STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

v.

NOTICE OF OMNIBUS MOTION

[redacted]

[redacted]

YOUR HONOR:

Please take notice that at a term of Erie County Court, Part 7, at 9:30 a.m. on [redacted] or as soon thereafter as counsel can be heard, the defendant will move this Court for the following relief.

1. Inspection of the Grand Jury minutes.
2. An Order dismissing the First and Fifth counts of the indictment upon the ground that the evidence before the Grand Jury was not legally sufficient to establish the offenses charged or any lesser included offense.
3. An Order dismissing the Seventh count of the indictment upon the ground that it is duplicitous, and therefore defective.
4. An Order directing the prosecution to disclose all items and information related to the Grand Jury presentation, including the legal instructions and attendance and voting sheets.
5. An Order directing the prosecution to disclose all completed and pending investigations by the Buffalo Police Department (BPD) and the Erie County District Attorney's Office concerning the conduct by the officers involved in the pursuit, shooting, and apprehension of the defendant.
6. The issuance of an adverse inference instruction for every instance in which an officer failed to activate his or her body worn camera in violation of BPD policy.
7. Any other relief this Court deems proper.

Respectfully submitted,

[redacted]

DATED: November 21, 2022
Buffalo, NY

TO:

Hon. [redacted]
Erie County Court, Part 7
25 Delaware Ave.
Buffalo, NY 14202

[redacted], Esq.
Erie County District Attorney's Office
25 Delaware Ave.
Buffalo, NY 14202

STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

SUPPORTING AFFIRMATION

v. [redacted]

[redacted]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

[redacted]., an attorney admitted to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. Along with co-counsel [redacted]., I am counsel for [redacted], who is charged in this indictment with five counts of attempted murder in the first degree (Penal Law §§ 110.00, 125.27[1][a][i]), one count of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]), one count of reckless endangerment in the first degree (Penal Law § 120.25), and one count of unlawful fleeing a police officer in a motor vehicle in the third degree (Penal Law § 270.25). All charges arise from a traffic stop and police pursuit which occurred on the early evening of March 29, 2022.
2. I make this affirmation in support of my motion for the relief described below. This affirmation is made upon information and belief, the sources of which are my review of the indictment and supporting paperwork, the discovery provided by the prosecution, and the relevant legal authority.

The evidence before the Grand Jury was legally insufficient to establish the offenses charged in the First and Fifth counts of the indictment.

3. A court may dismiss the indictment, or any count thereof, upon the ground that "[t]he evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser

included offense" (CPL 210.20[1][b]). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL 70.10[1]).

4. The defendant moves for inspection of the Grand Jury minutes for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support all of the offenses charged in the indictment (CPL 210.30[2]).
5. "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime" (Penal Law § 110.00).
6. Upon inspection, it will be clear that the evidence was legally insufficient to establish the element of attempt for the First and Fifth counts of the indictment.

The First Count

7. Under the First count of the indictment, the defendant is charged with attempted murder in the first degree for attempting to cause the death of a police officer at [redacted] in the city of Buffalo.
8. The incident at [redacted] was referenced only once in the Grand Jury proceeding, during the testimony of PO [redacted].

   Q. Did anything of interest occur to you on [redacted]

   A. Yes. Around [redacted] is when I saw his hand go out the window and then I heard two shots and the smoke of a gun.

   Q. Okay. And it was coming from the vehicle directly in front of you?

   A. Yes.

   Q. It was the defendant's vehicle?

   A. Yes (15; numbers in parentheses refer to pages of the Grand Jury minutes).

9. As there was no evidence that the defendant was shooting at a police officer, the evidence before the Grand Jury did not establish **either** the intent to kill **or** that he engaged in conduct which tended to effect the commission of the crime.
10. The evidence of attempt under the First count was not just insufficient; it was nonexistent.
11. As the evidence before the Grand Jury did not establish every element of the offense charged or any lesser included offense, the First count cannot stand.

The Fifth Count

12. Under the Fifth count of the indictment, the defendant is charged with attempted murder in the first degree for attempting to cause the death of a police officer at [redacted] Avenue in the city of Buffalo, the location of the terminus of the pursuit.
13. The details of the incident at [redacted] were referenced twice in the Grand Jury proceeding, during the testimony of POs [redacted]
14. PO Johnson testified to his observations after the defendant's vehicle crashed.
    Q. What could you see once you were able to have the point of view into the front driver side window?
    A. You could see the defendant in the driver's seat still and then a round came from inside the car in my direction.
    Q. Could you describe what you, I guess, felt or heard or sensed that gave you the indication that he was shooting at you?
    A. Sound of gunfire and then something kicked up and hit me, rocks or debris, and it was from his round hitting the ground right in front of me (60-61).
15. PO [redacted] testified to his observations after the defendant's vehicle crashed.
    Q. And what did you observe at that moment?
    A. I heard gunshots. And to my left, which was the vehicle's driver's side, I saw dirt kick up on the ground near two lieutenant's and an officer's foot (66).

16. As there was no evidence that the defendant was shooting at a police officer, the evidence before the Grand Jury did not establish **either** defendant's intent to kill a police officer at East [redacted] **or** that he engaged in conduct which tended to effect the commission of the crime.
17. In fact, the testimony establishes that the defendant was shooting at the ground in front of officers, not at their bodies.
18. As the evidence before the Grand Jury did not establish every element of the offense charged or any lesser included offense, the Fifth count cannot stand.

The Seventh count of the indictment is duplicitous.

19. A court may dismiss the indictment, or any count thereof, on the ground that "[s]uch indictment or count is defective, within the meaning of CPL 210.25" (CPL 210.20[1][a]). An indictment or count thereof is defective, in relevant part, where "[i]t does not substantially conform to the requirements stated in article two hundred" (CPL 210.25[1]).
20. One of the provisions of article two hundred is the prohibition against duplicitous counts, under which "[e]ach count of an indictment may charge one offense only" (CPL 200.30[1]).
21. Under the Seventh count of the indictment, the defendant is charged with reckless endangerment in the first degree for "driving recklessly throughout the City of Buffalo and firing multiple times at Buffalo Police Officers in marked patrol vehicles."
22. This allegation could refer to any or all of the incidents underlying the Second, Third, and Fourth counts of the indictment (and the First, if the Court finds it legally sufficient).
23. "A duplicitous indictment may fail to give a defendant adequate notice and opportunity to defend; it may impair his ability to assert the protection against double jeopardy in a future case; and it may undermine the requirement of jury unanimity, for if jurors are considering separate crimes in a single count, some may find the defendant guilty of one, and some of the other" (*People v. Alonzo*, 16 NY3d 267, 269 [2011], Smith, J.).

24. Because more than one offense is encompassed by the Seventh Count, it is duplicitous, and it cannot stand.

The prosecution must disclose all items and information related to the Grand Jury presentation.

25. The prosecution has provided the Grand Jury minutes, including the exhibits that were entered into evidence. However, it has not provided either the legal instructions or the attendance and voting sheets, although these items exist and are in their possession.

These items are part of the prosecution's automatic discovery obligation.

26. As part of their automatic discovery obligation, the prosecution must disclose to the defendant "all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including ***but not limited to***" the categories of discovery that follow (CPL 245.20[1], emphasis added).
27. The discovery statute includes a presumption of openness under which "[t]here shall be a presumption in favor of disclosure when interpreting sections 245.10 and 245.25, and subdivision one of section 245.20, of this article" (CPL 245.20[7]).
28. There is no question that all items and information related to the Grand Jury presentation – the source of the indictment – are related to the subject matter of the case.
29. Through this motion, the defendant is notifying the prosecution that their Certificate of Compliance is deficient until these items are provided (CPL 245.50[4][b]).

In the alternative, the Court should issue a discovery order.

30. If the Court finds that these items are not subject to automatic discovery, it may order their disclosure under its discretionary discovery authority. A discovery order may be issued "upon

a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means" (CPL 245.30[3]).

31. The request is reasonable. The legal instructions are necessary to ensure that the Grand Jury was properly instructed on the law and that the charges voted by the Grand Jury are consistent with the indictment. The voting and attendance sheets are necessary to ensure that the requisite number of grand jurors heard all of the testimony and voted the indictment (CPL 210.35[2], [3]). There are no interests that will be adversely affected by the disclosure of these items.
32. The defendant is unable to obtain these items unless they are provided by the prosecution.

The prosecution should be directed to disclose all investigations by the Buffalo Police Department and the Erie County District Attorney's Office concerning the conduct by the officers involved in the pursuit, shooting, and apprehension of the defendant.

33. The officers in this case initiated a pursuit in violation of BPD policy, continued the high-speed chase after it had been called off, and opened fire on the streets of Buffalo and in a residential neighborhood.
34. In separate public statements, BPD Commissioner Joseph Gramaglia and Erie County District Attorney John Flynn confirmed the existence of internal and external investigations into the officers' conduct.
35. As part of their automatic discovery obligation, the prosecution must disclose "[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to (i) negate the defendant's guilt as to a charged defense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment" (CPL 245.20[1][k]).

36. This statutory requirement is consistent with the prosecution's constitutional obligation to disclose all favorable information to the defense (*Brady v. Maryland*, 373 US 83 [1963]).
37. Law enforcement disciplinary records are subject to automatic discovery (*People v. Cooper*, 71 Misc3d 559 [Co Ct, Erie County, 2021], Eagan, J.). All information related to the District Attorney's investigation are as well, as it has the potential to contain information of exculpatory and impeachment value.
38. Even if the BPD investigations are pending, the defendant is entitled to all information that has been generated thus far, as well as any further information as it becomes available.
39. Through this motion, the defendant is notifying the prosecution that their Certificate of Compliance is deficient until these items are provided (CPL 245.50[4][b]).

Should the case go to trial, the Court should issue an adverse inference for every failure to activate body worn camera in violation of BPD policy.

40. Under BPD policy, "officers who are issued BWCs [body worn cameras] shall activate their BWCs … when engaged in a pursuit, whether on foot or in a vehicle" (Memorandum of Agreement Between the City of Buffalo and the Buffalo Police Benevolent Association, Inc. Related to Body Worn Cameras, § I[B][1][f], https://www.bpdny.org/DocumentCenter/View/183/Body-Worn-Camera-Policy).
41. This policy lists seven underlying purposes, including "[c]apturing and maintaining records of crimes in progress for evidence in court" (*id.*, § I[A][2]).
42. All officers involved in the pursuit of the defendant were required to active their body worn cameras, but some did not. Among these officers is PO Trevor Sheehan, the only officer alleged to have been shot by the defendant, and his partner.
43. As a result, there is no recording of PO Sheehan's shooting.
44. It is important to remember that the defendant was originally charged – wrongfully – with the shooting of two officers who were hit by friendly fire.

45. In *People v. Durant*, the Court of Appeals declined to mandate an adverse inference instruction where the police failed to electronically record an interrogation. Under the facts of that case, the court could not conclude "that the police must have acted out of a specific desire to prevent the creation of an objective record of unfavorable facts, and the police choice is just as likely to stem from an innocent oversight or a legitimate adherence to a neutral departmental policy" (26 NY3d 341, 351 [2015]).
46. Here, by contrast, the officers violated BPD policy.
47. Should the case go to trial, the jury should be instructed that it may infer that all unrecorded events would have generated evidence favorable to the defendant.

Further motions may be necessary.

48. In compliance with the omnibus motion rule, very effort has been made to include all pre-trial motions in the same set of papers (CPL 255.20[2]). However, the defendant reserves the right to file further motions should they become necessary.

The defendant respectfully requests the relief described above, along with any other relief that the Court deems proper.

_____

[redacted]