STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

v.

NOTICE OF MOTION FOR LEAVE TO REARGUE

[redacted],

[redacted]

Defendant.

Please take notice that the defendant, [redacted], through his attorney, [redacted], ESQ., and based on the attached affirmation, moves this Court, at a date and time to be set by the Court, for leave to reargue, pursuant to CPLR 2221(d)(2), this Court's [redacted] order denying the defendant's motion to dismiss the indictment.

Respectfully submitted,

[redacted]

June 16, 2022

TO: Hon. [redacted]
ERIE COUNTY COURT

CC: ERIE COUNTY DISTRICT ATTORNEY
25 Delaware Avenue
Buffalo, New York 14202
ATTN: BETHANY SOLEK, ESQ.

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

_____

THE PEOPLE OF THE STATE OF NEW YORK

v.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO REARGUE

[redacted]

[redacted]

Defendant.

_____

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

[redacted] affirms the following under penalty of perjury:

1. I am an attorney at law duly licensed to practice in the State of New York with an office located at [redacted] Buffalo, New York. I represent the defendant, [redacted], who is charged by [redacted] with one count of Feloniously Driving While Intoxicated, in violation of Vehicle and Traffic Law §1192(2), 1193(1)(c)(i), one count of Feloniously Driving While Intoxicated, in violation of Vehicle and Traffic Law §1192(3) 1193(1)(c)(i), and one count of Failure to stay within lane of Road, in violation of Vehicle and Traffic Law §1128(a).

2. This affirmation is based upon your deponent's review of the charging papers and supporting documents; my own investigation into the pertinent issues; discussions with the defendant; the peoples previously submitted moving papers including the exhibits attached thereto; defendants previously submitting moving papers and the exhibits attached thereto; and discovery turned over so far.

3. I make this affidavit in support of the defendant's motion for leave to reargue, pursuant to CPLR 2221(d)(2), this Court's [redacted] order denying the defendant's motion to dismiss the indictment.

4. The defendant was arrested on [redacted] (Arrest [redacted]) in the Town of [redacted] on Felony DWI charges.

5. **On [redacted], the criminal action in this case (arrest number 2021009734) was commenced by the filing of a felony complaint charging the defendant with Feloniously Driving While Intoxicated, in violation of Vehicle and Traffic Law §1192(2)**

6. It is the general rule that the criminal action is deemed to commence with the filing of **the *very first* accusatory instrument** (*People v Stiles*, 70 NY2d 765 [1987]; *People v Sinistaj*, 67 NY2d 236 [1986]; *People v Brown*, 23 AD3d 703 [3d Dept 2005]; *People v Dearstyne*, 215 AD2d 864 [3d Dept 1995]; *see* CPL 1.20[17] [defining commencement of the criminal action as the filing of the first accusatory]).

7. Appearance Tickets were also issued on [redacted] **for Misdemeanor and violation charges** to wit: misdemeanor DWI charges and Vehicle and traffic infractions. The appearance tickets advised the defendant to return to [redacted] town court on June 17, 2021, at 6 PM. **No felony charges were included in the appearance tickets.**

8. **In the instant case, because the criminal action commenced with the filing of the felony complaint on [redacted], the People were required to announce their readiness for trial by [redacted]. McKinney's CPL §30.30(1)(a).**

9. It is acknowledged by the court and conceded by the People that the first valid declaration of readiness was [redacted], after the defendant was arraigned on a superseding indictment and the people filed their certificate of compliance. (See April 19, 2022 Decision).

10. When the highest-level offense charged is a felony, the prosecution must establish its readiness within six months of the commencement of the criminal action (see e.g. People v Cox, 161 AD3d 1100, 1100 [2d Dept 2018])

11. [redacted] is well beyond the [redacted] date the people were required to declare ready by. The matter must be dismissed as a matter of law.

12. In the Court's [redacted], decision, the Court failed to address the arrest and felony complainant which were filed upon the defendant's arrest. The court's decision only addresses appearance tickets which **do not contain any felony charges they only contain misdemeanor and violation level offenses.**

13. Relying only on the appearance tickets the court based its determination for the commencement of the action with respect to the **felony** charges on the appearance tickets **which did not include felony charges.**

14. Under this analysis since the appearance tickets only address misdemeanors, the people needed to declare ready within 90 days, which they did not do.

15. The court held that the 123 days between [redacted] and [redacted] are chargeable to the people.

16. Pursuant to CPL §30.30(1)(b), a motion made pursuant to paragraph (e) of subdivision 170.30 must be granted where the People are not ready for trial within ninety (90) days of the commencement of a criminal action wherein the defendant is accused of an unclassified misdemeanor. McKinney's CPL §30.30(1)(b).

17. A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]).

18. The Court's omission of the felony complaints filed on [redacted], (See peoples exhibits in their responding affidavit) is a sufficient basis for leave to reargue.

19. The Court errored in applying the felony 30.30 time period to misdemeanor charges that did not include a felony.

20. Felony charges were commenced separately and prior to the misdemeanor appearance tickets by way of Felony Complaints filed on [redacted] which commenced the action for the felony charges. (see peoples response papers).

21. The Court's ruling was in error. With respect to the felony charges, the action was commenced with the filing of the felony complaints on [redacted]. The appearance tickets are irrelevant as they do not contain any felony charges. The felony complaints cannot be overlooked or ignored as to do so would only leave misdemeanor and violation level charges.

22. Even if the Court were to base the commencement of the action for the felony charges on the misdemeanor appearance tickets (which would be erroneous) the matter must still be dismissed as the court's application of *Mendoza* was incorrect.

23. With respect to the ruling by the Court that the defendant's June 17 2021, court appearance was not meaningful, it is a misapprehension of CPL 30.30(7)(b), as interpreted by *Mendoza*. It is necessary to distinguish between the present case and *Mendoza*. In *Mendoza* the "The record reflects that he did not appear at 9:00 A.M. as directed, but rather after the lunch hour, and that he left after a short time without presenting himself before the Court for arraignment. The record also reflects that the presiding Judge acknowledged his lack of appearance and was inclined to adjourn the matter to the "W" part, a part designed for those who had not appeared but were spared the issuance of a warrant" (72 Misc3d 1223[A] [NY City Crim Ct 2021]). So in Mendoza the defendant did not do what he was supposed to do or what he was ordered to do by the court.

    In [redacted] case, [redacted] appeared at the court on the date and time he was directded to as indicated on his appearance ticket. He could not get before the court because the court closed down, **without proper authorization**. [redacted] town court unfortunately is not entitled to suspend the rights of New York Citizens as the Governor did with the executive order and 30.30 suspension (which expired October 4, 2020). Failure on the part of [redacted] Town Court to hold court on a regularly scheduled date without attempting to address matters scheduled for that day is nothing like what happened in *Mendoza*. It is abundantly clear that [redacted] is in no way responsible for the failure of the court to arraign him. [redacted] showed up at the right time and place and was turned away.

24. Note that the criminal action does not commence upon *arraignment*, only when the defendant first *appears in a local criminal court in response to the ticket*.

25. The court ruled [redacted] appearance at [redacted] Town Court was not meaningful. This is not in the spirit of the law.

26. [redacted] appearance was entirely meaningful. He appeared as directed to avoid a bench warrant and to address the **misdemeanor** charges he was arrested on. His appearance was meaningful, deliberate, and purposeful unlike *Mendoza* where the defendant did not appear as directed, was cavalier and did not attempt to make an appearance on the record.

27. IF the Court uses the Misdemeanor and violation appearance tickets for the basis of the commencement of the action (which it should not) then the court must charge the people with the time form [redacted] when the defendant first appeared and commenced the action through [redacted].

28. The action actually commenced on [redacted] when the defendant was arrested and felony complaints were filed.

29. The time from [redacted] through [redacted] is chargeable to the peoples and the matter must be dismissed as a matter of law **McKinney's CPL §30.30(1)(a).**

WHEREFORE, the defendant respectfully requests that the Court grant motion for leave to reargue and issue an order granting the motion to dismiss.

Dated: [redacted]
Buffalo, New York

[redacted]