STATE OF NEW YORK
ORLEANS COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF OMNIBUS MOTION
Indictment Nos. [redacted]

[redacted]

YOUR HONOR:

Please take notice that at a term of Orleans County Court, held on May [redacted] or as soon thereafter as counsel can be heard, the defendant will move for the following relief.

1. Inspection of the Grand Jury minutes.
2. An Order dismissing Count Four of Indictment No. [redacted] on the ground that the evidence before the Grand Jury was legally insufficient to establish the offense charged.
3. An Order directing the special prosecutor to disclose all items and information related to the Grand Jury presentation, including the legal instructions and attendance and voting sheets, on both cases.
4. A finding that the special prosecutor is not in compliance with his discovery obligations, and not ready for trial, until he discloses the disciplinary records of all of their law enforcement witnesses.
5. An order dismissing Indictment No. [redacted] on the ground that the defendant was denied his right to a speedy trial.
6. Leave to file further motions, should they become necessary.
7. Any further relief this Court deems proper.

[redacted]

Respectfully yours,

[redacted]

TO:

Hon. Sanford Church

Anthony M. Bruce, Esq.
Orleans County Special Prosecutor
39 Ellicott St.
Batavia, New York 14020

STATE OF NEW YORK
ORLEANS COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

SUPPORTING AFFIRMATION
Indictment Nos. [redacted]

[redacted]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
TOWN OF HAMBURG)

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

1. I am counsel to Mr. [redacted] Under Indictment No. [redacted] he is charged with trespass (Penal Law § 140.05) and tampering with a witness in the fourth degree (Penal Law § 215.10[a]). Under Indictment No. [redacted] he is charged with trespass (Penal Law § 140.05), harassment in the second degree (Penal Law § 240.26[1]), criminal mischief in the second degree (Penal Law § 145.10), making a terroristic threat (Penal Law § 490.20[1]), and making a threat of mass harm (Penal Law § 240.78[1]).
2. I make this affirmation in support of my motion for the relief described below. Unless otherwise stated, it is made upon information and belief, the source of which is my review of the indictment and discovery provided by the special prosecutor.

Count Four of Indictment No. [redacted] must be dismissed.

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 both sets of Grand Jury minutes for the purpose of determining whether the evidence was legally sufficient to support all of the offenses charged in the indictments (CPL 210.30[2]).
5. Upon review, it is clear that Count Four of Indictment No. [redacted], which charges the offense of making a terroristic threat, was not supported by legally sufficient evidence.
6. "A person is guilty of making a terroristic threat when with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense" (Penal Law § 490.20[1]).
7. The evidence before the Grand Jury established that Mr. [redacted] made threats to members of law enforcement. But the threats were not transactional in nature.
8. As the Third Department noted, "the Legislature enacted Penal Law article 490 in the wake of the attacks of September 11, 2001 specifically to combat the evils of terrorism, and ... the statute must be applied only in a manner consistent with the unique meaning of terrorism by requiring proof of conduct aimed at influencing, as relevant here, government action" (*People v. Kaplan*, 168 AD3d 1229, 1230 [1st Dept. 2019]).
9. In *Kaplan*, the conviction was reversed because the threat to "come back and shoot the place down" contained no statements relating to policy or demanding that any action take place (*id.*, at 1230-31).
10. Mr. [redacted] alleged conduct is analogous to the conduct of the defendant in *Kaplan*. There was no evidence that he intended to commit murder if his demands were not met.

11. Accordingly, Count Four should be dismissed.

The defendant is entitled to all items and information related to the Grand Jury presentation.

12. The special prosecutor has provided the Grand Jury minutes, but not the legal instructions or the attendance and voting sheets, although these items exist and are in the possession of the prosecution.

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

13. 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).
14. "This mandate virtually constitutes open file discovery, or at least makes open file discovery the far better course of action to assure compliance" (*People v. Cartagena*, 76 Misc3d 1214[A] [Crim Ct, Bronx County 2022], Licitra, J.).
15. 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]).
16. 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.
17. Through this motion, the defendant is notifying the special prosecutor that his 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.

18. 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]).
19. 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.
20. The defendant is unable to obtain these items unless they are provided by the prosecution.

The defendant is entitled to all disciplinary records of the prosecution's law enforcement witnesses.

21. The special prosecutor has not provided the disciplinary records for any of the law enforcement witnesses, so-called "50-a material," even though they are subject to his automatic discovery obligations (CPL 245.20[1][k][iv]; *People v. Cooper*, 71 Misc3d 559, 568 [Co Ct, Erie County 2021], Eagan, J.). Until he does, he is not in compliance with his discovery obligations and cannot make a valid statement of readiness (*id.*, at 569).
22. Through this motion, the defendant is notifying the special prosecutor that his Certificate of Compliance is deficient until these items are provided (CPL 245.50[4][b]).

Under Indictment No. [redacted] the defendant has been denied his right to a speedy trial.

23. An indictment is subject to dismissal if the defendant has been denied his right to a speedy trial (CPL 210.20[1][g]).
24. Where, as here, the highest charge is a felony (with exceptions not relevant here), the prosecution had six months from the commencement of the criminal action in which to be ready for trial (CPL 30.30[1][a]). A statement of readiness is not valid unless accompanied or preceded by a certificate of compliance with the prosecution's discovery obligations (CPL 30.30[5]).
25. The criminal action commenced with the filing of the felony complaint on [redacted].
26. The prosecution did not make a valid statement of readiness for trial until April [redacted] more than four months after the expiration of the speedy trial period.
27. Accordingly, the indictment must be dismissed.

28. Although Mr. [redacted] has made every effort to include all pre-trial motions in the same set of papers, he reserves the right to file further motions if they become necessary.

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[redacted]