inspection. After reading each statement, he announced that he found some 'variances' between the statement and testimony and told defense counsel that ***they might examine and use only those portions of the statement containing the variances.***

In other words, ***he refused the request that the entire statement be given to the defense*** *so that counsel might 'determine for themselves' whether any other portions would be helpful upon cross-examination."*

The Holding in Rosario

- The Court of Appeals reviewed the trial courts actions and reversed what had been settled New York law:

"...this court is persuaded that ***a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand.*** *As long as the statement* ***relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential,*** *defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination."*

Rosario at Pretrial Hearings

- CPL §240.44 **Discovery; upon <u>pre-trial hearing</u>**

  Subject to a protective order, at a **pre-trial hearing** held in a criminal court at which a witness is called to testify, each party, at the conclusion of the direct examination of each of its witnesses, shall, **upon request of the other party,** make available to that party to the extent not previously disclosed:

  1. **Any written or recorded statement, including any testimony before a grand jury, made by such witness** other than the defendant which relates to the subject matter of the witness's testimony.

  2. A **record of a judgment of conviction of such witness** other than the defendant if the record of conviction is known by the prosecutor or defendant, as the case may be, to exist.

  3. The existence of **any pending criminal action against such witness** other than the defendant if the pending criminal action is known by the prosecutor or defendant, as the case may be, to exist.

Rosario at TRIAL

- **CPL §240.45, subdivision 1**

"1. ***After the jury has been sworn and before the prosecutor's opening address,*** *or in the case of a single judge trial after commencement and before submission of evidence, the prosecutor shall, subject to a protective order, make available to the defendant:*

(a) ***Any written or recorded statement, including any testimony before a grand jury and an examination videotaped pursuant to section 190.32*** *of this chapter, made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony;"*

CPL §190.32 allows the prior videotaping of a child witness or special witnesses grand jury testimony

Notes of a Prosecutor

- **CPL §240.45, subdivision 1(a) includes any notes taken by an investigator or a PROSECUTOR capsulizing witness's responses to questions asked during the investigation.**

Rosario: People v. Consolazio, 40 NY2d 446, (1976)

- Opinion by the Hon. Hugh R. Jones
- This case is reminiscent of past and current Wall Street scandals: An attorney perpetrated an investment scam. In preparation for trial the Prosecutor prepared worksheets in the form of unsigned questionnaires taken from the victims and did not reveal them to the defense.

Rosario: People v. Consolazio, 40 NY2d 446, (1976)

HOLDING: "We hold that the trial court erroneously concluded that the worksheets did not constitute 'prior statements' of prosecution witnesses within the contemplation or the rule" in Rosario. "The character of a statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature."

Rosario: People v. Consolazio, 40 NY2d 446, (1976)

Thus it has been held that witness' statement in narrative form made in preparation for trial by an Assistant District Attorney in his own hand is 'a record of prior statement by a …witness within the compass of the rule in People v. Rosario…and therefore not exempt from disclosure as a 'work product' datum of the prosecutor."

"We hold, of course, that the failure to turn over Rosario material may not be excused on the ground that such material would have been of limited or of no use to the defense, or that a witness' prior statements were totally consistent with his testimony at trial. We thus reject arguments that consideration of the significance of the content or substance of a witness' prior statements can result in a finding of <u>harmless error.</u>

Limitations on *Rosario*

A string of cases has limited Rosario. *See the following cases:*

- Prior statements of a witness would not be included, unless they actually came into possession of the police or of the prosecutor (*People v. Reedy*, 70 N.Y.2d 826, 523 N.Y.S.2d 438, 517 N.E.2d 1324 [1987]);
- Records in possession and control of state agencies other than "a primary law enforcement agency" are not *Rosario* material. *People v. Kelly*, 88 N.Y.2d 248, 644 N.Y.S.2d 475, 666 N.E.2d 1348 (1996);
- Notes made by a social worker of statements by child victim witnesses during interviews are exempted (*People v. Tissois*, 72 N.Y.2d 75, 531 N.Y.S.2d 228, 526 N.E.2d 1086 [1988]);
- Untranscribed plea minutes of a co-defendant prosecution witness, which had been ordered but not received by the prosecutor, because the People had no immediate access to the statements (*People v. Fishman*, 72 N.Y.2d 884, 532 N.Y.S.2d 739, 528 N.E.2d 1212 [1988]);
- A copy of a motor vehicle accident report filed with the Department of Motor Vehicles by a prosecution witness (*People v. Flynn*, 79 N.Y.2d 879, 581 N.Y.S.2d 160, 589 N.E.2d 383 [1992]);
- Audiotapes made at autopsies by a medical examiner (*People v Washington*, 86 NY2d 189, 630 N.Y.S.2d 693,654 N.E.2d 967 [1995]);
- Prison disciplinary transcripts (*People v Howard*, 87 NY2d 940, 641 N.Y.S.2d 222, 663 N.E.2d 1252 [1996]);
- Statements in possession of the State Division of Parole (*People v. Kelly, supra).*

MOTIONS TO SUPPRESS

- Article 710 of the Criminal Procedure Law. CPL §710.20 directs that a defendant who:

  *"(a) is aggrieved by **unlawful or improper acquisition of evidence** and has reasonable cause to believe that such may be offered against him in a criminal action,*

  OR

  *(b) claims that **improper identification testimony** may be offered against him in a criminal action,"*

Move to have such evidence suppressed or excluded

HUNTLEY HEARING

People v. Huntley, 15 NY2d 72 (1965)

- Hearing on motion to suppress a statement on the ground that it was involuntarily made

- DO NOT NEED SWORN ALLEGATIONS OF FACT

WADE HEARING

U.S. v. Wade, 87 S.Ct. 1926 (1967)

- Hearing on motion to suppress trial identification testimony on the ground it was tainted

- DO NOT NEED SWORN ALLEGATIONS OF FACT

TANGIBLE PROPERTY: The Mapp Hearing Understanding the Principles

- *Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, (1961)*

Mapp ties the Fourth Amendment prohibition against unlawful search and seizures together with the and Fifth Amendment ban against self-incrimination.

- ***It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property***

The Mapp Prohibition

- *Breaking into a house and opening boxes and drawers are circumstances of aggravation; but* ***any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation * * * (of those Amendments).***'

Seeking the Mapp Hearing

- **Requirements for Attorney's Affirmation for Suppression**

As required for most of the motions in the Omnibus Pretrial Motion, CPL §210.45 requires:

- 1. **the affirmation to be in writing** and
- 2. upon **reasonable notice** to the people.
- **3. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons.**
- **4. Such sworn allegations may be based upon personal knowledge of the affiant**

OR

- **5. upon information and belief,**
  - **a. provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence refuting or tending to refute such allegations**

MAPP HEARING

SWORN ALLEGATIONS OF FACT MUST BE SUBMITTED WITH YOUR MOVING PAPERS.

"The issue is best understood by first outlining the governing statute, CPL 710.60. When made before trial, suppression motions must be in writing, state the legal ground of the motion and ***"contain sworn allegations of fact,****" made by defendant or "another person." The factual allegations may be based upon personal knowledge or information and belief, so long as the sources of information and grounds for belief are stated. The prosecutor may then file an answer admitting or denying the movant's allegations (see, CPL 710.60 [1])."*

THE MAPP HEARING
Burden of Proof

First, the district attorney must establish the legality of police conduct.

"*The People, in order to prevail, are under the necessity of going forward in the first instance with evidence to show that probable cause existed both in obtaining a search warrant and in sustaining the legality of a search made, without a warrant, as incident to an arrest." People v. Malinsky, 15 N.Y.2d 86 (1965).*

Consent

In issues involving whether or not consent was given for a search, the **district attorney must show the voluntariness by clear and positive evidence.** People v. Zimmerman, 101 A.D.2d 294 (1984).

"...they bear the "heavy burden" of establishing that such consent was freely and voluntarily given (People v. Gonzalez, supra., p 128; People v. Kuhn, 33 NY2d 203, 208; Bumper v. North Carolina, 391 US 543, 548-549).

However, the People's burden is not, contrary to the holding of Criminal Term, to establish consent beyond a reasonable doubt, but to prove consent by ***"clear and positive" evidence*** *(see Judd v. United States, 190 F2d 649, 651; Channel v. United States, 285 F2d 217, 220; Amos v. United States, 255 US 313).*

Clear and Positive Evidence

Moreover, the voluntariness of the consent must be evaluated from the totality of the circumstances (*Schneckloth v. Bustamonte*, 412 US 218; *People v. Gonzalez*, supra., pp 128-130).

In *People v. Gonzalez* (supra), the Court of Appeals set forth four factors to be considered by the courts in determining the voluntariness of an apparent consent:

1. "whether the consenter is in custody or under arrest, and the circumstances surrounding the custody or arrest" (p 128);

2. "the background of the consenter" (p 129);

3. "whether the consenter has been, previously to the giving of the consents, or for that matter even later, evasive or un-cooperative with the law enforcement authorities" (p 129); and

4. "whether a defendant was advised of his right to refuse to consent" (p 130)

HEARSAY

- Pursuant to CPL §710.60, subdivision 4, **hearsay is admissible at the hearing** to establish any material fact.

People v. Mendoza
82 NY2d 415, (1993)

People v. Mendoza
82 NY2d 415, (1993)

In a “buy and bust” prosecution, the summary denial of defendant's suppression motion was correctly affirmed, since defendant's allegations that he was in a public place “acting in a lawful manner”, that there was no “reasonable suspicion” that he committed a crime, and thus the police had no reason to believe they were “legally entitled” to stop him, did not raise any factual issues to be resolved at a hearing. Defendant's submission is devoid of any factual information as to his activities at the relevant time. His averment of acting in a “lawful manner” is not tantamount to a denial of drug dealing. Defendant did not identify any issue upon which a hearing was sought, but instead claimed in the most general terms that his constitutional rights were violated. Nor is there any suggestion that defendant's lack of access to relevant information was an impediment to the suppression motion.

Mendoza

- *"The **two exceptions** to the court's authority to summarily deny suppression motions for lack of adequate factual allegations relate to motions to suppress statements as involuntarily *422 made (**Huntley motions**) or an identification stemming from an improper procedure (**Wade**) (CPL 710.60[3] [b]). **Accordingly, the sufficiency of the movant's factual allegations most often arises on motions to suppress tangible evidence Mapp or other evidence as the fruit of an unlawful seizure Dunaway, as in the appeals before us.**"*

- "*Hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, as will be discussed, we conclude that factual sufficiency should be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information.*"

CHIEF JUDGE JUDITH KAYE'S DECISION

- *The requirement that facts be alleged in support of a suppression motion strikes a sensible balance between these competing policies.*

\How, then, should the requirement be read and applied?"

"We conclude that the sufficiency of defendant's factual allegations should be evaluated by

(1) the ***face of the pleadings,***

(2) assessed in conjunction with the context of the motion*, and*

(3) defendant's access to information

Court's Discretion to Conduct a Hearing

- *"While technically not part of the test for determining the sufficiency of factual allegations, a fourth consideration bears mention.*
- ***The CPL does not mandate summary denial of defendant's motion even if the factual allegations are deficient (** see, CPL 710.60[3]*

- *["The court may summarily deny the motion"] [emphasis added]). If the court orders a Huntley or Wade hearing, and defendant's Mapp motion is grounded in the same facts involving the same police witnesses, the court may deem it appropriate in the exercise of discretion to consider the Mapp motion despite a perceived pleading deficiency.*

Court's Discretion to Conduct a Hearing

- DO NOT COUNT ON IT!

Duplicity and Multiplicity

Duplicity. Each count of an indictment must charge a single offense. A count charging more than one offense is duplicitous and is prohibited by CPL §200.30.

Duplicity and Multiplicity

Multiplicous. Charges a single offense in several counts. Also barred because it can lead to multiple sentences for the same offense and may suggest to the jury that the defendant has committed more crimes than are actually at issue. *People v. Demetsenare, 243 AD2d 777,(1997).*

Duplicity

People v. Corrado, 161 AD2d 658, (1990)

- 1st and 2nd Count charged Sexual Abuse 1st
- *"Although the first and second counts were not facially duplicitous, a review of the Grand Jury minutes reveals that each count was, in fact, premised upon multiple acts of sexual abuse. Therefore, the first and second counts of the indictment were properly dismissed as duplicitous."*

Duplicity

People v. Keindl, 68 NY2d 410, (1986)

"...where one count alleges the commission of a particular offense occurring repeatedly during a designated period of time, that count encompasses more than one offense and is duplicitous."

"Continuous crime" theory is not applicable to crimes of sodomy and sexual abuse."

IMPORTANT: BILL OF PARTICULAR IS CRITICAL IN DETERMINING DUPLICITY.

Multiplicity

People v. Demetsenare, 243 AD2d 777(1997)

Defendant was intoxicated and his car hit a snowmobile killing the driver. He was charged in:

Count One: Vehicular Manslaughter 2 based on V&T 1192(2) and,

Count Two: Vehicular Manslaughter 2 based on V&T 1192(3).

People v. Demetsenare, 243 AD2d 777(1997)

Although a defendant can be charged with DWI in separate counts of V&T §1192(2) and (3), here, Counts 1 & 2 charged defendant with the same crime – Vehicular Manslaughter 2 under PL §125.12 as to the SAME VICTIM and the court should have dismissed Count 2 as duplicitous.

APPENDIX

An Analysis of the 2012 U.S. Supreme Cases Regarding Plea Bargaining

Lafler and *Frye*

Analyzing *Frye* and *Lafler*

Strickland v. Washington, 104 S.Ct. 2052, (1984)

Established the Standards for Ineffective Assistance of Counsel

1. Was counsel's performance deficient?

   Requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the 6th Amendment.

2. The deficient performance prejudiced the defense.

   Counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Analyzing *Frye* and *Lafler*

Hill v. Lockhart, 106 S.Ct. 366, (1985)

Strickland v. Washington, supra, applies to plea bargains.

Lafler v. Cooper, 132 S.Ct. 1376, (2012)

Cooper was charged in Michigan with assault with intent to murder and 3 other offenses. Prosecution offered to dismiss 2 charges and recommended 51-85 months (4 ¼- 7 yrs) on the other 2. Cooper told the court he was guilty and would accept the plea offer, but his attorney told him that the prosecution could not establish intent to murder because the victim had been shot below the waist. Cooper was convicted after trial of all counts and received a mandatory sentence of 185-360 months (15 ½ -30 yrs.

Lafler v. Cooper, 132 S.Ct. 1376, (2012)

Decision by Justice Kennedy:

- "Defendants have a 6th Amendment right to counsel, a right that extends to the plea bargaining process...During plea negotiations defendants are "entitled to the effective assistance of competent counsel."

Lafler v. Cooper, 132 S.Ct. 1376, (2012)

Justice Kennedy :

1. Cooper was prejudiced by counsel's deficient performance in advising him to the reject the plea bargain and go to trial, and
2. The proper remedy was to order the State to reoffer the plea agreement, and then, if accepted, the trial court could exercise its discretion regarding whether to resentence.

Lafler v. Cooper, 132 S.Ct. 1376, (2012)

Defendant must show that:

1. But for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the Court,
2. Defendant would have accepted the plea,
3. Prosecutor would not have withdrawn it,
4. Court would have accepted it,
5. Offer would have been less severe than the sentence ultimately imposed.

Missouri v. Frye, 132 S.Ct. 1399, (2012)

FACTS: Galin Frye was charged with driving while revoked for the 4th time which was a felony in Missouri carrying a 4 year maximum. Prosecutor sent Frye's lawyer a misdemeanor offer and a 90-day sentence. Counsel did not convey the offer. Before the preliminary hearing, Frye was arrested again for driving while revoked. He pled guilty and was given 3 years.

Missouri v. Frye, 132 S.Ct. 1399, (2012)

Justice Kennedy:

1. Defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused,
2. Counsel was deficient in failing to communicate to the defendant the prosecutor's written plea offer before it expired.

Sample Motions

State of New York
County of Oneida County Court

People of the State of New York,

-against-

Ely Torby,

Defendant.

Notice of Motion
For
Omnibus Pretrial Relief

Indictment No. 2011-330

PLEASE TAKE NOTICE that upon the annexed affirmation of Frank J. Nebush, Jr., Esq., Oneida County Public Defender, Criminal Division, and all prior pleadings and proceedings heretofore had herein, a motion will be made as follows:

DATE AND TIME OF MOTION:	December 1, 2005 at 9:30 a.m., or as soon thereafter as Counsel can be heard.
PLACE OF MOTION:	ONEIDA COUNTY COURT 200 Elizabeth Street Utica, New York 13501
MOTION MADE BY:	Frank J. Nebush, Jr., Esq. Oneida County Public Defender Criminal Division Attorney for Ely Torby
OBJECT OF MOTION:	Omnibus Pretrial Motion together with such relief as this Court deems just and proper.

Dated: Utica, New York
September 29, 2011

Yours, etc.,
Frank J. Nebush, Jr., Esq.
Oneida County Public Defender - Criminal Division
Attorney for Ely Torby
250 Boehlert Center
321 Main Street
Utica, New York 13501
Telephone: (315) 798-5870

To: Hon. Michael A. Arcuri
Oneida County District Attorney

Sharon A. Carraway
Oneida County Court Clerk

TABLE OF CONTENTS

State of New York
County of Oneida County Court

People of the State of New York, -against- Ely Torby, Defendant.	Affirmation In Support Of Omnibus Pretrial Motion Indictment No. 2011-330

State of New York)
County of Oneida) ss.:

Frank J. Nebush, Jr., Esq., an attorney duly admitted to practice in the Courts of the State of New York and the duly appointed Public Defender in and for the County of Oneida, the attorney of record for the above-named defendant, affirms, under penalty of perjury and pursuant to Rule 2106 of the Civil Practice Law and Rules, that the following facts are true:

1. I make this affirmation upon information and belief, said information having been obtained by my investigation of the case, conversations with the defendant and examination of the relevant documents herein.

2. The indictment herein was filed against the defendant by the Oneida County Grand Jury on October 12, 2005, charging the defendant with the following counts:

Count 1: Murder in the Second Degree in violation of Section 125.25, subdivision 1 of the Penal Law of the State of New York alleging that the defendant intentionally caused the death of Sandra Janes on or about May 25, 2003;

Count 2: Grand Larceny in the Third Degree in violation of Section 155.35 of the Penal Law of the State of New York alleging that the defendant did steal money from Jeannette Watts in an amount exceeding three thousand dollars ($3,000.00) from on or about May 27, 2003 through and including March 3, 2005.

3. The defendant was thereafter arraigned in Oneida County Court on October 13, 2005 before the Hon. Michael L. Dwyer, Oneida County Judge.

4. This affirmation is made in support of various requests for pre-trial relief, set forth below

in sections duly noted by Roman numerals and labeled as to the specific relief requested.

5. The defendant has made no previous motions for the relief herein requested.

I. MOTION FOR A SANDOVAL HEARING

6. Pursuant to Section 240.43 of the Criminal Procedure Law, Counsel respectfully requests that prior to the selection of a jury, this Court hold an *in camera* hearing to determine the admissibility of any:

(a) Prior criminal conviction of the defendant; and/or

(b) Prior underlying bad acts of the defendant, if any, concerning which the prosecution may seek to cross-examine the defendant.

This motion is made under the authority of *People v. Sandoval, 34 N.Y.2d 371(1974).*

7. Defendant further requests that at this hearing the prosecution be required to inform the Court and Counsel on the record whether or not the District Attorney intends to introduce at trial any other criminal acts normally not allowed as evidence against the defendant pursuant to *People v. Molineaux, 168 N.Y. 264, (1901).* Counsel further requests this Court to rule on the admissibility of such evidence.

II. MOTION FOR A PRETRIAL VENTIMIGLIA HEARING REGARDING OTHER CRIMINAL ACTS

8. Often in a trial, the prosecutor brings out as part of his direct case other crimes and criminal acts attributed to the defendant. Though seemingly unrelated to the crime for which the defendant is charged, they are arguably exceptions to the well known *Molineaux Doctrine, supra*, i.e., evidence of a common scheme or plan or evidence that is somehow connected to matters that are before the Court in trial. When this is done in the middle of a trial, objections by defense counsel are generally inadequate to protect the defendant if the court eventually rules that these criminal acts are

immaterial and should not have been brought up. As a result of this inability to *"unring a bell"*, the New York State Court of Appeals in *People v. Ventimiglia, 52 N.Y.2d 350, 361-362 (1981)*, indicated the following procedure should be followed regarding the introduction of such evidence:

> *"When a prosecutor, knowing that such evidence is to be presented, waits until objection is made when it is offered during trial before informing the court of the basis upon which he considers it to be admissible, there is unfairness to the defendant, even if his objection is sustained, in view of the questionable effectiveness of cautionary instructions in removing prior crime evidence from consideration by the jurors. There is, moreover, a greater probability of error, and consequent waste of scarce judicial resources, when evidentiary rulings are made during trial than in the more relaxed atmosphere of an inquiry out of the presence of the jury. Whether some time prior to trial, just before the trial begins or just before the witness testifies will depend upon the circumstances of the particular case, but at one of those times the prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness. The court should then assess how the evidence came into the case and the relevance and probativeness of, and necessity for it against its prejudicial effect, and either admit or exclude it in total, or admit it without the prejudicial parts when that can be done without distortion of its meaning."*

9. Counsel, therefore, respectfully requests that should the District Attorney intend to offer such evidence in court at the trial of this matter, a *Ventimiglia* hearing be conducted in this matter prior to the trial to determine the admissibility of such evidence.

III. MOTION TO INSPECT GRAND JURY MINUTES AND DISMISS OR REDUCE THE INDICTMENT

10. On October 13, 2005 the Grand Jury of Oneida County filed an indictment against the defendant charging her with the offenses set forth at paragraph 2 above.

11. Counsel contends that all of the counts contained in said indictment are insufficient on their face and fail to conform to the requirements of Section 200.50(7)(a) of the Criminal Procedure Law. Pursuant to Section 210.30 of the Criminal Procedure Law, the defendant hereby requests a transcript of the stenographic minutes of the Grand Jury proceedings in this matter be made available to the defense for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support the charges contained in the indictment.

12. The defendant further requests, pursuant to Section 210.30 of the Criminal Procedure Law, that the court inspect the stenographic minutes of the Grand Jury proceedings in this matter to determine whether the evidence before the Grand Jury was legally sufficient to support the charges contained in the indictment and if the Court, after examining the minutes, determines that there was insufficient evidence before the Grand Jury to support the charges in the indictment, the defendant hereby moves for dismissal of the charges.

13. Counsel further moves that each count of the indictment be reduced to lesser charges which might be supported by the evidence pursuant to Section 210.20(1-a) of the Criminal Procedure Law.

14. The defendant requests disclosure of the legal instructions to the Grand Jury so that the accuracy and sufficiency of the Prosecutor's instructions to the Grand Jury be evaluated.

IV. MOTION FOR POLICE REPORTS AND ARREST REPORTS

15. Counsel respectfully requests this Court to issue an order directing the People to provide the Defendant with a copy of any and all police arrest reports and investigative reports not previously provided during the discovery conference, or copies of such said reports not presently either in the possession of the district attorney or that become available during the pendency of this action. If the District Attorney refuses and fails to provide said reports, the prosecution should be precluded from using them at trial.

V. MOTION FOR LIST OF PERSONS INTERVIEWED BY LAW ENFORCEMENT PERSONNEL

16. Counsel respectfully requests that this Court issue an order directing the prosecution to turn over to the defendant a list of names, addresses and dates of birth of all persons who have been interviewed by any and all law enforcement personnel, including police officers, the District

Attorneys' investigators, the District Attorney, and other governmental personnel. Pursuant to Criminal Procedure Law §240.40(1)(b), this material is necessary so that the defense can conduct an adequate independent investigation as to the facts and circumstances concerning this matter. The request herein is reasonable and places no great burden upon the prosecution to comply.

VI. MOTION FOR PRIOR STATEMENTS OF WITNESSES

17. Pursuant to C.P.L. Section 240.45(1)(a), Counsel respectfully requests that this court issue an order directing the District Attorney to provide any and all written, tape recorded, videotape recordings and other similar statements of any and all witnesses, made of or by a witness whom the prosecution intends to call at trial. This motion includes written notes made by a prosecutor, investigator or police officer as a result of oral statements made by a prosecution witness. This also would include tape recordings and/or transcriptions thereof. Such written notes made by a prosecutor, investigator or police officer based upon an oral conversation with the potential prosecution witness are not "attorneys' work product" under the definition thereof in Section 240.10(2) of the Criminal Procedure Law since they would not contain opinions, theories, or conclusions of the prosecutor.

18. Criminal Procedure Law §240.45 requires that said information be turned over to the defense before the prosecutor's opening address. Counsel respectfully submits that said material should be turned over before jury selection begins to allow Counsel the opportunity to represent this client properly, adequately review the material, and facilitate the orderly progression of trial so that said trial is not unduly interrupted. The gravity of the charges against this defendant are such that Counsel should be allowed sufficient opportunity to review this material prior to the trial of this action. Therefore, Counsel respectfully requests that this Court order all of said material turned over to the defense at least one week prior to the date set for jury selection.

VII. MOTION FOR LIST OF WITNESSES

19. In order to facilitate the orderly progression of trial and allow preparation on both sides, Counsel would be pleased to exchange a list of witnesses with the prosecution one week prior to jury selection. Under the provisions of the Criminal Procedure Law of the State of New York providing for reciprocal discovery of witnesses, Counsel would first serve the District Attorney with a list of the names and addresses of defense witnesses together with their dates of birth before the District Attorney would be obligated to reciprocate. Counsel stands ready to provide such information to the District Attorney provided the information requested herein is provided to Counsel.

VIII. MOTION FOR EXCULPATORY MATERIAL

20. Counsel respectfully requests that this Court issue an order directing the District Attorney to examine all governmental, prosecution, police and law enforcement files to determine whether any witness or any other potential evidence exists which might tend to show the innocence of the accused, a lack of criminal intent or knowledge, or mitigate in punishment. *United States v. Agurs, 427 U.S. 97, 98 S.Ct. 2392, 49 L.Ed.2d 342 (l976).*

21. This request would include, but not be limited to a statement by a witness of his or her inability to identify the alleged perpetrator, a statement identifying someone other than the defendant as being involved in the offense, or a statement indicating the inability of a witness to pick the defendant from a photographic array, show-up or corporeal line-up. This request would also include any indication that a witness was intoxicated under any substances at the time they allegedly observed the defendant.

IX. MOTION FOR BRADY MATERIAL

22. The defendant moves this Court to issue an order compelling the People to disclose to the defendant, all evidence which is or may be favorable to the defendant which is now in the possession, custody or control of the People, the existence of which is known, or which by the exercise of due diligence may become known to the District Attorney. In the case of any books, papers, reports, testimony, statements, photographs or any other tangible items, which may contain evidence favorable to the defendant, this motion includes an order for the District Attorney to produce and deliver these items for inspection and copying by the defendant. This motion is made under the authority of *Brady v. Maryland, 373 U.S. 83.*

23. This evidence, which is referred to as *"Brady Material"*, is evidence which may be favorable to the defendant, and material to the issue of guilt or innocence, or bears in any material degree on the charges against the defendant and prosecution under them, or in any manner may aid the defendant in ascertaining the truth.

24. The disclosure and production requested herein should be made without regard to whether or not the evidence to be disclosed and produced is deemed to be admissible at the trial of this action, and the disclosures and production would include, but not be limited to the following:

(a) Any written or recorded statements, admissions or confessions made by the defendant, or any witnesses, which may be exculpatory or non-incriminatory. These statements should be turned over to the defense regardless of whether the People intend to call such witness at trial;

(b) The names and addresses of any witnesses that might be favorable to the defendant;

(c) The criminal records or any list or summary reflecting the criminal records of all persons the People intend to call at trial;

(d) The rule announced by the United States Supreme Court in *Brady v. Maryland, supra,* which the defense asks this Court to enforce, would impose no hardship on the People since Counsel is only requesting for that evidence which is favorable to the defendant.

(e) Counsel specifically reserves the right to make any additional requests for material encompassed by *Brady v. Maryland, supra,* at the time this motion is argued, or at such time as the existence of such material shall become known to Counsel.

25. It is respectfully requested that the Court specifically admonish the People that they have a duty to furnish the aforesaid to Counsel.

X. MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS

26. The defendant has been served with several notices pursuant to Section 710.30 of the Criminal Procedure Law of the People's intention to offer into evidence oral and written statements allegedly made by the defendant to members of the Utica Police Department and persons acting as agents of the Utica Police Department.

27. The C.P.L. Section 710.30 notices Counsel refers to at paragraph 26 above which Counsel has been served with to date are set forth in brief below and appended hereto as marked exhibits as follows:

Statement Date	Location	Statement Made to:	Type	Exhibit
3/24/05	13 Elm Street	Inv. E. Smith	Police Report	A
5/17/05	Utica Police Department	Inv. E. Smith	Signed typewritten statement	B
5/17/05	13 Elm Street	Inv. E.Smith/Sgt. G.Benson	Police Report	C
5/18/05	13 Elm Street	Inv. E.Smith/Sgt. G.Benson	Police Report	D
5/19/05	13 Elm Street	Sgt.G.Benson	Police Report	E
6/18/05	13 Elm Street	Inv. E. Smith/Sgt. G. Benson	Police Report	F
7/1/05	St. Joseph's Nursing Home	Sgt. Grace Benson	Signed typewritten statement	G
7/2/05	St. Joseph's Nursing	Inv E.Smith/Sgt G Benson	Police Report	H

	Home			
7/5/05	St. Joseph's Nursing Home	C.Dinkers	Audiotape	I
7/6/05	St. Joseph's Nursing Home	C.Dinkers	Audiotape	J
7/7/2005	St. Joseph's Nursing Home	B. Reilly	Audiotape	K
7/8/05	St. Joseph's Nursing Home	B. Reilly	Audiotape (3 recordings)	L
7/12/05	St. Joseph's Nursing Home	Inv. Peter J. Robers	Handwritten Statement	M
1/1/03-7/12/05	Client Diary	Seized by Utica Police Department		N
7/13/05	St. Joseph's Nursing Home	Inv.A.Antone/Inv.P.Robers	Police Report	O
10/13/05	UPD	B.Reilly	Statement	P

28. These alleged statements, if found to have been made by the defendant, were involuntarily made to the police or their agents contrary to law and should therefore be suppressed from use in evidence against the defendant.

29. I am informed by the defendant and verily believe that prior to the statements allegedly given by the defendant and at the time of her arrest, defendant had never been fully advised of her right to counsel or her other rights guaranteed to her by the Constitution of the State of New York, as well as the United States Constitution.

30. I am further informed by the defendant and verily believe that the statements made by the defendant were obtained without probable cause by use of undue pressure and that the defendant when so questioned was under the influence of prescription medications for various physical and mental illnesses. Further, Counsel contends that the police and their agents were well aware of defendant's feeble physical and mental condition and nevertheless pressured, harassed, intimidated and threatened the defendant over a period of months in order to elicit the alleged statements set forth above in violation of defendant's rights under the constitutions of the State of New York and the United States.

31. Under these circumstances, it is respectfully requested, pursuant to Section 7l0.20 of the Criminal Procedure Law, the Court issue an order suppressing from evidence against the defendant any and all statements taken from the defendant by law enforcement officers and their agents or in the alternative, directing that a pre-trial hearing be held to determine the admissibility of any such statement.

32. It is further submitted that the custodial detention of the defendant was not based upon probable cause and therefore any statements derived therefrom even with the giving of *Miranda* warnings constitute fruit of the poisonous tree and must be suppressed. *Dunaway v. New York*, 42 U.S. 200, 60 L.Ed.2d 824 (1979).

33. In the case of *People v. Weaver*, 49 N.Y.2d l0l2 (l980), the Court of Appeals held that there must be a hearing whenever the defendant claims a statement made by the defendant was involuntarily made no matter what facts the defendant puts forth in support of that claim.

XI. MOTION TO SUPPRESS PHYSICAL EVIDENCE: SEARCH AND SEIZURE WAIVER WAS OBTAINED BY COERCION IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 12 OF THE CONSTITUTION OF THE STATE OF NEW YORK; THE SEARCH WARRANT WAS DEFICIENT ON IT'S FACE IN VIOLATION OF SECTION 690.45 OF THE CRIMINAL PROCEDURE LAW; THE SEARCH WARRANT WAS NOT RETURNED "WITHOUT UNNECESSARY DELAY" AS REQUIRED BY SECTION 690.30 OF THE CRIMINAL PROCEDURE LAW; THE SEARCH WARRANT WAS THE "FRUIT OF A POISONOUS TREE"

34. Counsel moves this Court to suppress all physical evidence taken from the defendant on the following grounds:

(a) The search and seizure waiver *(Exhibit Q)* was obtained from the defendant under coercion and duress in violation of her rights under the Fourth Amendment to the constitution of the United States and the constitution of the State of New York, and

(b) The warrant issued herein *(Exhibit R)* was insufficient on its face in violation of the mandates of Section 690.45 of the Criminal Procedure Law, and

(c) The search warrant was not returned to the Court without "unnecessary delay" as provided for by C.P.L Section 690.30(1) *(See Exhibit S)*, and

(d) The search warrant was the product of the "fruit of the poisonous tree" since the alleged statements of the defendant formed the basis for the application of the warrant and the defendant's statements relied upon by law enforcement officers were obtained from the defendant by coercion and duress.

35. In the alternative, Counsel requests this Court hold a hearing to determine whether undue coercion was used to obtain the Search and Seizure Waiver from the defendant and the legal sufficiency of the search warrant. The following copies of the search warrant documents are attached as exhibits:

(a) Exhibit Q – Search and Seizure Waiver

(b) Exhibit R – Search Warrant

(c) Exhibit S – Search Warrant Return

(d) Exhibit T – Search Warrant Incident Property Summary Report

36. On July 1, 2005, the defendant signed a Search and Seizure Waiver allegedly authorizing the Utica Police Department, New York State Police and the Oneida County District Attorney to conduct a complete search of her home at 13 Elm Street in the City of Utica *(Exhibit Q).* Defendant contends that said waiver was signed under duress and pressure from members of Utica Police Department. She was confined to St. Joseph's Nursing Home after suffering a stroke, was on medication for physical and mental ailments, was physically and mentally infirm and therefore any consent provided by her could not have been freely and voluntarily given. When the issue is whether consent was given for the search, the prosecution has the burden of proving voluntariness by clear and convincing evidence. (People v. Zimmerman, 101 A.D.2d 294, 475 N.Y.S.2d 127 (2d Dep't 1984).

37. The search warrant documents provided during the discovery conference in this matter do not contain an affidavit by a police officer. The consent form signed by the defendant is attached. Counsel contends that unless the prosecution has an affidavit duly executed and meeting the two-pronged *Aguilar-Spinelli* test - reliability of information and basis for knowledge – as enunciated in *Aguilar v. State of Texas, 378 U.S. 108 (1964)* and *Spinelli v. U.S., 393 U.S. 410 (1969)* and adopted by New York in *People v. Griminger, 71 N.Y. 2d 635 (1988),* the involuntary written consent of the defendant forms an insufficient basis for the warrant and the warrant is legally deficient. The evidence seized thereby must therefore be suppressed.

38. C.P.L. Section 690.15(1)(a) requires a warrant to direct the search of … *"a designated or described place or premises."* The courts have interpreted this language in light of federal and constitutional law to mean "specifically designate" stemming from the language of *Maryland v. Garrison*, 1987, 107 S.Ct. 1013, 1017 which interprets the Fourth Amendment to the U.S. Constitution and N.Y. Constitution, Article I, § 12 to "categorically" prohibit:

> *"[T]he issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.' The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific area and things for which there is probable cause to search to the specific area and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus the scope of a search is defined by the object of the search and the places in which there is probable cause to believe that it may be found."*

39. Counsel contends that the warrant is deficient in describing the "entire premise, known as 13 Elm Street" because it is overbroad, is not based upon probable cause, and not based upon either reliable information or a basis for knowledge as set forth in an affidavit by a law enforcement officer as required. Counsel is not in possession of any such affidavit and knows only of a Search and Seizure Waiver signed by the defendant under duress. In the absence of such an affidavit, and if in fact the warrant is based only on the coerced consent of the defendant, this Court and Counsel cannot ascertain whether sufficient probable cause existed for the issuance of the warrant to search the described areas, especially in light of the numerous places upon the premises the warrant recites, some of which are the personal residences of persons other than the defendant herein. The police report of March 24, 2005 attached to the C.P.L. Section 710.30 Notice *(Exhibit A)* indicates that on that date, three months prior to the application for the warrant, the police were aware of other persons inhabiting apartments at defendant's residence as evidenced by Inv. E. Smith's actions he states in the last two paragraphs of the report showing he took note of the various names on the mailboxes of 13 Elm Street when he exited the defendant's residence on that date. Particularity of description of the place to be searched is also required so those officers executing a warrant can direct themselves solely to the target location and protect the privacy of others. *People v. Cordero, 101 A.D.2d 351.*

40. Counsel additionally challenges the description of things to be seized listed in the warrant on the same basis as the challenge to the description of the location to be searched. Defendant's involuntary, coerced consent seems to form the basis for the issuance of the warrant; no independent recitation of probable cause is available to justify the issuance of the warrant with the description of the items to be seized. Therefore, the warrant must be deemed deficient on its face and all of the evidence obtained there under suppressed.

41. C.P.L. Section 690.30(1) requires:

(1) A search warrant must be executed not more than ten (10) days after the date of issuance, and

(2) The warrant must thereafter be returned to the court without unnecessary delay.

42. The return of the warrant (*Exhibit S*) herein is dated July 26, 2005. It was issued, and the document seems to indicate it was executed, on July 2, 2005.

43. Counsel contends that the return of the warrant some twenty-four (24) days after issuance violates the section mandating return to the court "without unnecessary delay". Such a delay in this case caused undue prejudice to the defendant who had not obtained counsel to represent her and where law enforcement officers and their agents sought to obtain incriminating, uncounseled statements from the defendant between the time the warrant was issued by Utica City Judge Gerald J. Popeo on July 2, 2005 and the return of the warrant on July 26, 2005.

44. In fact, on July 2, 2005, Sgt. Grace Benson and Inv. E. Smith issued a police report detailing their conversations with defendant on that date at the St. Joseph's Nursing Home where defendant was residing. Counting this July 2nd conversation with the defendant, there are seven (7) C.P.L. Section 710.30 notices provided to Counsel of conversations with the defendant by law enforcement officers or their agents between the date of the issuance of the warrant and its return..

45. Counsel contends that such numerous contacts during and after the issuance of the search warrant on July 2nd prejudiced the ability of the defendant to adequately obtain counsel prior to her arrest and allowed law enforcement officers and their agents to attempt to obtain incriminating statements from the defendant using items seized under the warrant to coerce the defendant to make such statements prior to the return of the warrant to the issuing court.

46. Counsel further contends that any statements obtained by law enforcement and their agents listed in Exhibits A – P herein prior to the issuance of the warrant, formed the basis for the issuance of the search warrant and that such statements in whole or part, jointly or severally, formed the basis for the request to the lower court to issue the search warrant. Such statements were obtained unlawfully by law enforcement officers and agents through coercion and duress and were involuntarily given by the defendant. As such, any "fruits" these statements may have produced must be suppressed since they constitute "fruit of the poisonous tree." (*People v. Conyers*, 68 N.Y.2d 982, 1986).

47. Therefore, defendant moves this Court to issue an order declaring said warrant defective on its' face and that all evidence seized pursuant to said warrant and all items seized, subsequent items seized and testimony derived therefrom be suppressed as fruits of an illegal search and seizure. In the alternative, Counsel requests a hearing to determine the issues set forth in this motion.

XII. MOTION TO REVEAL ANY PLEA AGREEMENTS UNDERSTANDING OR DEAL WITH ANY POTENTIAL PROSECUTION WITNESS OR INFORMER

48. Counsel contends that the charges contained in the indictment are based upon information provided by an informant who played a material part in the alleged transactions set forth in the indictment.

49. Counsel further believes from his independent investigation that said informer or informers are prosecution or potential material witnesses for the prosecution and have been offered or given immunity,

leniency, preferential treatment, payment, a witness protection program or other reward given to someone else for the benefit of said witness or informer in exchange for said witnesses' agreement to give information or to testify before a grand jury or in the trial of this matter.

50. Defendant requests that the criminal record of arrests and convictions of any prospective material witness or informer be furnished to defendant, including any charge or offense of which said person is suspected or under investigation, but not yet charged or arrested.

51. Defendant requests he be furnished with the full and complete details of any said agreement, understanding, offer, program or deal, and if the prosecution denies any, then defendant requests said denial be stated in the record of these proceedings.

52. Due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution requires that such information be revealed prior to trial herein, so defendant may adequately prepare a defense.

53. Defendant requests and demands the District Attorney be required to produce for inspection and copying, all statements, oral or written, or reports or interviews and Grand Jury testimony of each said person, whether the prosecution intends to call them as a witness or not. This motion is made under the authority *of Brady v. Maryland,* 373 U.S. 83, 83 S.Ct.1194 (1963); *Giles v. Maryland,* 386 U.S. 66, 87 S.Ct. 793 (1967), and *People v. Savvides,* 1 N.Y. 2d 554 (1956).

XIII. MOTION FOR AUDIBILITY HEARING

54. The defendant was notified at the time of discovery that members of law enforcement and their agents audio taped conversations with defendant. Defendant was unaware that her conversations with agents of the police were being recorded.

55. In fact, Counsel has been notified pursuant to Section 710.30 of the Criminal Procedure Law by the District Attorney of Oneida County that the prosecution intends to introduce said tape or tapes into evidence against the defendant herein.(*Exhibits I – L*)

56. In order to constitute competent proof, an audio tape should at least be sufficiently audible so third parties can listen to it and produce a reasonable transcript. *People v. Lubow, 29 N.Y. 2d 58, 68.* The law is clear that a recording must be rejected if it is so inaudible and indistinct that a jury must speculate as to the contents thereof. Where an audiotape is garbled, full of static and other foreign sounds; and otherwise unintelligible and inaudible for the most part, the fair exercise of discretion requires the entire tape to be withheld from the jury. Basic fairness demands its exclusion. *People v. Sacchitella, 31 A.D. 2d 180 (1968).*

57. Audio tapes can be a vital piece of evidence against any accused and jurors can not be left to speculate as to the contents of that tape. The Court must weigh the probative value of the evidence on the tape against the potential for prejudice. *People v. Ryan, 121 A.D. 2d 34; People v. Morgan, 175 A.D. 2d 930, 932; People v. Carrasco, 125 A.D. 2d 695.*

58. Additionally, *Corrasco, supra*, stands for the proposition that a third party's statements or comments on an audiotape can be unduly suggestive of incriminatory involvement by the defendant even though the defendant admits of no involvement on the audio tape.

59. Therefore, Counsel contends that the audio tapes in this matter are inaudible and without probative weight or value to the jury in this matter and this Court should properly rule that said tapes are inadmissible in the trial of this action. Alternatively, Counsel requests that a hearing be held in this matter to determine the admissibility of this tape based upon its audibility as well as the probative weight and value of such evidence at trial. *People v. DiMatteo, 80 Misc. 2d 1029.*

XIV. MOTION TO SEVER THE SECOND COUNT IN THE INDICTMENT CHARGING GRAND LARCENY IN THE THIRD DEGREE FROM THE FIRST COUNT OF THE INDICTMENT CHARGING MURDER IN THE SECOND DEGREE PURSUANT TO C.P.L SECTION 200.20

60. The defendant is charged with only two (2) counts in Indictment No. 2005-330:

Count 1: Murder in the Second Degree in violation of Section 125.25, subdivision 1 of the Penal Law – intent to cause the death of Sandra L. Goodman on or about May 25, 2003;

Count 2: Grand Larceny in the Third Degree in violation of Section 155.35 of the Penal Law – stealing money in excess of Three Thousand Dollars ($3,000.00) from Jeannette Fink on about May 27, 2003 through and including March 3, 2005.

61. Counsel contends that these counts constitute an improper joinder in the same indictment in violation of C.P.L. Section 200.20 because:

(1) They are not based upon the same criminal transaction,

(2) The criminal transactions underlying the two offenses are of such a nature that proof of the first offense is not material and admissible as evidence in chief upon a trial of the second, and proof of the second would not be material and admissible as evidence in chief upon a trial of the first,

(3) No other joinder rules apply to allow the joinder of these two offenses in the same indictment

62. As the District Attorney choose to plead the indictment, there is no relation between the two offenses since the alleged victim in the first count is not the same as the alleged victim in the second count, and the indictment fails to establish a nexus. Obviously, Grand Larceny in the Third Degree has no material element of Murder in the Second Degree, nor does the indictment allege that the offense of Grand Larceny in the Third Degree was the cause for the defendant to allegedly commit the offense of Murder in the Second Degree.

63. In the alternative, C.P.L. Section 200.20(3) allows severance of the counts in the interests of justice for good cause shown not limited to the enumerated situations listed therein. The indictment pleads the date of the murder as on or about May 25, 2003 while the dates of the offense of the larceny run from May 27, 2003 through March 3, 2005.

64. Obviously, any relation between the two offenses is tenuous at best.

65. Pursuant to C.P.L. Section 200.20(a) good cause constitutes a finding that there is substantially more proof on one or more such joinable offenses than on others and there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense. The proof of murder in this case consists primarily of forensic and circumstantial evidence.

66. From the lab reports submitted from the New York State Police laboratory, there is a quantum of complex DNA evidence the prosecutor needs to present that will occupy the attention of the jury, while the larceny charge revolves around volumes of various bank records that the prosecution must cross-reference to meet their legal burden of proof.

67. Given the complexity of proof the prosecution must present on both offenses and the differences in the type of proof to presented, as well as the difference in dates each offense was allegedly committed and the fact that different victims are alleged in each count, Counsel verily believes the jury will not only be subjected to intense and immense confusion, but trying both offenses together would prejudice the defendant because the jury will be unable to separate the proof of one offense as it relates to the commission of the other.

68. Further, the provisions of C.P.L. Section 200.20(b) allow for severance where the defendant has important testimony to give concerning one count and a genuine need to refrain from testifying on the other. Given the severity of the first count of the indictment, the decision for the defendant to testify or refrain from testifying is a grave one. Since the larceny count does not carry the same gravity, the defendant may well choose to take the stand to explain the complex financial transactions the prosecution will put forth to the jury. The risk of prejudice to the defendant in taking the stand is substantial should she choose to explain to the jury her innocence of the larceny while risking being subjected to cross-examination regarding the count of intentional murder.

69. Counsel therefore requests this court to sever the offenses for trial in this action.

XV. MOTION TO RESERVE THE RIGHT TO SUBMIT FURTHER MOTIONS

70. It is respectfully requested that in addition to the relief sought herein, the Court grant such other and further relief as may be just and proper under all the circumstances of this case. Given the complexity of the evidence of this case obtained during the discovery conference with the District Attorney including but not limited to the voluminous bank records, DNA lab analysis data from the New York State Police laboratory as well as the mental and physical health records Counsel has been able to obtain from the defendant's providers as well as releases for medical information not yet received by Counsel, Counsel respectfully requests this Court to allow the defendant to make any further motions Counsel could not have made with due diligence in this Omnibus Pretrial Motion. The defendant respectfully reserves the right to make further and additional motions which may be required and advisable in light of the Court's rulings on the matters contained herein.

WHEREFORE, your affirmant respectfully seeks that this Court issue an order granting the relief requested in this Omnibus Motion, together with such other and further relief as this Court may deem just and proper.

DATED: Utica, New York
November 30, 2005

_____
Frank J. Nebush, Jr., Esq.

State of New York
County of Oneida County Court

People of the State of New York,

-against-

Joanie Jones,

Defendant.

Amended
Notice of Motion
For
Omnibus Pretrial Relief

Indictment No. 2011-322

PLEASE TAKE NOTICE that upon the annexed affirmation of Frank J. Nebush, Jr., Esq., Oneida County Public Defender, Criminal Division, and all prior pleadings and proceedings heretofore had herein, a motion will be made as follows:

DATE AND TIME OF MOTION:	October 26, 2009 9:30 a.m., or as soon thereafter as Counsel can be heard.
PLACE OF MOTION:	ONEIDA COUNTY COURT 200 Elizabeth Street Utica, New York 13501
MOTION MADE BY:	Frank J. Nebush, Jr., Esq. Oneida County Public Defender, Criminal Division Attorney for Joanie Jones
OBJECT OF MOTION:	Omnibus Pretrial Motion together with such relief as this Court deems just and proper.

Dated: Utica, New York
October 26, 2009

Yours, etc.,
Frank J. Nebush, Jr., Esq.
Oneida County Public Defender - Criminal Division
Attorney for Joanie Jones
250 Boehlert Center
321 Main Street
Utica, New York 13501
Telephone: (315) 798-5870

To: Hon. Scott D. McNamara
Oneida County District Attorney

Jeanne Natale
Clerk, Oneida County Court

TABLE OF CONTENTS

State of New York
County of Oneida County Court

People of the State of New York, -against- Joanie Jones, Defendant.	Affirmation In Support Of Amended Omnibus Pretrial Motion Indictment No. 2011-322

State of New York)
County of Oneida) ss.:

Frank J. Nebush, Jr., Esq., an attorney duly admitted to practice in the Courts of the State of New York and a duly appointed Public Defender, Criminal Division in and for the County of Oneida, the attorney of record for the above-named defendant, affirms, under penalty of perjury and pursuant to Rule 2106 of the Civil Practice Law and Rules, that the following facts are true:

1. I make this affirmation upon information and belief, said information having been obtained by my investigation of the case, conversations with the defendant and examination of the relevant documents herein.

2. My client was arrested in Davis County, North Carolina on June 10, 2009 by the Oneida County Sheriff's Department and charged with Murder in the Second Degree in violation of §125.25, subdivision 4 of the Penal Law of the State of New York for causing the death of her four month old daughter, Baby Jones, on April 17, 2008 in the Town of Floyd, Oneida County, New York.

3. Ms. Jones thereafter waived extradition from the State of North Carolina and was returned by the Oneida County Sheriff's Department to Oneida County and arraigned on the felony complaint on July 2, 2009 in the Local Criminal Court for the Town of Floyd before the Hon. Christopher C. Clarkin. At the arraignment, your Affirmant was appointed to represent her, and a plea of not guilty was entered on her behalf.

4. A preliminary hearing on the felony complaint was waived on July 10, 2009 and the defendant's case was bound over to the Oneida County Grand Jury.

5. The indictment herein was filed against the defendant by the Oneida County Grand Jury on August 13, 2009 charging the defendant with the sole count of Murder in the Second Degree in violation of §125.25, subdivision 4 of the Penal Law of the State of New York alleging that the defendant,

> *"…on or about April 17, 2008, in the County of Oneida, Town of Floyd, under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engaged in conduct which created a grave risk of serious physical injury or death to another person less than eleven years old and thereby caused the death of such person, to wit: Baby Jones, a female child with a date of birth of December 18, 2007."*

6. The defendant was thereafter arraigned in Oneida County Court on August 19, 2009 before the Hon. Barry M. Donalty and entered a plea of not guilty and filed a notice of the psychiatric defense of not responsible by reason of mental disease or defect.

7. This affirmation is made in support of various requests for pre-trial relief, set forth below in sections duly noted by Roman numerals and labeled as to the specific relief requested.

8. The defendant has made a previous motion for the relief herein requested, however this amended motion only corrects grammatical and typographical errors, errors in caption numbering, legal citations, and page designations in the table of contents. Counsel has deleted an authority at paragraph 61 and substituted another authority in its place and stead. In all other respects, this motion seeks the same relief requested as the original omnibus pretrial motion.

I. MOTION FOR A SANDOVAL HEARING

9. Pursuant to Section 240.43 of the Criminal Procedure Law, Counsel respectfully requests that prior to the selection of a jury, this Court hold an *in camera* hearing to determine the admissibility of any:

(a) Prior criminal conviction of the defendant; and/or

(b) Prior uncharged criminal, vicious or immoral conduct of the defendant of which the prosecutor has knowledge and which the prosecutor intends to use at trial for the purpose of impeaching the credibility of the defendant.

This motion is made under the authority of *People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974).*

10. Defendant further requests that at this hearing the prosecution be required to inform the Court and Counsel on the record whether or not the District Attorney intends to introduce at trial any other criminal acts normally not allowed as evidence against the defendant pursuant to the *Molineux* Doctrine *(People v. Molineux, 168 NY 264, 1901).* Should the District Attorney propose to introduce such evidence, Counsel requests this Court to first require the prosecution to identify an issue, other than mere criminal propensity, to which the evidence is relevant and if such a showing is made to the satisfaction of the Court, then Counsel further requests the Court to weigh the probative worth of the evidence against its potential for prejudice. (*People v. Alvino, 71 NY2d 233, 1987*).

II. MOTION FOR A PRETRIAL <u>VENTIMIGLIA</u> HEARING REGARDING OTHER CRIMINAL ACTS

11. Often in a trial, the prosecutor brings out as part of the direct case other crimes and criminal acts attributed to the defendant. Though seemingly unrelated to the crime for which the defendant is charged, they are arguably exceptions to the well known *Molineaux* Doctrine, i.e., evidence of a common scheme or plan or evidence that is somehow connected to matters that are before the Court in trial. When this is done in the middle of a trial, objections by defense counsel are generally inadequate to protect the defendant if the court eventually rules that these criminal acts are immaterial and should not have been brought up. As a result of this inability to *"unring a bell,"* the New York State Court of Appeals in *People v. Ventimiglia,* 52 N.Y.2d 350, 438 N.Y.S.2d 261 (1981), indicated the following procedure should be followed regarding the introduction of such evidence:

"When a prosecutor, knowing that such evidence is to be presented, waits until objection is made when it is offered during trial before informing the court of the basis upon which he considers it to be admissible, there is unfairness to the defendant, even if his objection is sustained, in view of the questionable effectiveness of cautionary instructions in removing prior crime evidence from consideration by the jurors. There is, moreover, a greater probability of error, and consequent waste of scarce judicial resources, when evidentiary rulings are made during trial than in the more relaxed atmosphere of an inquiry out of the presence of the jury. Whether some time prior to trial, just before the trial begins or just before the witness testifies will depend upon the circumstances of the particular case, but at one of those times the prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness. The court should then assess how the evidence came into the case and the relevance and probativeness of, and necessity for it against its prejudicial effect, and either admit or exclude it in total, or admit it without the prejudicial parts when that can be done without distortion of its meaning."[citations omitted]

12. Counsel, therefore, respectfully requests that should the District Attorney intend to offer such evidence in court at the trial of this matter, a *Ventimiglia* hearing be conducted in this matter prior to the trial to determine the admissibility of such evidence.

III. MOTION TO INSPECT THE GRAND JURY MINUTES AND DISMISS OR REDUCE THE INDICTMENT

13. Counsel moves this Court to inspect the minutes of the Oneida County Grand Jury in this matter pursuant to the provisions of CPL §210.30 and:

(a) dismiss or reduce the indictment as provided in CPL §210.20(1)(a) because the indictment is defective and does not substantially conform to the requirements of CPL §200.50, subdivision 7(a) which requires the indictment to contain "[a] plain and concise factual statement in each count which without allegations of an evidentiary nature…asserts facts supporting every element of the offense charged and the defendant's…commission thereof with sufficient precision to clearly apprise the defendant… of the conduct which is the subject of the accusation;" or

(b) dismiss the sole count of the indictment pursuant to CPL §210.20(1)(b) because the "evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense."

14. On August 13, 2009, the Grand Jury of Oneida County filed an indictment against the defendant charging the defendant with the sole count of Murder in the Second Degree in violation of §125.25, subdivision 4, as alleged in paragraph 5 above. As further alleged at paragraph 5, the indictment states that Joanie Jones acting "*under circumstances evincing a depraved indifference to human life…recklessly engaged in conduct which created a grave risk of serious physical injury or death to another person…."*

(a) ***THE INDICTMENT DOES NOT CONFORM TO THE REQUIREMENTS OF CPL 200.50(7)(a) BECAUSE IT DOES NOT ASSERT FACTS SUFFICIENT TO ESTABLISH DEPRAVED INDIFFERENCE MURDER UNDER PENAL LAW §125.25(4)***

15. Counsel contends that the indictment is insufficient on its face and fails to conform with the requirements of Section 200.50, subdivision (7)(a), of the Criminal Procedure Law of the State of New York that mandates that the indictment "…***asserts facts supporting every element of the offense charged and the defendant's …commission thereof with sufficient precision to clearly apprise the defendant… of the conduct which is the subject of the accusation…."****[emphasis added]*

16. The standard of proof and the use of offenses in cases alleging "depraved indifference" have long been debated by the courts in New York. In 2006, the New York Court of Appeals finally put the issue to rest in *People v. Feingold*, 7 NY3d 288 by overruling *People v. Register, 60 NY2d 270 (1983)* and *People v. Sanchez, 98 NY2d 373 (2002)*.

17. *Feingold* is best understood in conjunction with a case that preceded it, *People v. Suarez, 6 NY3d 202 (2005)* where the defendant stabbed his girlfriend in the throat, chest and abdomen and left her to bleed to death. The *Feingold* explained the reasoning in *Suarez* when it stated succinctly that "rarely can depraved indifference murder apply to the killing of a single victim."

18. *Suarez* indicates that "[i]n the"extraordinary case, a child's death may be punishable as depraved indifference murder, which requires two distinct *mens reas*: recklessness and 'depraved indifference to human life.' The latter *mens rea* requires an 'utter disregard for the value of human life' and 'wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts,' making the killing equal in blameworthiness to intentional murder. *(6 N.Y. Prac., Criminal Law §6:24,* quoting *People v. Suarez, supra).*

19. Indictment 2009-322 herein merely restates Penal Law §125.25, subdivision 4, provides the date of death of the infant, the name of the infant and date of birth of the infant. It completely lacks sufficient context to meet the pleading requirements of the statute and give notice of the conduct the defendant is alleged to have committed that constitutes "depraved indifference" to human life and recklessness.

20. Therefore, the indictment is insufficient on its face and should be dismissed.

(b) AS A MATTER OF LAW THE EVIDENCE PRESENTED TO THE GRAND JURY OF ONEIDA COUNTY WAS INSUFFIENT TO ESTABLISH THE CRIME OF DEPRAVED INDIFFERENCE MURDER UNDER PENAL LAW §125.25(4) AND SHOULD BE DISMISSED OR REDUCED

21. CPL 190.65 provides that "… a grand jury may indict a person for an offense when

(a) the evidence before it is legally sufficient to establish that such person committed such offense…" and

(b) "competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense."

22. Prof. Peter Preiser's *Practice Commentaries* to CPL §190.65 indicate that although grand juries "[a]t common law and federal practice have…never have been bound by the rules of evidence applicable to trials" or "subject to challenge on the ground of an inadequate evidentiary basis for the offense charged.… [a] decision of a New York Grand Jury to charge a defendant with an offense must…be based upon competent evidence…. Accordingly, a New York Grand Jury's accusation will be dismissed, or the charge reduced, if the reviewing court determines the evidence before that body was not legally

sufficient to support *every element* of the charge alleged in the accusatory instrument. (see CPL §210.20).” [emphasis added]

23. CPL §70.10(1) defines “legally sufficient evidence” as “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof.…” [emphasis added]. The section also states that “reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.”

24. Counsel re-alleges paragraphs 16 through 18 above dealing with the quantum of proof when a defendant is charged under Penal Law §125.25(4), depraved indifference murder. As the court in *Suarez, supra*, stated, “depraved indifference” requires an “utter disregard for the value of human life” and “wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts,” making the killing equal in blameworthiness to intentional murder.

25. Although “depraved indifference” may be charged in certain situations where the *mens rea* can be established, the leading cases follow the *Suarez* guidelines as shown in the list of cases included in Footnote 18, §6:24 of *6 New York Practice, Criminal Law* in order to uphold a finding of “depraved indifference” as the following cases indicate:

People v. Poplis, 30 N.Y.2d 85, 330 N.Y.S.2d 365, 281 N.E.2d 167 (1972) (continued beating of 3 ½-year-old child over 5 days);

People v. Williams, 54 A.D.3d 599, 864 N.Y.S.2d 405 (1st Dep't 2008) (slamming five-week-old infant into crib mattress five times with great force, and then holding infant in a choke hold, established depraved indifference, despite later efforts to revive and obtain help for infant);

People v. Bowman, 48 A.D.3d 178, 847 N.Y.S.2d 536 (1st Dep't 2007), leave to appeal denied, 10 N.Y.3d 808, 857 N.Y.S.2d 42, 886 N.E.2d 807 (2008) (striking baby's head several times with significant force and preventing mother from calling 911);

People v. Smith, 41 A.D.3d 964, 838 N.Y.S.2d 690 (3d Dep't 2007) (violently shaking 3-year-old, while aware of risk from defendant's infliction of prior similar injuries);

People v. Dickerson, 42 A.D.3d 228, 837 N.Y.S.2d 101 (1st Dep't 2007) (starving child from infancy to almost age 5, in household marked by abuse of other children);

People v. Stephens, 3 A.D.3d 57, 769 N.Y.S.2d 249 (1st Dep't 2003) (defendant acting *in loco parentis* was guilty of depraved indifference murder when he burned child's hand for taking food from the refrigerator, tied her to the bed for several nights thereafter, ignored entreaties of his other children to obtain medical care for the victim's infected hand, and beat her, all resulting in her death from, *inter alia*, infection, gangrene and pneumonia);

People v. Best, 202 A.D.2d 1015, 609 N.Y.S.2d 478 (4th Dep't 1994), order aff'd, 85 N.Y.2d 826, 624 N.Y.S.2d 363, 648 N.E.2d 782 (1995) (severe beatings of 9-year-old son, which caused large open wound resulting in blood poisoning and ultimately death by asphyxiation, continued after parent became aware of child's condition);

People v. Quinones, 155 A.D.2d 244, 546 N.Y.S.2d 854 (1st Dep't 1989) (viciously beating and binding 3-year-old and throwing child into river). But see People v. Swinton, 7 N.Y.3d 776, 820 N.Y.S.2d 537, 853 N.E.2d 1105 (2006) (devoted parents who fed their infant daughter only homemade "vegan" formula, causing severe malnutrition, were not guilty of depraved indifference assault).

26. Counsel contends that as a ***matter of law***, "depraved indifference" cannot be charged where the facts of the cases establish that "reckless" behavior or "criminal negligence" causes the death of another person and the facts of the case, although grievous, do not rise to the level enunciated in *Suarez* and *Feingold*. Therefore the lesser homicide charges set forth in the cases listed below apply.

People v. Henson, 33 NY 2d 63 (1973), upholding a mother's conviction of criminally negligent homicide for failing to get timely medical help for her 4 year old son, who died of bronchial pneumonia after days of physical abuse and neglect, being tied to his bed at night and hitting him during the day when he was not moving fast enough;

People v. Steinberg, 79 NY2d 673 (1992), supported a manslaughter in the first degree conviction where the child was slammed in the head by the defendant causing head trauma and failing to summon aid for several hours while the child lay unconscious and became annoyed that the unconscious child was "staring" at him;

People v. Morales, 118 AD2d 663(1986), where the defendant was convicted of manslaughter in the first degree for intentionally beating and causing the death of his five year old nephew. Witnesses testified that shortly after their cousin's arrival at their apartment the defendant and the victim walked into the bathroom and the defendant closed the door behind them. Both heard water running and the younger child testified that he heard the victim scream. The defendant subsequently opened the door and carried the victim out. After an unsuccessful attempt to revive the child the defendant laid him on the bed and left the room. The child lay there until he was picked up by his father and rushed to the hospital approximately one hour later. Uncontroverted medical testimony characterized the injury which precipitated the death as a "blunt force injury" caused by a blow of tremendous force and velocity. After receiving such an injury the child

would be in excruciating pain followed closely by shock and unconsciousness and would be unable to walk or even move;

People v. Garbarino, 152 AD2d 254 (1989) upholding a conviction of Criminally Negligent Homicide where the victim's mother and father provided 25 ounces of 80-proof alcohol to their fifteen year old child over a 1-to-2-hour period;

People v. Myers, 201 AD2d 855 (1994) involving a charge of manslaughter in the second degree against a 17-year-old mother who found her two-month-old son, Kenneth, dead in his crib and an autopsy revealed the cause of death to be severe dehydration and malnutrition;

People v. Manon, 226 AD2d 774 (1996) upholding the conviction for criminally negligent homicide where the defendant, a 17-year-old mother, was accused of causing the death of her infant son as the result of dehydration and undernutrition;

People v. Sika, 138 AD 2d 935 (1988) where the court reduced a "depraved indifference" murder conviction to manslaughter in the second degree declaring that "depraved indifference" requires evidence that is "'so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy"' as to warrant the same criminal liability that is imposed for an intentional murder *(People v. Fenner*, 61 NY2d 971, 973; *see also*, Byrn, *Homicide Under the Proposed New York Penal Law*, 33 Fordham L Rev 173, 186-187). The defendant's month-old son died of malnutrition and dehydration. We conclude that by failing to provide adequate food and nourishment to her infant son and by failing to seek medical assistance, defendant recklessly caused his death *(see, People v. Stubbs*, 122 AD2d 91), but there is no evidence that defendant's conduct was purposeful *(cf., State v. Crocker*, 435 A2d 58 [Me]) or so brutal, callous or wanton that it evinced a depraved indifference to human life *(see, People v. Poplis*, 30 NY2d 85; *People v. Stevens*, 51 AD2d 659).

27. The Grand Jury could not have been presented with legally sufficient evidence establishing every element of the crime charged under the dictates of *Suarez* and *Feingold* because the element of "depraved indifference" clearly does not apply to the facts presented.

28. The amended final autopsy report completed in this case by Dr. Michael Sikirica dated July 2, 2009 following the autopsy he performed on Baby Jones on April 19, 2008 indicates the cause of death as "compressive asphyxia." There is absolutely no indication in the autopsy of any of the factors that *Suarez* and *Feingold* dictate, to wit: "wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts," making the killing equal in blameworthiness to intentional murder. Dr. Sikirica's own narrative reads as follows:

(a) "The body is that of a …normally developed, well nourished infant."

(b) "*The general appearance of the body is of good health and hygiene*."

(c) "The face is symmetric and the facial bones are intact to palpation."

(d) "There are no materials in the mouth, nose or ears."

(e) "**There is no injury to the lips or gums."**

(f) "The neck is free of masses. There are *no unusual marks* or lesions on the skin of the neck."

(g) "The chest is of normal contour."

(h) "*The posterior torso shows no significant abnormalities."*

(i) "There is no evidence of injury or abnormal secretions."

(j) "The buttocks and anus are unremarkable."

(k) "**There are no scars noted."**

(l) "Passive motion of the head, neck and extremities reveals no abnormal morbility (*sic*) or crepitus."

(m) "There is no unusual odor about the body. The body hygiene is good."

29. Additionally, none of the CPL §710.30 notices or the interrogation recordings indicate anything other than statements made by the defendant that she pressed the infant against her chest thereby causing the death of the infant. There is no indication from any of the statements of the defendant, any witnesses, any law enforcement official or any social services caseworker of any "wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts, making the killing equal in blameworthiness to intentional murder" as required as a *matter of law* for the charge of "depraved indifference" under Penal Law §125.25(4).

30. In considering to dismiss the indictment or reduce the charge therein, the Court must view the evidence in the light most favorable to the People (*People v. Marin, 65 N.Y.2d 741, 1985; People v. Allah, 71 NY 2d 830, 1988)*. Even using this standard, there is no evidence and certainly no evidence presented to the Grand Jury during their deliberations in this matter, which establishes the elements of "depraved indifference".

31. Counsel therefore requests this Court to dismiss the indictment or, in the event this Court finds that the evidence before the grand jury was not legally sufficient to establish the commission by the defendant of the offense of Murder in the Second Degree in violation of Penal Law §125.25(4) but was legally sufficient to establish the commission of a lesser included offense, it order said count reduced to allege the most serious lesser included offense with respect to which the evidence before the grand jury was sufficient.

32. The defendant further requests disclosure of the legal instructions to the Grand Jury so that the accuracy and sufficiency of the Prosecutor's instructions to the Grand Jury be evaluated.

IV. MOTION FOR POLICE REPORTS AND ARREST REPORTS

33. Counsel respectfully requests this Court order that Counsel is provided with a copy of the police arrest reports and, in addition, copies of any and all police investigative reports pertinent to the investigation of this case and the arrest of the defendant herein. Said request is necessary to allow Counsel the opportunity to prepare the defense for trial and is made pursuant to Section 240.40, subdivision 1(b), of the Criminal Procedure Law. Said reports are vital to Counsel because they detail important dates, times and places, will mention witnesses present, and will provide other information necessary to prepare an adequate defense and further investigate this matter in preparation for trial.

34. This Court is also reminded that very often in a criminal trial, the prosecution uses the police report during the direct examination of a police officer or other agent of the police to refresh recollection and otherwise conduct direct examination. Counsel submits that such use of said report is "at the trial" for purposes of Sections 240.10, subdivision 4, and 240.40, subdivision 1(a), of the Criminal Procedure Law. If the District Attorney refuses and fails to provide said reports, the prosecution should be precluded from using them at trial.

V. MOTION FOR LIST OF PERSONS INTERVIEWED BY LAW ENFORCEMENT PERSONNEL

35. Counsel respectfully requests that this Court issue an order directing the prosecution to turn over to the defendant a list of names, addresses and dates of birth of all persons who have been interviewed by any and all law enforcement personnel, including police officers, the District Attorneys' investigators, the District Attorney, and other governmental personnel. Pursuant to Section 240.40, subdivision 1(b), of the Criminal Procedure Law, this material is necessary so that the defense can conduct an adequate independent investigation as to the facts and circumstances concerning this matter. The request herein is reasonable and places no great burden upon the prosecution to comply.

VI. MOTION FOR PRIOR STATEMENTS OF WITNESSES

36. Pursuant to Section 240.45, subdivision 1(a), of the Criminal Procedure Law, Counsel respectfully requests that this court issue an order directing the District Attorney to provide any and all written, tape recorded, videotape recordings and other similar statements of any and all witnesses, made of or by a witness whom the prosecution intends to call at trial. This motion includes written notes made by a prosecutor, investigator or police officer as a result of oral statements made by a prosecution witness. This also would include tape recordings and/or transcriptions thereof. Such written notes made by a prosecutor, investigator or police officer based upon an oral conversation with the potential prosecution witness are not "attorneys' work product" under the definition thereof, in Section 240.10, subdivision 2, of the Criminal Procedure Law since they would not contain opinions, theories, or conclusions of the prosecutor.

37. Section 240.45 of the Criminal Procedure Law requires that said information be turned over to the defense before the prosecutor's opening address. Counsel respectfully submits that said material should be turned over before jury selection begins to allow Counsel the opportunity to represent this client properly, adequately review the material, and facilitate the orderly progression of trial so that said

trial is not unduly interrupted. The gravity of the charges against this defendant is such that Counsel should be allowed sufficient opportunity to review this material prior to the trial of this action. Therefore, Counsel respectfully requests that this Court order all of said material turned over to the defense at least one week prior to the date set for jury selection.

VII. MOTION FOR LIST OF WITNESSES

38. In order to facilitate the orderly progression of trial and allow preparation on both sides, Counsel would be pleased to exchange a list of witnesses with the prosecution one week prior to jury selection. Under the provisions of the Criminal Procedure Law of the State of New York providing for reciprocal discovery of witnesses, Counsel would first serve the District Attorney with a list of the names and addresses of defense witnesses together with their dates of birth before the District Attorney would be obligated to reciprocate. Counsel stands ready to provide such information to the District Attorney provided the information requested herein is provided to Counsel.

VIII. MOTION FOR EXCULPATORY MATERIAL

39. Counsel respectfully requests that this Court issue an order directing the District Attorney to examine all governmental, prosecution, police and law enforcement files to determine whether any witness or any other potential evidence exists which might tend to show the innocence of the accused, a lack of criminal intent or knowledge, or mitigate punishment. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (l976).

40. This request would include, but not be limited to a statement by a witness of his or her inability to identify the alleged perpetrator, a statement identifying someone other than the defendant as being involved in the offense, or a statement indicating the inability of a witness to pick the defendant from a photographic array, show-up or corporeal line-up. This request would also include any indication that a

witness was intoxicated or under the influence of any controlled substance at the time they allegedly observed the defendant.

IX. MOTION FOR BRADY MATERIAL

41. The defendant moves this Court to issue an order compelling the People to disclose to the defendant, all evidence which is or may be favorable to the defendant which is now in the possession, custody or control of the People, the existence of which is known, or which by the exercise of due diligence may become known to the District Attorney. In the case of any books, papers, reports, testimony, statements, photographs or any other tangible items, which may contain evidence favorable to the defendant, this motion includes an order for the District Attorney to produce and deliver these items for inspection and copying by the defendant. This motion is made under the authority of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

42. This evidence, which is referred to as *"Brady Material,"* is evidence which may be favorable to the defendant, and material to the issue of guilt or innocence, or bears in any material degree on the charges against the defendant and prosecution under them, or in any manner may aid the defendant in ascertaining the truth.

43. The disclosure and production requested herein should be made without regard to whether or not the evidence to be disclosed and produced is deemed to be admissible at the trial of this action, and the disclosures and production would include, but not be limited to the following:

(a) Any written or recorded statements, admissions or confessions made by the defendant, or any witnesses, which may be exculpatory or non-incriminatory. These statements should be turned over to the defense regardless of whether the People intend to call such witness at trial;

(b) The names and addresses of any witnesses that might be favorable to the defendant;

(c) The criminal records or any list or summary reflecting the criminal records of all persons the People intend to call at trial;

44. The rule announced by the United States Supreme Court in *Brady v. Maryland, supra,* which the defense asks this Court to enforce, would impose no hardship on the People since Counsel is only requesting that evidence which is favorable to the defendant;

45. Counsel specifically reserves the right to make any additional requests for material encompassed by *Brady v. Maryland, supra,* at the time this motion is argued, or at such time as the existence of such material shall become known to Counsel.

46. It is respectfully requested that the Court specifically admonish the People that they have a duty to furnish the aforesaid to Counsel.

X. MOTION TO PRECLUDE ANY AND ALL STATEMENTS MADE TO MEMBERS OF LAW ENFORCEMENT ON JUNE 9, 2009 BY THE DEFENDANT AT THE DAVIS COUNTY SHERIFF'S DEPARTMENT, ASHEVILLE, NORTH CAROLINA AS SETFORTH IN THE CPL §710.30(a) NOTICE

47. The District Attorney served a CPL §710.30(a) Notice upon the defendant at her arraignment upon Indictment Number 2009-322 purportedly giving notice of oral statements made by her on June 9, 2009 at the Davis County Sheriff's Department in Asheville, North Carolina. Attached to said notice are three (3) pages of narrative entitled "*Oneida County Sheriff's Office: Supplementary/Investigative Report*" and purporting to be the report of "Inv. D. Nowakowski." Attached thereafter are an additional two (2) pages titled as the first three pages and containing the following subtitle: "*Addendum: Interview @ Davis County S.O. 09 June 2009 1310 Hours*."

48. Counsel contends that said notice is defective and does not meet the requirements of CPL §710.30 and therefore must be precluded. The New York State Court of Appeals stated in *People v. Lopez, 84 N.Y.2d 425, 618 N.Y.S.2d 879 (1994)* that "[t]he People were required to inform defendant of the time and place the oral or written statements were made and of the sum and substance of those statements *(see,* People v Bennett, 56 NY2d 837; *People v Laporte*, 184 AD2d 803, 804-805, *lv denied*

80 NY2d 905; *People v Holmes*, 170 AD2d 534, 535, *lv denied* 77 NY2d 961). Full copies of the statements need not be supplied but they must be described sufficiently so that the defendant can intelligently identify them."

49. Given all of the events described in the June 9, 2009 report attached to the CPL §710.30 notice, the notice simply does not provide the specificity envisioned by the statute to properly inform Counsel if any statements made by the defendant were made involuntarily and it fails to set forth the specific statements the prosecution intends to use at trial which if involuntarily made would be inadmissible. Although as Counsel asserted at paragraph 48 above, full copies of the statements need not be supplied, "…they must be described sufficiently so that the defendant can intelligently identify them." *(People v. Lopez, 84 NY2d 425, 428)*

50. Counsel is not required to divine the intentions of the prosecutor in reviewing a statutory notice to determine which portions of the attachment to the notice she will seek to admit against the defendant herein. The purpose of CPL §710.30 is to obviate such uncertainty and to particularly identify for Counsel those statements the prosecution will seek to use against the defendant so Counsel can investigate whether such statements were in fact involuntarily made.

51. Affirmant therefore requests this Court to preclude the use of any all statements referenced or stated in the CPL §710.30 notice referring to any statements made by the defendant on June 9, 2009.

XI. MOTION TO SUPRESS ANY AND ALL ORAL OR WRITTEN STATEMENTS MADE BY THE DEFENDANT TO MEMBERS OF LAW ENFORCEMENT ON JUNE 9, 2009 AS REFERRED TO IN THE CPL §710.30 NOTICE

52. In the event this Court deems sufficient notice has been provided pursuant to Section 710.30 of the Criminal Procedure Law, the defendant respectfully submits that such alleged statement or statements, if found to have been made by the defendant, were involuntarily made to the police or their agents contrary to law and should therefore be suppressed from use in evidence against the defendant.

53. Counsel contends that at the time of her interrogation at the Davis County Sheriff's office on June 9, 2009, the defendant was not fully advised of her right to counsel or her other rights guaranteed to her by the Constitution of the State of New York, as well as the United States Constitution, or if she was so advised, she did fully understand and comprehend those rights.

54. Joanie Jones was a twenty year old, pregnant female at the time of her interrogation by members of law enforcement on June 9, 2009 at the Davis County Sheriff's Department. Her first baby had died a year ago, she had a long history of being sexually abused by males since at least the age of four, was photographed in pornographic positions and raped while in foster care in Benson County, Delaware by her foster father resulting in criminal proceedings against him, attempted suicide a number of times while a juvenile including a recent attempt while she resided in Oneida County, and, it is Counsel's understanding that she had endured approximately sixteen foster placements during her childhood. In fact the documentation of her life by various social service agencies is voluminous. All or most of her history was known to the members of law enforcement who interrogated her at the Davis County Sheriff's Department on June 9, 2009 since there had been numerous meetings between the caseworkers at the Oneida County Social Services Department and the law enforcement officers from Oneida County regarding Joanie Jones after the death of her baby.

55. The District Attorney served a CPL §710.30(a) Notice upon the defendant at her arraignment upon Indictment Number 2009-322 purportedly giving notice of oral statements made by her on June 9, 2009 at the Davis County Sheriff's Department in Asheville, North Carolina. Attached to said notice are three (3) pages of narrative entitled "*Oneida County Sheriff's Office: Supplementary/Investigative Report*" and purporting to be the report of "Inv. D. Nowakowski." Attached thereafter are an additional two (2) pages titled as the first three pages and containing the following subtitle: "*Addendum: Interview @ Davis County S.O. 09 June 2009 1310 Hours.*"

56. Additionally, Counsel understands that the interrogation of the defendant on June 9, 2009 was supposed to be recorded by the Davis County Sheriff's audio/visual equipment but due to a malfunction the equipment did not record the interview. The CPL §710.30 Notice of June 9, 2009 and the "Investigative Report" attached to the notice are an attempt to recreate the interrogation of the defendant at the Davis County Sheriff's Office in North Carolina.

57. Said videotape is the best evidence of the circumstances surrounding the interrogation of the defendant on June 9, 2009 at the Davis County Sheriff's Office especially in light of the history of this defendant, the questioning of Joanie Jones using a *fictitious* medical examiner's report and the fact that a member of law enforcement held himself out to be a "Certified Voice Stress Administrator."

58. Although mere deception alone does not render a statement involuntary, a statement may be adjudged involuntary when from the totality of the circumstances the deception is "so fundamentally unfair as to deny due process" *(People v Tarsia*, 50 NY2d 1, 11 [1980]) or that the deception could have induced a false confession *People v Pereira*, 26 NY2d 265, 268-269; *People v Boone*, 22 NY2d 476, 483, *cert denied sub nom. Brandon v New York*, 393 US 991; *People v McQueen*, 18 NY2d 337, 346; *People v Green*, 147 AD2d 955).

59. *Tarsia*, supra, involved a voice stress evaluation test which Justice Fuchsberg, writing for the Court of Appeals, stated "…authorities on voice stress analysis tend to agree that test is not reliable *(See Moenssens and Inbau, Scientific Evidence in Criminal Cases [2d ed], § 15.14; Link, Detection*

Through Voice-Analysis, 3 Military Police Law Enforcement J, pp 38, 40).” Later Fuchsberg states that defense counsel attempted to prove the defendant’s statement was “…produced by psychological pressures which drew their strength from a highly suspect and invidious pseudo-scientific device.”[emphasis added].

60. Your Affirmant urges this Court to take judicial notice of the National Academy of Sciences report issued in April, 2009 entitled “*Strengthening Forensic Science in the United States: A Path Forward*”(hereinafter NAS Report) which was commissioned by an act of Congress on November 22, 2005. In fact the report is mentioned in a 2009 United States Supreme Court case, *Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527,174 L.Ed.2d 314*, requiring the technician who conducted a laboratory test on drugs to testify instead of simply introducing a laboratory “certificate.” In that case, Justice Antonin Scalia noted that forensic laboratories are not immune from mistakes, and that putting the lab technician on the stand will help “weed out not only the fraudulent analyst, but the incompetent one as well.” Justice Scalia, in citing the NAS Report, observed:

> *“Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) ….. And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” Id., at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure-or have an incentive-to alter the evidence in a manner favorable to the prosecution.”* Melendez-Diaz, supra, at 2536.

61. The “Voice Stress Evaluation Test” falls within the parameters of the “junk science” category that the NAS Report describes as passing for forensic “truth” without establishing national standards, universal accreditation, trainers, training, or uniform certification criteria. In fact, a 2002 report published by the U.S. Department of Justice entitled *“Investigation and Evaluation of Voice*

Stress Analysis Technology" involving government testing of these systems performed at The National Law Enforcement and Corrections Technology Center -Northeast Region (NLECTC-NE) which was established at the Air Force Research Laboratory -Information Directorate (AFRLAF) (formerly Rome Laboratory) in Rome, NY in 1996 whose mission to work with government, industry, and academia to identify, evaluate, demonstrate, develop and assess technology applications for law enforcement and corrections stated:

> *"After reviewing the three technical tests performed, it could be stated that these two VSA units do recognize stress. Although these systems state they detect deception, this was not proven. This study does show, from a number of speech under stress studies, that linear and non-linear features are useful for stress classification. Due to the lack of deceptive stress data available, classification of deceptive stress versus emotional stress or physical stress was not tested. This is a vital role in the detection and classification of stress. Many suspects are under an extreme amount of stress when being interrogated. Do these VSA systems actually differentiate between the different types of stress? This still needs to be proven. "*

62. Of course, the "Certified Voice Stress Administrator" in the CPL §710.30 notice tells the defendant that the "truth verification exam" would eliminate the defendant if she was truthful, and he further informs her the test could confirm her "responsibility" for the death of her baby when, in fact, the test only purports to detect stress levels in voice patterns.

63. Absent the audio/video recording of the events of June 9, 2009 at the Davis County Sheriff's Department especially given the use of a fictitious medical examiner's report and the use of the voice stress evaluation test to elicit statements from Joanie Jones, it is impossible to gain any useful knowledge of whether, under the totality of the circumstances, those statements were involuntarily made.

64. Although the best evidence rule permits the secondary evidence where original evidence is not available because of excusable loss or destruction (*Steele v. Lord, 70 NY 280, 283-284, (1877)),* there must be a showing that a reasonable effort was made to locate the original evidence. *Schozer v. William Penn Life Ins Co., 84 NY2d 639, 644 (1994).* In the absence of such a showing, the

substitution of the investigators report is not sufficient and any purported evidence should be suppressed from evidence.

65. Additionally, given the history of Joanie Jones as setforth above, the male dominated atmosphere, the use of deception in the form of the fictitious Medical Examiner's report, the use of the "Voice Stress Evaluation Test" and the manner in which it was used and the methods used to induce her to agree to the test, all show that the members of law enforcement present at the interrogation created a coercive, male-dominated atmosphere which overcame her free will. Therefore, any and all statements resulting from the interrogation on June 9, 2099 were involuntarily made and should be suppressed.

66. Under these circumstances, it is respectfully requested, pursuant to Section 710.20 of the Criminal Procedure Law, the Court issue an order suppressing from evidence against the defendant any and all statements taken from the defendant by a public servant on June 9, 2009 or in the alternative, directing that a pre-trial hearing be held to determine the admissibility of any such statement.

67. It is further submitted that the custodial detention of the defendant was not based upon probable cause and therefore any statements derived therefrom, even with the giving of *Miranda* warnings, constitute fruit of the poisonous tree and must be suppressed. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979).

68. In the case of *People v. Weaver*, 49 N.Y.2d 1012, 429 N.Y.S.2d 399 (1980), the Court of Appeals held that there must be a hearing whenever the defendant claims a statement made by the defendant was involuntarily made no matter what facts the defendant puts forth in support of that claim.

XII. MOTION TO SUPPRESS FROM EVIDENCE A VIDEOTAPED INTERVIEW OF THE DEFENDANT MADE AT THE DAVIS COUNTY SHERIFF'S DEPARTMENT ON JUNE 10, 2009 ALONG WITH ANY ALL ORAL OR WRITTEN STATEMENTS, DOCUMENTS OR MATERIALS TAKEN FROM THE DEFENDANT

69. Counsel re-alleges paragraphs 54 and 65 above as if fully setforth herein.

70. The defendant was interviewed and videotaped by members of law enforcement on June 9, 2009 at the Davis County Sheriff's Office in Asheville, North Carolina. Counsel contends that said interview was involuntary, unlawful, in violation of her rights against self-incrimination and right to counsel, any statements or admissions were the result of a hostile, custodial environment and should therefore be suppressed. Therefore any further interrogation of the defendant on the following day June 10, 2009 was unlawful and "fruit of the poisonous tree." *Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).*

71. Counsel further contends that all statements of the defendant made on June 10, 2009 at the Davis County Sheriff's Department were made under duress, were involuntary and produced by fraudulent promises, were in violation of her Sixth Amendment right to counsel and made in the absence of proper warnings of her right to remain silent and not incriminate herself.

72. Under these circumstances, it is respectfully requested, pursuant to Section 710.20 of the Criminal Procedure Law, the Court issue an order suppressing from evidence against the defendant any and all statements taken from the defendant by a public servant on June 10, 2009 or in the alternative, directing that a pre-trial hearing be held to determine the admissibility of any such statement.

73. It is further submitted that the custodial detention of the defendant was not based upon probable cause and therefore any statements derived therefrom, even with the giving of *Miranda* warnings, constitute fruit of the poisonous tree and must be suppressed. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979).

74. In the case of *People v. Weaver*, 49 N.Y.2d 1012, 429 N.Y.S.2d 399 (1980), the Court of Appeals held that there must be a hearing whenever the defendant claims a statement made by the defendant was involuntarily made no matter what facts the defendant puts forth in support of that claim.

XIII. MOTION TO SUPPRESS ANY AND ALL ORAL AND WRITTEN STATEMENTS MADE BY THE DEFENDANT ON APRIL 24, 2008 AT THE ONEIDA COUNTY SHERIFF'S DEPARTMENT INCLUDING BUT NOT LIMITED TO AN AUDIO/VIDEO RECORDING AS SET FORTH IN THE CPL §710.30 NOTICE

75. Counsel re-alleges paragraphs 54 and 65 above as if fully setforth herein.

76. On April 24, 2008 the defendant was interviewed by members of law enforcement at the Law Enforcement Building of the Oneida County Sheriff's Department on Judd Road, Oriskany, New York. The District Attorney has provided a CPL §710.30 notice and a copy of the audio/video recording contained on DVD to Counsel.

77. Counsel further contends that all statements, oral or written, of the defendant made on April 24, 2008 at the Oneida County Sheriff's Department were made under duress, were involuntary and produced by fraudulent promises, were in violation of her Sixth Amendment right to counsel and made in the absence of proper warnings of her right to remain silent and not incriminate herself.

78. Under these circumstances, it is respectfully requested, pursuant to Section 710.20 of the Criminal Procedure Law, the Court issue an order suppressing from evidence against the defendant any and all statements taken from the defendant by a public servant on June 10, 2009 or in the alternative, directing that a pre-trial hearing be held to determine the admissibility of any such statement.

79. It is further submitted that the custodial detention of the defendant was not based upon probable cause and therefore any statements derived therefrom, even with the giving of *Miranda* warnings, constitute fruit of the poisonous tree and must be suppressed. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979).

80. In the case of *People v. Weaver*, 49 N.Y.2d 1012, 429 N.Y.S.2d 399 (1980), the Court of Appeals held that there must be a hearing whenever the defendant claims a statement made by the defendant was involuntarily made no matter what facts the defendant puts forth in support of that claim.

XIV. MOTION TO PRECLUDE ANY AND ALL STATEMENTS MADE TO MEMBERS OF LAW ENFORCEMENT AS SETFORTH IN THE TWO CPL §710.30(a) NOTICES LISTED BELOW

81. The District Attorney provided Counsel with CPL §710.30 notices in the regard to the following statements allegedly made by the defendant:

(a) Date: April 30, 2008 Place: Ben Deal and Joanie Jones's apartment on Oneida Street, Utica, New York Substance: Oral Statements

(b) Date: "Various conversations occurring on April 21, 2008 through to and including April 29, 2009" Place: "Attached report" Substance: Oral and Written Statements

82. Counsel contends that said notices are defective and do not meet the requirements of CPL §710.30 and therefore must be precluded. The New York State Court of Appeals stated in *People v. Lopez, 84 N.Y.2d 425, 618 N.Y.S.2d 879 (1994)* that "[t]he People were required to inform defendant of the time and place the oral or written statements were made and of the sum and substance of those statements *(see, People v Bennett,* 56 NY2d 837; *People v Laporte,* 184 AD2d 803, 804-805, *lv denied* 80 NY2d 905; *People v Holmes,* 170 AD2d 534, 535, *lv denied* 77 NY2d 961). Full copies of the statements need not be supplied but they must be described sufficiently so that the defendant can intelligently identify them."

83. Given all of the events described in the reports attached to the CPL §710.30 notice, the notice simply does not provide the specificity envisioned by the statute to properly inform Counsel if any statements made by the defendant were made involuntarily and it fails to set forth the specific statements the prosecution intends to use at trial which if involuntarily made would be inadmissible. Although as Counsel asserted at paragraph 48 above, "[f]ull copies of the statements need not be supplied

…they must be described sufficiently so that the defendant can intelligently identify them." *(People v. Lopez, 84 NY2d 425, 428)*

84. Counsel is not required to divine the intentions of the prosecutor in reviewing a statutory notice to determine which portions of the attachment to the notice she will seek to admit against the defendant herein. The purpose of CPL §710.30 is to obviate such uncertainty and to particularly identify for Counsel those statements the prosecution will seek to use against the defendant so Counsel can investigate whether such statements were in fact involuntarily made.

85. Affirmant therefore requests this Court to preclude the use of any all statements referenced or stated in the CPL §710.30 notice referring to any statements made by the defendant referenced in the specified CPL §710.30 notices.

XV. MOTION TO SUPRESS ANY AND ALL STATEMENTS MADE TO MEMBERS OF LAW ENFORCEMENT AS SETFORTH IN THE CPL §710.30(a) NOTICES LISTED BELOW

86. Counsel re-alleges paragraphs 54 and 65 above as if fully setforth herein.

87. The District Attorney provided Counsel with CPL §710.30 notices in the regard to the following statements allegedly made by the defendant:

(c) Date: April 17, 2008 Place: 31 Fineview Drive, Town of Floyd
Substance: Oral Statement
(d) Date: April 17, 2008 Place: St. Luke's Hospital
Substance: Oral Statement
(e) Date: April 24, 2008 Place: 31 Fineview Drive or Law Enforcement Bldg.
Substance: Written Statement
(f) Date: June 10, 2009 Place: Davis County Sheriff's Department, Asheville, North Carolina Substance: Written Statement
(g) Date: April 30, 2008 Place: Ben Deal and Joanie Jones's apartment on Oneida Street, Utica, New York Substance: Oral Statements
(h) Date: "Various conversations occurring on April 21, 2008 through to and including April 29, 2009" Place: "Attached report" Substance: Oral and Written Statements

88. Counsel contends that all statements, oral or written, of the defendant made on the dates and at the places indicated at paragraph 73 above, were made under duress, were involuntary and produced by

fraudulent promises, were in violation of her Sixth Amendment right to counsel and made in the absence of proper warnings of her right to remain silent and not incriminate herself.

89. Under these circumstances, it is respectfully requested, pursuant to Section 710.20 of the Criminal Procedure Law, the Court issue an order suppressing from evidence against the defendant any and all statements taken from the defendant by a public servant on listed on the CPL §710.30 notices setforth above or in the alternative, directing that a pre-trial hearing be held to determine the admissibility of any such statement.

90. It is further submitted that the custodial detention of the defendant was not based upon probable cause and therefore any statements derived therefrom, even with the giving of *Miranda* warnings, constitute fruit of the poisonous tree and must be suppressed. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979).

91. In the case of *People v. Weaver*, 49 N.Y.2d 1012, 429 N.Y.S.2d 399 (1980), the Court of Appeals held that there must be a hearing whenever the defendant claims a statement made by the defendant was involuntarily made no matter what facts the defendant puts forth in support of that claim.

XVI. MOTION TO PRODUCE THE VOICE STRESS EVALUATION TEST MANUAL USED BY THE CERTIFIED VOICE STRESS ADMINISTRATOR TOGETHER WITH ANY AND ALL CHARTS AND GRAPHS USED OR RESULTING FROM THE VOICE STRESS EVALUATION TEST ADMINISTERED TO THE DEFENDANT AND ANY CONSENT FORM ALLEGEDLY SIGNED BY THE DEFENDANT, THE QUESTIONS PRESENTED TO HER AND ANY NOTES MADE BY THE OFFICERS PRESENT

92. In the CPL §710.30 Notice for June 9, 2009 at the Davis County Sheriff's Department, the attached "*Supplementary/Investigative Report*" states that the reporting officer "…extended the opportunity to take a truth verification exam" to the defendant herein, that she accepted and she thereafter signed a "Truth Verification Release Form."

93. Counsel contends that the interrogation of defendant on June 9, 2009 at the Davis County Sheriff's Department resulted in statements made by the defendant that were the product of psychological coercion, deception by members of law enforcement, and undue pressure and therefore any and all statements made by the defendant were involuntarily made and should be suppressed.

94. During any pretrial hearings and the trial of this matter, the events of June 9, 2009 and June 10, 2009 at the Davis County Sheriff's Department will be the subject of extensive direct and cross-examination.

95. A key component of the questioning by Counsel of the members of law enforcement who interrogated Joanie Jones will involve the use of the Voice Stress Evaluation Test to elicit admissions from the defendant.

96. As Counsel alleged in paragraphs 59 - 61 above relating to the reliability of the Voice Stress Evaluation Test and the above referenced report of the National Academy of Sciences critical of the present state of forensic sciences, especially the lack of criteria for training and testing administrators of forensic testing and the lack of uniformity in the administration of these tests, Counsel respectfully requests this Court to order the District Attorney to produce for your Affirmant the following items in order to facilitate the pretrial proceedings in this matter:

(a) The manual used or relied upon by members of law enforcement who administered the Voice Stress Evaluation Test on June 9, 2009 at the Davis County Sheriff's Department;

(b) Any and all charts and graphs used or produced as a result of said test;

(c) A list of the questions members of law enforcement used during the test;

(d) A copy of the Truth Verification Release Form allegedly signed by the defendant;

(e) Any certificates issued to the administrator of the test to attest to his certification;

(f) A statement providing the dates the administrator was trained;

(g) The location and organization or agency that provided the training to the administrator;

(h) A statement indicating whether any other "Certified Voice Stress Administrator" was present or in attendance at the time and place where defendant was administered the test.

XVII. MOTION TO PRODUCE THE FICTITIOUS MEDICAL EXAMINER'S REPORT REFERRED TO IN THE CPL §710.30 NOTICE OF JUNE 9, 2009

97. As setforth in the CPL §710.30 notice for June 9, 2009 at the Davis County Sheriff's Department, the reporting officer states that Sgt. Wilbur "showed Joanie the autopsy report and a fictitious Medical Examiner's report."

98. Counsel contends that said fictitious report was part of an attempt to coerce a confession from the defendant.

99. In order to properly investigate the events that occurred at the Davis County Sheriff's Department on June 9, 2009 that led to the involuntary statements made by Joanie Jones to members of law enforcement and to fully discuss these events with her, Counsel requests this Court order that a true and accurate copy of the fictitious Medical Examiner's report be provided to the defendant.

XVIII. MOTION TO ALLOW COUNSEL TO STATE HIS OBJECTIONS FOR THE RECORD

100. Given the grievous nature of the charge contained in Indictment 2009-322 together with the facts and circumstances of this matter, the possible length of any sentence that may be imposed upon the defendant should the prosecution obtain a conviction to the charge contained in the said indictment, the number of witnesses that will be testifying for the prosecution and defense, and the length of time the trial of this matter may take, Counsel hereby requests this Court to require the District Attorney to state the specific grounds for each and every objection made at any hearing or trial of this matter and to allow your Affirmant the opportunity to state his specific objection or objections for the record. Your Affirmant further requests the Court to specify the grounds for sustaining objections by the District Attorney or Counsel.

101. Often in criminal trials and hearings, the People make objections to questions posed to witnesses by the defense without specifying the grounds for such objections and Courts frequently sustain these objections without identifying the ground for its ruling. Additionally, Counsel for the defendant in many criminal proceedings is not allowed sufficient time to state a specific objection for the record and the Court does not state its grounds for overruling the objection.

102. The Court of Appeals has repeatedly rejected issues on appeal because it was not preserved by a proper specific objection and therefore the court stated they were beyond their power to review. In *People v. Liccione, 50 N.Y.2d 850, 430 N.Y.S.2d 36, [1980]* the Court stated unequivocally:

> *"Whatever the merits of this contention, the issue is not preserved for review. For, although defendant specifically objected to the admissibility of the dying declaration qua dying declaration, and also specifically objected to the alleged failure of the prosecution to establish a prima facie case of conspiracy, no question was raised as to whether the assailant's statements were made in furtherance of the conspiracy. These objections in this instance preserved only the grounds specified… and thus the precise issue argued is beyond our power of review."*

103. The guiding principle regarding such objections was stated in *People ex rel. New York Central R. Co. v. Vincent, 68 N.Y.S. 2d 202, 205 (Ontario County Court, 1947)* where the Court stated that it is *"…well established that a party objecting to the admission of proffered evidence should state the specific grounds of his objections in order that the Court may properly rule, and that the opposing party, if the objection is sustained, may resort to some other proper form of proof."* (See also Fisch on New York Evidence, §20, p. 13 (2nd ed. 1977) which states *"The guiding principle of specificity is to furnish the proponent and the court with information as to the ground upon which the evidence should be excluded, thereby enabling the court to rule properly and the proponent to cure the defect or substitute other evidence."*

104. For these reasons and because of the adverse appellate consequences of having to challenge the trial court's decision to sustain a general objection, since it is an established principle of law in New York that the *"…overruling of an objection to an offer of evidence cannot be made the ground for error on appeal unless the objection was specific, i.e. the specific ground for objecting was stated*." *Fisch,*

supra, citing People v. Vidal, 26 N.Y.2d 249, 309 N.Y.S.2d 336, (1970), it is crucial to preserve a full and accurate record for appeal.

105. Therefore, Counsel respectfully requests this Court to require the District Attorney to state the specific grounds for each and every objection made at any hearing or trial of this matter, to allow your Affirmant the opportunity to state his specific objection or objections for the record, and requests that this Court specify the grounds for sustaining or overruling objections by the District Attorney or Counsel.

XIX. MOTION TO INSTRUCT THE JURY THAT THE USE OF CELL PHONES, TEXTING, TWITTERING AND TWEETING IS PROHIBITED DURING THE COURSE OF THE TRIAL INCLUDING JURY DELIBERATIONS

106. Counsel requests this Court to instruct the prospective jurors and jurors in this matter to refrain from the use of a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation, and not to obtain or disclose information about the case, or access the internet to discover their own information about the case while the case is pending, whether or not they are in the court or, in the alternative, to check such devices at the courthouse door.

107. Michigan instituted such a rule on September 1, 2009 and several states and the National Center for State Courts are attempting to draft such instructions to jurors due to a number of instances of jurors texting, twittering, tweeting, posting their activities in court on Facebook and Twitter, and attempting to Google information about the case they were hearing. (*See "Why Courts Need to Ban Jurors' Electronic Communications Devices," Anita Ramasastry, FindLaw, August 11, 2009 and "The Move to Silence Juror Twittering," Jessica Stephen, Wisconsin LJ, April 20, 2009).* Such abuses would compromise the integrity of this case and pose the additional threat of tainting the judicial process resulting in a possible mistrial and the waste of valuable time, effort and expense.

XX. MOTION TO RESERVE THE RIGHT TO SUBMIT FURTHER MOTIONS

108. It is respectfully requested that in addition to the relief sought herein, the Court grant such other and further relief as may be just and proper under all the circumstances of this case. The defendant respectfully reserves the right to make further and additional motions which may be required and advisable in light of the Court's rulings on the matters contained herein.

WHEREFORE, your affirmant respectfully seeks that this Court issue an order granting the relief requested in this Omnibus Motion, together with such other and further relief as this Court may deem just and proper.

DATED: Utica, New York
October 26, 2009

Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division