## STATE OF NEW YORK COUNTY COURT: COUNTY OF ERIE

## THE PEOPLE OF THE STATE OF NEW YORK

v.

MEMORANDUM OF LAW

Defendant

## **Statement of Facts**

On August 20, 2020, a photo array procedure was performed by Erie County District Attorney's Office Investigator Salvatore Valvo at the request of Detective Timothy Rooney of the Buffalo Police Department.

In his investigation of the present matter, Detective Rooney developed a witness "Witness A" and decided to administer a photo array. He enlisted the help of Investigator Valvo to administer the photo array procedure with Witness A.

Detective Rooney prepared the photo array and then handed it to Investigator Valvo to perform the procedure in a "double blind" manner. Detective Rooney used WEB RICI to formulate the array and generate the images. Investigator Valvo then administered the photo array with Witness A.

## **Argument**

The photo array form has multiple lists of questions that have boxes next to them. It has instructions for the administrator as to what questions to ask and when to ask them.

Investigator Valvo testified that he went through all of the questions on the form (Transcript ["T"] p 10 at line 13). While being asked about the questions on the form both front and back, he testified that it is his practice to check <u>all</u> of the boxes <u>as</u> he went along. (T p 10 at line 14). He then testified that it was correct that he "go(es) one by one and check(s) the boxes <u>as</u> (he) asks the questions. (T p 11 at line 3).

In sum and substance, all of the boxes were not checked. Investigator Valvo claimed the checkmark issue was a "clerical error" (T p 11 at line 14), but this begs the question as to whether or not these questions were ever *actually asked*.

Shortly after this testimony, Investigator Valvo completely changes his position and testifies that he has a different procedure for the different parts of the photo array form:

Q: It seems as though you have a different procedure you follow on each side of this?

A: As far as checkmarks go, maybe. But as far as asking the questions, no. I always ask the questions. (T p 12 lines 9-12).

Contrast that with his earlier testimony:

- Q: Is it your practice to check all of the boxes as you go along?
- A: It is. (T p 10 lines 14-16).

These snippets of confusing testimony are directly contradictory with each other and bring to question the credibility of this witness' testimony.

The Erie County District Attorney's office has video and audio recording capabilities (T p 23 at line 4). They did not engage these for this matter (else we would have been provided them in discovery). We acknowledge there is no requirement for these procedures to be video recorded, but given the contradictory testimony of the Investigator who performed this procedure, it would have been clarifying.

Without video, capabilities for which were available, the Prosecutors have failed to meet their burden of going forward with *credible* evidence (People v Berrios, 28 N.Y.2D 361, 369 (1971); People v. Burton, 130 A.D.2d 675, 676 (2d Dep't 1987); People v. Quinones, 61 A.D.2d 765, 766 (1<sup>st</sup> Dep't 1978); *see* People v. Rumph, 199 A.D.2d 434, 435 (2<sup>nd</sup> Dep't 1993); People v. Martinez, 71 A.D.2d 905, 906 (2d Dep't 1979) (*Confusing and self contradictory evidence did not meet the prosecution's burden*).

The Prosecutors failed to establish the legality of this photo array procedure and it must be suppressed.

DATED: Buffalo, New York March 14, 2023 Yours etc.,



TO: Hon. New York State County Court

Buffalo, New York 14202

Assistant District Attorney Erie County District Attorney's Office 25 Delaware Avenue Buffalo, New York 14202