

STATE OF NEW YORK  
COUNTY COURT : COUNTY OF ERIE

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PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

**NOTICE OF OMNIBUS MOTION**

File No: [REDACTED]

[REDACTED]  
Defendant.

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**PLEASE TAKE NOTICE**, that upon the annexed affirmation of attorneys [REDACTED] and [REDACTED] counsel for Defendant, [REDACTED] and all of the papers and proceedings heretofore had herein, a motion will be made in this Court On [REDACTED] for an Order granting the following relief:

1. Inspection of the Grand Jury Minutes and Dismissal of the Indictment.
2. Discovery and Inspection of all evidence in the custody of the prosecution, pursuant to NY CPL § 245.00.
3. A Wade Hearing
4. A Huntley Hearing
5. Delivery to the Defendant of all materials available or exculpatory to him under the authority of Brady v. Maryland, 373 U.S. 83 (1963).
6. Notice of the People's intent to use at trial any evidence of uncharged conduct by the Defendant, pursuant to C.P.L. §240.43, People v. Sandoval, 34 N.Y.2d 371, and People v. Ventimiglia, 52 N.Y.2d 350 (1981).
7. Lifting of Protective Order pursuant to the authority granted by NY CPL § 245.70.
8. Severance of Co-Defendants' cases pursuant to NY CPL § 200.40.

9. Renewal of defendant's motion to remove the matter to Family Court, the proper venue for the alleged offender in the interest of justice.
10. Reserving to Defendant the right to file any other motion as may be appropriate throughout the pendency of this case.
11. Granting such other and further relief as is just and proper.

**PLEASE TAKE FURTHER NOTICE**, that summary relief in favor of the Defendant is requested if the prosecution fails to submit answering papers that controvert the factual allegations that support these motions etc.

Dated: J 



TO: Erie County Court  
Attn: Hon. Kenneth F. Case  
25 Delaware Avenue  
Buffalo, NY 14202

CC: Erie County District Attorney's Office  
Attn: Assistant District Attorneys Nicholas Bussi and Danielle D'Abate  
25 Delaware Avenue  
Buffalo, NY 14202

STATE OF NEW YORK  
COUNTY COURT : COUNTY OF ERIE

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PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

**ATTORNEY AFFIRMATION  
IN SUPPORT OF OMNIBUS MOTION**

File No: [REDACTED]

[REDACTED]

Defendant.

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STATE OF NEW YORK  
COUNTY OF ERIE

[REDACTED] attorneys licensed in the State of New York,  
being duly sworn, affirm:

1. We are the attorneys for the accused herein. Through our own investigation and conversations with the Defendant herein, we are fully familiar with the facts and circumstances surrounding this case.
2. The sources of our information and belief are conversations with the accused, as well as with friends and relatives of the accused, a review of the court file, and of our own investigation.
3. The accused is charged with:
  - a. (1) count of Attempted Murder in the Second Degree [NY PL §§110.00, 125.25(1), 20.00], and
  - b. (1) count of Assault in the First Degree [NY PL §§120.10(1), 20.00].

\*This affidavit has been divided into sections appropriate to the relief requested:

## **INSPECTION OF GRAND JURY MINUTES & DISMISSAL OF INDICTMENT**

4. The charges against defendant [REDACTED] must be dismissed. Defendant was charged as an accomplice, the People must prove not only that the defendant shared the requisite mens rea for the underlying crimes but also that defendant, in furtherance of the crime, solicited, requested, commanded, importuned or intentionally aided the principal in the commission of the crime . . . People v. Davila, 124 A.D.3d 1233, 1234, 999 N.Y.S.2d 624 (2015).
5. The people failed to meet this burden. Even viewing the evidence before the grand jury in the light most favorable to the prosecution (People v. Contes, 60 N.Y.2d 620, 621, 454 N.E.2d 932 (1983)) there is no valid line of reasoning or permissible inferences that could lead a rational person to the conclusion that defendant possessed any mens rea beyond intent to cause injury which falls well short of intent to cause death or intent to seriously injure the victim People v. Davila, 124 A.D.3d 1233, 999 N.Y.S.2d 624 (2015).
6. Absent the requisite men's Rea for the charged offenses the indictment should be dismissed.
7. Defendant respectfully requests this Court to inspect the Grand Jury minutes and, upon such inspection, dismiss the Indictment on the grounds that the Grand Jury proceedings were defective within the meaning of §210.35 of the Criminal Procedure Law, in that the Grand Jury proceedings failed to conform to the requirements of Article 190 to such a degree that its integrity was impaired, and Defendant was prejudiced.
8. The circumstances of this case including necessitate that the Grand Jury be advised with respect to the defense of justification and self-defense. Defendant requested the grand

jury be instructed on justification and self-defense. See defendants attached 190.50 letter and email sent to ADA [REDACTED] at 9:57 PM.

9. Despite defendant specifically requesting the charge of justification in writing, the people presented the matter to the grand jury and completely ignored the defendants request. As a legal advisor the people were not permitted to outright disregard the defendant's request where a sufficient basis existed for the requesting the charge.
10. Failure to provide that instruction impaired the integrity of the grand jury proceeding (see CPL 210.35[5]; *People v. Grant*, 113 A.D.3d 875, 876, 978 N.Y.S.2d 905). *People v. Graham*, 148 A.D.3d 1517, 1519, 50 N.Y.S.3d 196, 199 (2017). This is fatal to the people's case.
11. The record must be viewed in the light most favorable to the defendant (cf. *People v. Padgett*, 60 N.Y.2d 142, 144–145, 468 N.Y.S.2d 854, 456 N.E.2d 795). *People v. Samuels*, 12 A.D.3d 695, 698, 785 N.Y.S.2d 485, 488 (2004).
12. See the attached email to the District Attorney's Office, The Court, Co-Counsel and counsel of co-defendant sent on [REDACTED] which was made part of the record by consent. The email and attachments and specifically demonstrated the basis for defendants request for justification/self-defense, asked the court to see if the charges were given and requested dismissal for the District Attorney's failure to do so.
13. §190.25(6) of the Criminal Procedure Law provides as follows:

The legal advisors of the Grand Jury are the Court of the District Attorney, and the Grand Jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the Court or the District Attorney, or both, must instruct the Grand Jury concerning the law with respect to its duties or any matter before it, and such instruction must be recorded in the minutes.

14. The District Attorney failed to instruct the Grand Jury on Justification. District Attorney's refusal to charge the Grand Jury on self-defense impaired the integrity of the Grand Jury.
15. the presentation to the grand jury was intentionally misleading as it omitted information favorable to the defendant. Specifically, the Police report of Judith Walker documents that she spoke with [REDACTED] mentioned "She did not see [REDACTED] with a weapon" and "she observed [REDACTED] and hit him". This information is Brady material and was never disclosed to the Grand Jury. Failure to give the Grand Jury this information resulted in impaired integrity of the entire proceeding. The indictment needs to be dismissed.
16. Certainly, instructions were necessary for the Grand Jury to properly consider the charges against Defendant. Consequently, an inspection of the Grand Jury minutes should be conducted, and defense counsel should be supplied with a copy of the instructions.
17. In the alternative, this Court should inspect the Grand Jury minutes in camera regarding any and all instruction given to the grand jurors by the District Attorney prior to their service and prior to their rendering a vote in Defendant's case for a true bill. Specifically, instructions regarding the following items should be given careful consideration:
  - a. The burden of proof pursuant to Criminal Procedure Law §§190.65 and 170.10;
  - b. The law relating to circumstantial evidence, People v. Leon Porte, Misc.2d (Sup. Ct., NY Co., Hon. L. Sandler)(10/15/76); People v. Frataccia, (Sup. Ct., Oswego Co., Murray, J., Indictment #76-31)(4/22/77);

- c. The meaning of the terms “legally sufficient evidence” and “reasonable cause to believe that a person has committed an offense” as those terms are defined by Criminal Procedure Law §70.10 *et seq*;
8. Disclosure of the instructions given to the Grand Jury will in no way prejudice the People’s case in that such disclosure does not involve revealing testimony of witnesses.
9. Authorities support the Defense’s need for this information and authorize a dismissal of the Indictment when inadequate instructions are offered to the Grand Jury.
10. It is requested that the Grand Jury minutes be inspected, in camera if necessary, for the purpose of determining their sufficiency.
11. Article 190 of the Criminal Procedure Law had codified for the most part the substantive and procedural aspects of Grand Jury proceedings. Because Grand Jury proceedings are in the main cloaked with a veil of secrecy, a defendant is only able to examine the legality of those proceedings by making specific inquiries as to the various areas of Grand Jury proceedings.
12. It is submitted that although under certain circumstances an Indictment is presumed to be uniform and valid on its face, this presumption does not exist unless certain predicate facts are established.
13. Thus, in the instant case before this presumption, as any presumption, can be established, certain facts must be disclosed by the prosecution. It is respectfully requested that the prosecution provide the following information:
  - a. State whether the People properly instructed the Grand Jury on the issue of Justification (self-defense);

- b. state whether the proceedings involving the case at any time were conducted before than sixteen grand jurors, or whether fewer than twelve grand jurors concurred in the directive issued by its foreperson;
- c. state, specifically, the names and addresses of all those persons who were inside the Grand Jury room, at any time, when evidence relating to Defendant's case was being presented, including, but not limited to the stenographer, the court attendants, the Cattaraugus County District Attorney, her assistants, or any persons other than the grand jurors themselves;
- d. state, specifically, the date on which the Grand Jury's investigation of Defendant, or any other person connected with this case, began and state the date(s) on which it was concluded;
- e. state whether there was any evidence accumulated in the investigation of this case which, in any way related to these matters, was not presented to the Grand Jury, and, if so, state the substance of that evidence;
- f. state the names and addresses of the witnesses who testified before the Grand Jury in this case, and identify all documentary evidence presented to the Grand Jury;
- g. state whether the District Attorney gave to the Grand Jury any directives regarding the admissibility of evidence or made any comments regarding the competency of the witnesses before the Grand Jury;
- h. state whether there were any off-the-record discussions in the presence of the Grand Jury which were not transcribed;



- i. state whether the proceedings before the Grand Jury were stenographically transcribed in total and, if not, state what portion or part thereof was not transcribed.
14. The indictment should be dismissed if unauthorized personnel were present before the Grand Jury or if any other impropriety occurred with reference to the Grand Jury; hence, Defendant moves for dismissal of the Indictment if any impropriety occurred and reserves the right to move for dismissal on specific grounds pending receipt of the requested information.
15. The information sought will not, in any way, prejudice the People's case nor will it jeopardize the proper function of the Grand Jury. Indeed, this material is clearly necessary for Defendant to properly prepare his case and ensure due process of law and uniformity of the criminal process.
16. Defendant respectfully reserves the rights to supplement these requests at the time motions are argued, if the facts at that time warrant further inquiry into the Grand Jury proceedings. *In Re Special Grand Jury*, 674 F.2d 778 (9th Cir. 1982).
17. Your deponent respectfully requests that the Indictment in this case be dismissed of the reasons stated above and for facial insufficiency.

#### **DISCOVERY AND INSPECTION**

18. Pursuant to Criminal Procedure Law §245.00, Defendant hereby demands discovery and inspection of all evidence in the custody of the prosecution, or known by the prosecution to exist, including, but not limited to the following:
  - a. any written, recorded, or oral statement of Defendant, and of co-Defendant to be tried jointly, made, other than in the course of the criminal transaction, to a public

servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him;

- b. any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of, a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial;
- c. any photograph or drawing relating to the criminal action or proceeding which was made or completed by a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial;
- d. any photograph, photocopy or other reproduction made by or at the direction of a police officer, peace officer or prosecutor of any property prior to its release pursuant to the provisions of the §450.10 of the New York State Penal Law, irrespective of whether the people intend to introduce at trial the property or the photograph, photocopy or other reproduction;
- e. any property obtained from Defendant, or a co-Defendant to be tried jointly, including but not limited to any tangible property belonging to Defendant that (a) was given to a prosecutor, police officer or peace officer by any third party; (b) has been seized by law enforcement officials from Defendant or any third party; or (c) any other property obtained from Defendant;

- f. anything required to be disclosed, prior to trial, to Defendant by the prosecutor, pursuant to the constitution of this state or of the United States and/or as required by Brady v. Maryland, 373 U.S. 83;
- g. the approximate date, time and place of the offense charged and of Defendant's arrest;
- h. any written report or document, or portion thereof, concerning a physical examination, a scientific test or experiment, including the most recent record of inspection, or calibration or repair of machines or instruments utilized to perform such scientific tests or experiments and the certification certificate, in any, held by the operator of the machine or instrument, which tests or examinations were made by or at the request or direction of a public servant engaged in law enforcement activity or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial;
- i. tape recordings, complaint logs and transcripts relating to any call to or from police or to "911" relating to any of the charges herein;
- j. all written statements of Defendant, whether signed or unsigned;
- k. the content of any oral statements of Defendant, whether inculpatory or exculpatory;
- l. any audio or video tapes made of Defendant by the police officials, including the name of the person who recorded such tapes; and
- m. a copy of any writing executed or audio or video tapes recorded by a police official or other interested party dealing with the incident under which Defendant stands charged, but not limited to suppression of physical evidence;

- n. all routine police reports made and filed in connection with the investigation of or which relate to the events charged herein and all original notes made by law enforcement personnel relating to the investigation thereof;
- o. any portion of any police department manual directive or policy statement governing police conduct of this investigation in any respect;
- p. names, shield numbers and assignments of all police officers or law enforcement personnel participating or assisting in the instant investigation;
- q. any property obtained from Defendant or from any premises in which Defendant has or had an interest or over which it is alleged Defendant exercised control, together with a description of inventory of such property and a statement of when, where, from whom and on what authority such was obtained;
- r. any other property as defined in Section 240 of the New York Penal Law.
- s. Any audio tapes containing the 911 calls and radio transmissions of all Police-to-Police radio transmissions concerning the stop and arrest of Defendant.
- t. Any warrants the police may have had at the time of arrest of Defendant.
- u. Any and all video and/or audio surveillance footage from the arresting officer's dash cam and footage from the Police Departments Booking Room.

#### **WADE HEARING**

- 22. The Defendant has received notice pursuant to CPL 710.30 and CPL 700.70 that the People intend to offer at trial evidence of testimony identifying the Defendant to law enforcement personnel.
- 23. Upon information and belief, and upon examination of the discovery previously provided, the out-of-Court identification of the eyewitness upon the grounds that

the police arranged identification procedure, People v. Dixon, 85 NY2d 218 (1995), employed in this case was unduly suggestive to the extent that it created the likelihood of an irreparable misidentification, CPL 710.60, US v. Wade, 388 U.S. 218.

24. Defendant also moves that the people produce the identifying witness at the Wade hearing for purposes of examination by the defendant.
25. Factors which increase the danger of misidentification in this case include: the violence of the crime; the brief period of time the which the eyewitness had to view the perpetrator; cross-racial misidentification issues; the possible sharing of information between witnesses assembled in a group and asked to identify the defendant; the focus of the police on Defendant as the only suspect at the time of the identification procedures; the repeated viewings of Defendant by the witnesses and the multiple identification procedures used; the stress experienced by the eyewitnesses at the time of the crime and at the time of identification; the delay between the crime and identification procedures; and the pressure, in general, on eyewitnesses to make a positive identification.
26. It is clear that when a defendant makes a motion for a Wade Hearing upon the ground of an improperly made previous identification of the defendant by a prospective witness, CPL 710.20(6), the court “must conduct a hearing and make findings of fact..” CPL 710.60. Further, a defendant’s failure to set forth sworn allegations of fact to support the motion made pursuant to CPL 710.20(6) does not permit the court to summarily deny the motion without a hearing, CPL 710.60(3)(b).

27. Although the Court of Appeals has held that a defendant does not possess an absolute right to call the identifying witness at the Wade Hearing, People v. Chipp, 75 NY2d 327 (1990), the Chipp Court made clear that the testimony of such witness “might become necessary if the hearing evidence raises substantial issues as to the constitutionality of the procedure,” and where the People’s evidence is “notably incomplete.” In either situation, reasoned Chipp, the resolution of these issues could not possibly be resolved without testimony from the identification witness. See, People v. Ocasio, 134 AD2d 293 (defendant should have been permitted to call identifying witness at Wade, where detective who conducted photo procedure could not state whether all witnesses followed his instruction not to discuss their identification of defendant with remaining witnesses – defendant not required to accept at face value police testimony). Accordingly, People v. Soklyansky, 147 AD2d 722 (court erred in not permitting witness to testify – detective had testified that he left two witnesses together for more than 20 minutes, in the presence of other detectives, before each identified defendant in lineup). See also, People v. Adams, 53 NY2d 241, 248.
28. In the instant case, only the identifying witness can confirm or deny whether they improperly observed Defendant in a photo viewing or if they improperly conversed with other potential identifying witnesses, or whether police made suggestive comments to the witness prior to the photo viewing. The testimony of the eyewitness will surely differ from that offered by the People’s witnesses, Cf., People v. Peterkin, 75 NY2d 261. Thus, Defendant moves this court to order the

People to produce the eyewitness or, in the alternative, provide Defendant with the information necessary to subpoena such witness.

29. In People v. Rodriquez, 79 NY2d 445 (1992), the Court reasoned that in some cases a Wade Hearing is not required whether the defendant and witness are “known” to each other and thus the witness is unlikely to be affected by police suggestiveness. However, the Court explained that the “known to each other” or “confirmatory” exception does not apply where the familiarity emanates from, as here, “a brief encounter” or the prior relationship is “fleeting or distant.” In short, the *Rodriquez* Court concluded that a hearing should have been granted at least to explore the People’s alleged “prior familiarity” claim in order to determine whether a Wade hearing was necessary. Accordingly, People v. Williamson, 79 NY2d 799, People v. Sydney, \_\_\_ AD2d \_\_\_, 600 NY2d 358 (3d Dept., 1993).
30. Thus, a pre-Wade Hearing must be held to explore and resolve whether the “confirmatory” or “known to each other” exception applies. In making this determination this court should consider “such factors as the number of times the witness viewed the defendant prior to the crime, the nature and duration of the encounter, the setting, the period of time over which the prior viewing occurred, the time that elapsed between the crime and the previous viewing, and whether the two had any conversations.” Rodriquez, 451 (People bear burden of demonstrating that the identification procedure was merely confirmatory).
31. Testimony at such a hearing will leave no doubt but that the identification by the witness was anything but confirmatory, and, accordingly, a full Wade Hearing must be held and that the alleged eyewitness must be present for examination.

32. Accordingly, defendant respectfully requests that the above-sought hearing(s) be held and that the witness's out-of-court identification be suppressed.

### **HUNTLEY HEARING**

33. The Defendant has received notice pursuant to NY CPL 710.30 that the People intend to offer at trial evidence of statements made by the defendant to law enforcement personnel.

34. Upon information and belief, and upon examination of the discovery previously provided, such statements were taken involuntarily or otherwise in violation of rights of the accused under the New York and United States Constitutions.

35. Due to the improper conduct on the part of law enforcement officials, the alleged statements were:

- a. Involuntarily made within the meaning of CPL 60.45
- b. In violation of the right against self-incrimination;
- c. In violation of the constitutional right to counsel;
- d. Taken without adequate "Miranda" Warnings;
- e. Taken in the absence of a knowing, voluntary, or intelligent waiver of rights prior to questioning.
- f. Defendant requests the statements in the 710.30 Notice be suppressed or a Huntley Hearing held to determine their admissibility.
- g. Such an inquiry elevated the encounter from a simple request for information to a Tier II "common-law inquiry." (People v. Hollman, 79 N.Y.2d 181).
- h. Such an inquiry must be supported by a "founded suspicion that criminal activity is afoot." (Id.).



i. The Hollman Court held:

“[When a] police officer’s questions become extended and accusatory and the officer’s inquiry focuses on the possible criminality of the person approached, this is not a simple request for information. Where the person approached from the content of the officer’s questions might reasonably believe that he or she is suspected of some wrongdoing, the officer is no longer seeking information.” (Id. at 191).

j. Thus, the nature of the questioning rendered the subsequent seizure

constitutionally impermissible and subject to suppression. (Wong Sun v. United States, 371 U.S. 471).

k. A search conducted without a valid search warrant is *per se* unreasonable unless exigent circumstances exist. *See generally* California v. Acevedo, 500 U.S. 565 (1982).

l. **Exigent circumstances are** said to exist whenever, though there is probable cause to search, urgent events make it impossible to obtain a warrant in sufficient time to preserve evidence or contraband threatened with removal or destruction. People v. Vaccaro, 39 N.Y.2d 468, 472, quoting Chapman v. United States, 365 U.S. 610, 615.

m. But, even when that holds true, the scope of conduct sanctioned is strictly limited by the necessities of the circumstances in which it arises. People v. Knapp, 52 N.Y.2d 689, 695-696; People v. Gonzalez, 39 N.Y.2d 122, 127.

n. In this instance, there was no probable cause to search, nor did the search fall under any other exceptions to the warrant requirement.

As such, an Order should be entered suppressing the evidence seized or, in the alternative, conducting a hearing pursuant to Mapp v. Ohio, *supra*.

### **BRADY MATERIAL**

34. Pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, Deponent requests that all relevant and material evidence or information, whether admissible at trial or not, whether regarding facts known or occurrences known, or the absence of such facts or occurrences, which are known to the prosecutor or which could become known upon diligent inquiry to either the prosecutor or to any persons under the prosecutor's direction or control which is in any way favorable to Defendant, whether by detracting from the prosecution's case or detracting from the credibility of any of the prosecution's witnesses, be disclosed:
- a. any statements, records or information indicating that any prospective witness has given contradictory or untrue information in the course of the investigation;
  - b. any information which may indicate that a prospective witness has given information deemed inconsistent or materially different from information received from other more reliable sources;
  - c. the names and addresses and/or statements of any persons who may have been interviewed by, or on behalf of, the prosecution or who are known to have been witnesses to the events which underlie the charges, who the prosecutor does not intent to call as witnesses;
  - d. any information to the effect that the present prosecution is based upon or derived from evidence acquired as a result of Governmental action violative of Constitutional standards.
  - e. Such requests encompasses any information which might affect this Court's decision on any suppression issue in a way that is favorable to Defendant;

f. any information and/or documentation which reflects any misidentification, whether it is corporeal, voice, photograph or otherwise, of Defendant, as participants in any of the alleged crimes.

35. Defendant also requests information which may be utilized for impeachment of prosecution witnesses, including the specific disclosure of the following which may be in the possession, custody or control of the prosecution or which, with due diligence, could become known to the prosecution:

- a. any records or information revealing prior convictions attributed to any witness to be called by the prosecution, including, but not limited to, relevant police records or “rap sheets”;
- b. any records, including police personnel records, or information revealing the prior misconduct or any bad, vicious or immoral acts on the part of any witness;
- c. any consideration, or promise of consideration, or any expectation of consideration with respect to any witness intended to be called by the prosecution or given to anyone whether such person has provided information in this matter, whether or not intended to be called by the prosecution.
- d. Such “consideration” is not limited to leniency, favorable treatment or assistance, with respect to any pending legal proceeding, but also includes any witness fees or any special provisions for protection or any other motive or bias on the part of any person in favor of the prosecution, or against the defense, or which may act as an inducement for information or testimony or to color such information or such testimony if provided;

- e. any threats, whether expressed or implied, whether direct or indirect, or any other measures which may be directed against any witness, including threats of criminal prosecution or investigation, or the potential of such prosecution or investigation or any probationary parole or deferred prosecution or custodial status of any witness over which the prosecution has real, apparent, or perceived influence;
  - f. any information as to any prospective prosecution witness, Governmental agent or informant relative to this case, having a history of mental or emotional disturbance;
  - g. the existence and identification of each occasion on which any witness and/or any Governmental agent or informant has testified or provided information before any Court, Grand Jury or other tribunal given in relation to Defendant, the investigation, or any of the facts of this case;
  - h. the existence and identification of each occasion on which any witness or any person who was or is an informant, accomplice, or co-conspirator has testified before any Court, Grand Jury, or other tribunal; and
36. The same records or information requests in the above paragraphs “a through h” above is requested with respect to each and every non-witness declarant whose statements may be offered into evidence

**SANDOVAL/VENTIMIGLIA**

37. Pursuant to People v. Sandoval, 34 N.Y.2d 371 (1974), it is respectfully requested that this Court make an advance ruling that the prosecutor may not use prior convictions or proof of the prior commission of specific criminal, vicious, or immoral acts for the purpose of impeaching Defendant’s credibility.

38. As the New York Court of Appeals has held, cross-examination with respect to crimes or conduct similar to that for which Defendant is presently charged may be highly prejudicial in view of the risk, despite clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than reserved solely to the issue of credibility. (See People v. Sandoval, *supra*, cited in 2 Waxner, New York Criminal Practice, [Matthew Bender] Par. 14.16[16]).
39. In the event that this Court feels that an evidentiary hearing is necessary, then it is respectfully requested that such a hearing be held and that Defendant be given the opportunity to give relevant and material proof that the prejudicial purposes outweighs the probative worth of such evidence on the issue of credibility.
40. It is respectfully requested that this Court direct the prosecutor to divulge any alleged criminal, vicious, or immoral acts with which he proposes to use to impeach Defendant so that a ruling might be made by this Court with regard to those acts. (People v. Ventimiglia, 52 N.Y.2d 350).
41. In addition, it is respectfully requested that this Court direct the prosecution to divulge any uncharged criminal, vicious, or immoral acts which it plans to use during its direct case or for any other reason at trial. (People v. Ventimiglia, *supra*).

**PROTECTIVE ORDER HEARING**

42. Defense requests The Court modify the protective order previously granted allowing for sharing of material with defendant, a 16-year-old non-native individual in order to adequately prepare a defense.
43. In the alternative, defense now requests a hearing with respect to the protective orders issued in the case pursuant to CPL 245.70(3).
44. The piecemeal dissemination of over 100 Gigabits of discovery with potentially protected material sprinkled throughout creates a landmine with respect to navigating discovery.
45. There is no need for a protective order in the matter at hand. It is an abuse of discretion by the prosecution and is interfering with the ability to adequately represent the defendant.
46. Should the court hold that a protective order is necessary, Defense requests all protected material be turned over at one time in a specifically designated folder or jacket labeled “protected” in such a manner that separates it from non-protected discovery.

#### **SEVERANCE**

47. The prosecution has asserted that both defendants were acting as part of a common plan yet it is likely that defendant [REDACTED] will disclaim any participation, knowledge or cooperation with the other codefendant and therefore severance must be granted. *People v. Figueroa*, 193 A.D.2d 452, 597 N.Y.S.2d 685 (1993).

48. Defendant [REDACTED] ability to call the co-defendant as a witness is precluded by codefendants 5<sup>th</sup> amendment rights and therefore severance must be granted. *People v. Joseph*, 273 A.D.2d 61, 709 N.Y.S.2d 535 (2000)
49. Defendants are Joined improperly for multiple charges. It is clear there is substantially more evidence of one incident with respect to Defendant [REDACTED] [REDACTED] compared to Defendant [REDACTED] where outstanding actors are yet to be apprehended or arrested. Because of this there is substantial likelihood that the jury will be unable to consider separately the evidence as it relates to each incident and Severance must be granted. *People v. Benshitrit*, 185 A.D.3d 1046, 1047, 126 N.Y.S.3d 194, 196, leave to appeal denied, 36 N.Y.3d 969, 162 N.E.3d 711 (2020).
50. Defendant moves for severance in the matter at hand. Where there is a significant possibility that codefendants will prejudice each other through their use of impeachment a separate trial should be granted. *People v. McGee*, 68 N.Y.2d 328, 501 N.E.2d 576 (1986)
51. Severance should be granted where a significant possibility exists that each defense will prejudice the other. If good cause is shown why the joint trial will prejudice substantial rights of the codefendants, failure to sever may amount to an abuse of discretion. *People v. McGee*, 68 N.Y.2d 328, 333, 501 N.E.2d 576 (1986)
52. Should Defendant testify, it is possible Defendant will be prejudiced by the conduct of codefendant's counsel in aggressively cross-examining defendant, which would effectively make codefendant's counsel a second prosecutor (see,

People v. Cardwell, 78 N.Y.2d 996, 575 N.Y.S.2d 267, 580 N.E.2d 753). People v. McGriff, 219 A.D.2d 829, 829, 631 N.Y.S.2d 969, 970 (1995)

### **REMOVAL TO FAMILY COURT IN THE INTEREST OF JUSTICE**

53. In determining whether removal to family court is appropriate, the court relied erroneously on the grand jury minutes and failed to give an hearing with respect to removal. This is plain error as the grand jury minutes rely on accomplice liability and he **People did not prove, by a preponderance of the evidence, that defendant caused the injuries sustained by the victim** People v. J.H., 66 Misc.3d 779, 119 N.Y.S.3d 403 (N.Y. Co. Ct. 2020).
54. People on their own admission cannot state that defendant [REDACTED] caused any stab wounds to the victim. CPL 722.23 (2) (c) (i) is intended to disqualify an adolescent offender's case from removal to Family Court when he or she directly “caused significant physical injury” to a nonparticipant in the offense. **There is no basis in the statutory language to expand the scope of disqualification to include individuals who did not directly cause significant injury.**
55. There is no basis in law or fact for the court to rely on accomplice liability vis-à-vis the grand jury minutes when determining removal of the adolescent offender.
56. Notwithstanding the severity of the injuries sustained by the victim, that the People have failed to satisfy their burden in proving that this AO “caused” the victim's injuries.



57. As in *People v. J.H. Supra*, The Court should not be misled by the People's argument that the court must consider "accomplice liability" when determining whether one of the three statutory factors is present for the purposes of the removal hearing. *People v. J.H.*, 66 Misc. 3d 779, 782, 119 N.Y.S.3d 403 (N.Y. Co. Ct. 2020).

#### **ADDITIONAL MOTIONS**

58. No previous application for the relief sought herein has been made.
59. Based on the nature of the relief afforded this Defendant in connection with the motion herein set forth, Defendant respectfully reserves the right to make further and additional motions and arguments which may be required in light of the Court's rulings on the motions herein made.
60. Summary relief in favor of the Defendant is requested if the prosecution fails to submit answering papers controverting the factual allegations supporting these motions.
61. It is respectfully requested that in addition to the relief sought herein the Court grant such other and further relief as it may deem to be just and equitable under the circumstances.

#### **OTHER RELIEF**

62. Granting such other and further relief as this Court may deem just and proper.

**W H E R E F O R E**, Defendant respectfully prays for an Order granting the relief requested herein in addition to such other and further relief this Court deems to be just and proper under the circumstances.

Affirmed this July 29, 2022.



TO: Erie County Court  
Attn: Hon. Kenneth F. Case  
25 Delaware Avenue  
Buffalo, NY 14202

CC: Erie County District Attorney's Office  
Attn: Assistant District Attorneys Nicholas Bussi and Danielle D'Abate  
25 Delaware Avenue  
Buffalo, NY 14202

[REDACTED]

Mr. [REDACTED]  
Erie County District Attorney's Office  
25 Delaware Avenue  
Buffalo, New York 14202  
VIA EMAIL: [REDACTED]

RE: People v. [REDACTED]

Dear Mr. [REDACTED]

Seth Seegart and I have been assigned to represent Mr. [REDACTED] in Erie County [REDACTED] on his charges of Attempted Murder and Assault in the First Degree.

On [REDACTED] at approximately [REDACTED] we received an email notifying us of Grand Jury Action for [REDACTED]. This leaves us less than one business day to gain access to our client who is housed in [REDACTED] Center. Protocols at [REDACTED] necessitate that attorney's schedule appointments in advance to see their clients. Given this restriction we cannot adequately advise our client on such short notice and must request additional time before the matter is presented to the grand jury. This is especially important when considering the seriousness of the allegations Mr. [REDACTED] is facing and his lack of any criminal record.

Pleas also be advised that pursuant to People v. Samuels, 12 A.D.3d 695, 696, 785 N.Y.S.2d 485, 486 (2004) We are formally requesting that in the event you present the matter to the grand jury that you also instruct the grand jury on the defense of justification. District Attorney, John Flynn has acknowledged in at least 2 separate press conferences that the facts and circumstances surrounding the allegations include 2 separate groups consisting of anywhere between [REDACTED]. Certainly this information viewed in a light most favorable to Mr. [REDACTED] supports a justification defense and therefore the Grand Jury needs to be so advised.

Very truly yours,

[REDACTED]

From: [REDACTED] <[REDACTED]>  
Subject: [REDACTED] 0.50 time request  
Date: [REDACTED]  
To: [REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

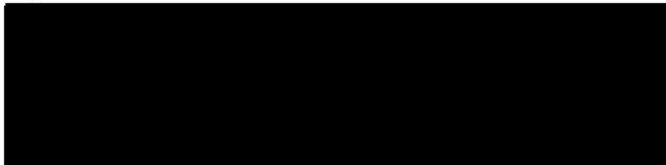
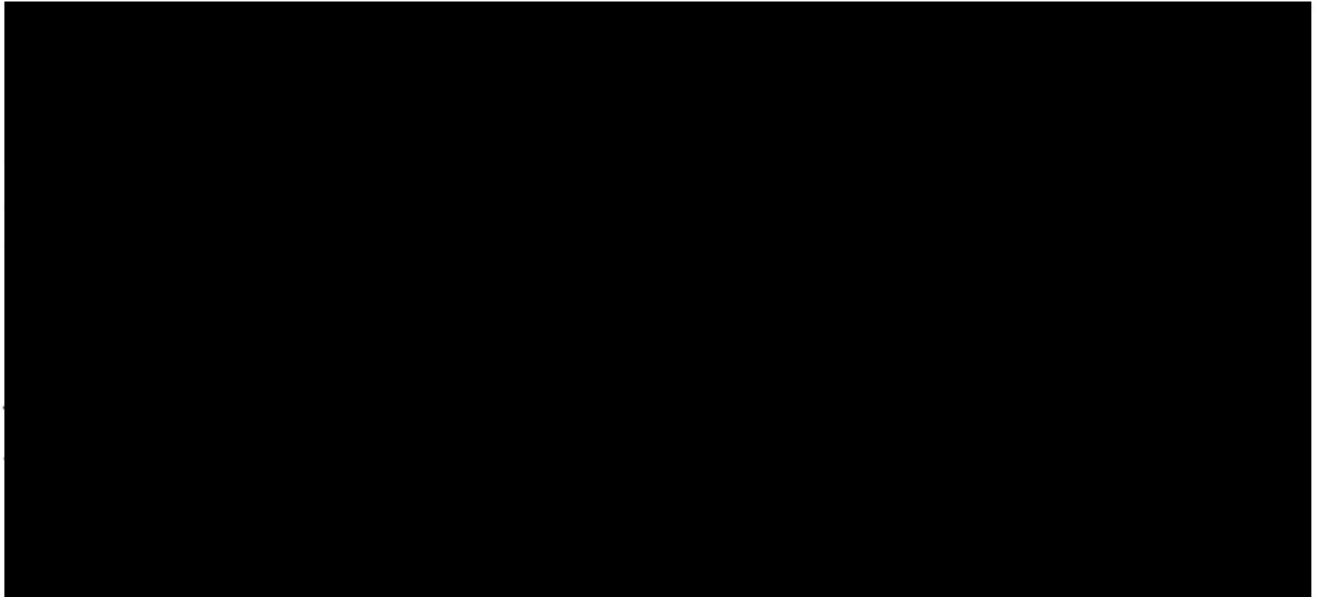
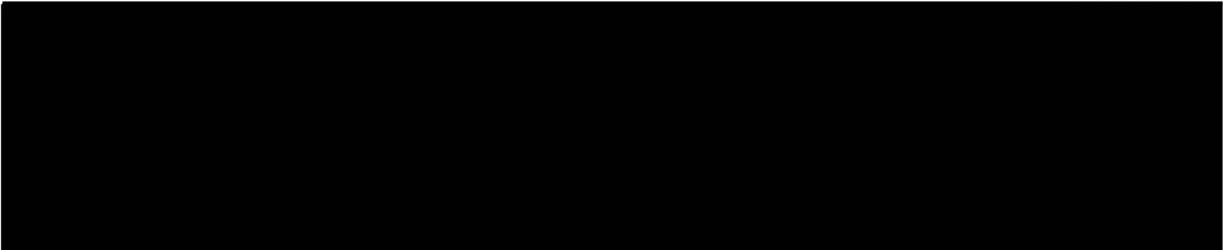
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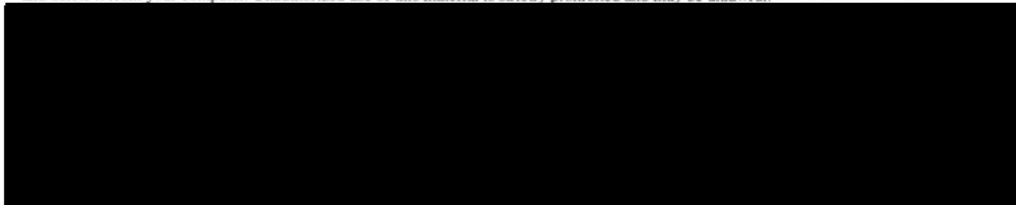
[REDACTED]

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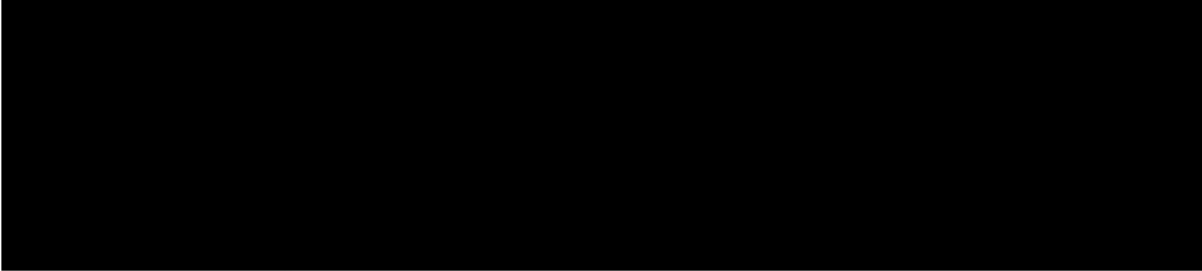



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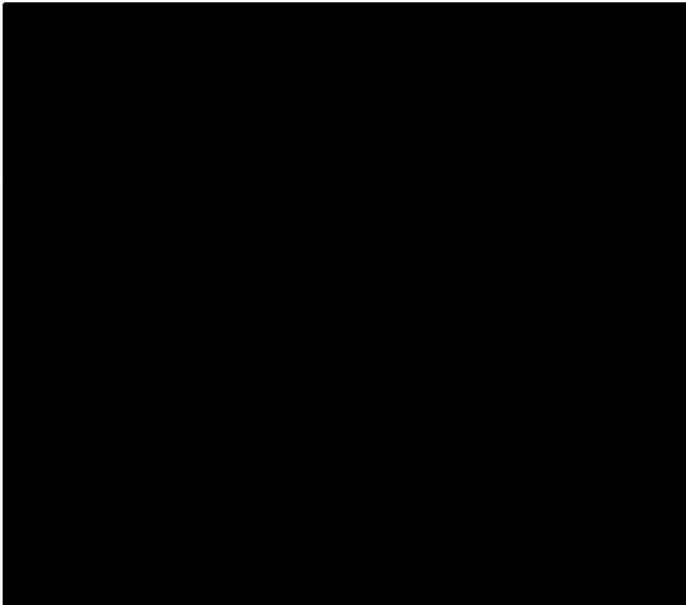
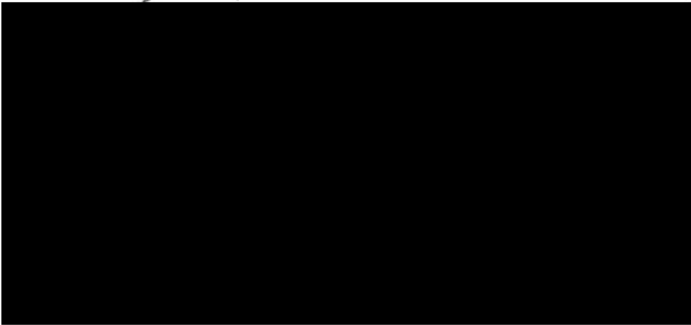
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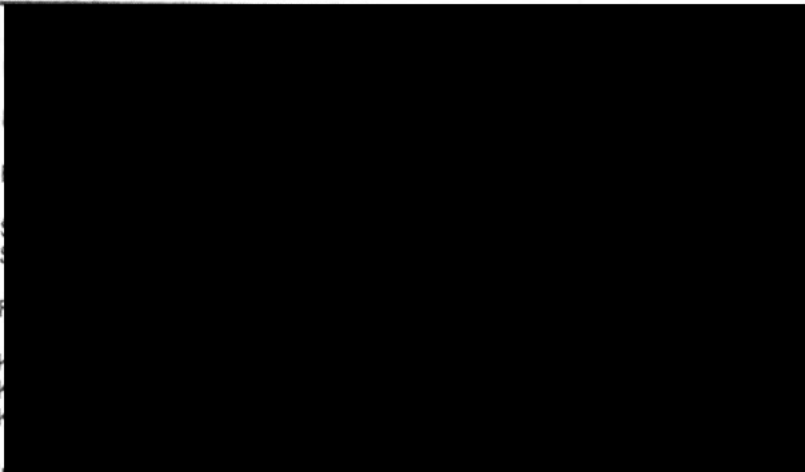
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