STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

NOTICE OF MOTION TO DISMISS THE INDICTMENT

-vs-

Indictment No. [redacted]

[redacted],

Defendant.

PLEASE TAKE NOTICE, that upon the annexed affirmation of [redacted] upon all of the attached and enclosed exhibits, and upon all of the papers and proceedings heretofore had herein, a motion will be made on behalf of the defendant, [redacted] on the ____ day of ____, 2023, at ____ in the ___noon, or as soon thereafter as counsel may be heard, for an Order granting dismissal of the indictment pursuant to CPL 40.40(2).

DATED: [redacted]
Buffalo, New York

[redacted]
Attorneys for [redacted]

TO: **HON. KENNETH F. CASE**
Judge, Erie County Court

[redacted]**, ESQ.**
Assistant District Attorney, Erie County

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff, **INDEX OF EXHIBITS**

-vs-

Indictment No. [redacted]

[redacted]

Defendant.

In addition to the exhibits listed below, submitted herewith and incorporated herein is a flash drive containing bodyworn camera footage of Buffalo Police Officer [redacted] from [redacted]

[redacted]

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff, **AFFIRMATION**

-vs-

[redacted]

Defendant.

[redacted]., affirms the following to be true under penalty of perjury:

1. I am an attorney duly licensed to practice law in the State of New York and am attorney for the defendant in the above-captioned matter.

2. Unless otherwise stated, all allegations made herein are based upon information and belief, the sources of your deponent's belief being: official court documents, conversations with the Assistant District Attorney, conferences with the defendant and other potential witnesses, and my personal investigation of this matter.

3. This affirmation is submitted in support of a motion to dismiss the indictment as violative of CPL 40.40(2).

4. As will be fully set forth below, prosecution of [redacted] for murder in the second degree (Penal Law § 125.25[1]) is precluded by her guilty plea to criminal possession of a firearm in the second degree (Penal Law § 265.01-b(1) under Indictment Number [redacted] That guilty plea was entered in this Court on [redacted], and the transcript is attached hereto as Exhibit A.

5. As will be developed further below, prosecution is barred by CPL 40.40 because [redacted] was charged with criminal possession of a firearm, but not with second degree murder, which was a jointly prosecutable offense based upon the same criminal transaction, despite possession of the prosecution of legally sufficient proof to support a charge of murder in the second degree. All of the concepts and prongs of the CPL 40.40 bar will be discussed below.

Procedural History

7. On [redacted] at around [redacted] the police responded to [redacted] in Buffalo after receiving calls from neighbors reporting that [redacted] was yelling and breaking things on her front porch and inside her home. The police arrived to find [redacted] standing naked, with her arms through two broken front door windows. [redacted] was yelling and saying bizarre things, and her mood was uneven. Within two minutes of arriving, officers noticed the body of an elderly woman on the couch as they looked in from the porch, who was later determined to be her grandmother, [redacted] J[redacted] who also lived at the house at [redacted]. This is all confirmed by the bodyworn camera of Buffalo Police Officer [redacted], one of the first officers who arrived at the scene, which is being sent herewith and is incorporated into this motion/affirmation.

8. [redacted] was acting in a bizarre manner, told police to handcuff her and/or arrest her several times, and admitted that she broke her own windows, She refused to tell officers her name, and indicated that she inherited the house from her grandmother upon her grandmother's death (BWC). While police dealt with this emergency situation, they

found a Taurus .357 magnum revolver near [redacted] body and a Taurus.38 caliber luger semi-automatic pistol upstairs (Exhibit C, Original Grand Jury Presentment under Indictment No. [redacted] pp. 13-15). The .357 revolver had two spent rounds in the chamber (Exhibit D, Evidence Discrepancy Form by [redacted]). Police observed that [redacted] had what appeared to be a bullet hole in her upper right chest (Exhibit E, Case Notes).

9. That same day, [redacted] was charged by the filing of a felony complaint in Buffalo City Court with criminal possession of a firearm, a class E felony (Exhibit F, [redacted] accusatory instrument).

10. On [redacted], Dr. [redacted] conducted an autopsy on [redacted] Dr. [redacted] ruled J[redacted]' death to be a homicide by gun shot wound to the torso, noting an entry wound to [redacted]' upper chest and an exit wound on her back (Exhibit G, Autopsy Report).

11. The police submitted the handguns with which [redacted] was charged, a spent cartridge casing from the house, and fired bullets found inside the house to the Erie County Central Police Services Laboratory ("CPS Lab"). On [redacted], [redacted] of the CPS Lab authored a report indicating that the .38 revolver was operable and that it exhibited rifling characteristics of five grooves with a right twist. The fired bullets from inside the house where [redacted] laid dead with a bullet wound exhibited those same characteristics (Exhibit H, Lab Report 1 dated 12/6/2021).

12. On [redacted], [redacted] was arraigned before this Court on Indictment No. [redacted], which charged her with two counts of criminal possession of a firearm (Penal Law § 265.01-b[1]), alleging that she possessed both the .38 pistol and the .357 revolver

(Exhibit A, Indictment No. [redacted]). At the arraignment upon the indictment, [redacted] pleaded not guilty to both firearm charges (Exhibit I, Original Arraignment Transcript, dated [redacted]).

13. On [redacted] the prosecution declared trial readiness on the record regarding the weapon possession charges. The Court conducted the requisite inquiry, which was as follows in relevant part:

> THE COURT: And any witnesses you would need to call to establish this case beyond a reasonable doubt, are they currently ready and available to you?
>
> MR. [redacted] Yes.
>
> THE COURT: And any evidence that you would need to admit before a trier of fact to meet your burden, is that currently available to you as well?
>
> MR. [redacted]: Yes (Exhibit J, Transcript of [redacted] proceeding).

14. Thus, on [redacted], the prosecution represented that it had sufficient evidence to prove beyond a reasonable doubt that, on [redacted] possessed the revolver found next to [redacted], which revolver had two spent casings inside of it. They were also aware that [redacted] had died from a gun shot wound and had recovered fired bullets from inside the house.

15. Thereafter, on [redacted], the CPS Lab issued a report containing additional ballistic analysis. Firearms examiner [redacted] indicated that the fired bullets from inside the home, including the one found lodged in the wall behind where [redacted] lay, were fired from that same revolver, Item 5 (Exhibit K: Lab Report 2, dated [redacted]).

16. [redacted]' case on the weapons possession charge proceeded. Motions were filed, hearings were scheduled and rescheduled, and the case proceeded as normal. The parties appeared before this Court on [redacted] which was almost a year after the

incident, over six months after the arraignment on the indictment, and over four months after the CPS Lab confirmed that the gun [redacted] was accused of possessing was the same gun that fired the fatal shot to [redacted]. On that date, [redacted] pleaded guilty as charged to possession of both weapons (Exhibit B: [redacted] plea transcript).

17. On [redacted], this Court placed [redacted] on probation for a period of five years upon her convictions for the class E felony offenses of criminal possession of a firearm. No violations have been filed since, and by all accounts, she is doing well under probation supervision and with the assistance of Erie County Assigned Counsel's Social Work Unit.

18. On [redacted], the prosecution applied for a Court Order compelling [redacted] to submit to a buccal swab for comparison of genetic material found on the revolver (Exhibit L: [redacted] OTSC).

19. On [redacted], this Court granted the prosecution motion over defense objection.

20. Thereafter the prosecution presented the murder charge to an Erie County grand jury, which voted an indictment charging [redacted] with murder in the second degree (Penal Law § 125.25[1]) (Exhibit M, Grand Jury Transcript for Indictment No. [redacted] Exhibit N, Indictment No. [redacted]).

21. The parties appeared before special term (Boller, J.S.C.) for arraignment upon Indictment No. [redacted] charging second degree murder on [redacted]. Over the prosecution's objection, the Court released [redacted] on her own recognizance, recognizing both the issue of this prosecution being barred and [redacted] positive probation record.

22. The matter was then assigned to this Court for adjudication.

23. As this motion is a threshold motion, the defense respectfully requests leave to file other motions in the unlikely event that this prosecution continues.

Preclusion under CPL 40.40[2]

24. CPL 40.40(2) dictates that:

> When (a) one of two or more joinable offenses of the kind specified in subdivision one is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the people of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred.

25. "Two or more joinable offenses of the kind specified in subdivision one" means two or more offenses that are joinable because they are part of the "same criminal transaction" (*see* CPL 40.40[1]).

26. Thus, in checklist form, in order for the prosecution to be precluded from prosecuting [redacted] upon the murder indictment, the following conditions must be met:

a) Possession of the firearm is joinable with murder in the second degree, and is based upon the same criminal transaction;

b) Possession of the firearm was charged in the indictment, while murder in the second degree was not charged in that indictment or any accusatory instrument before this Court;

c) Commencement of a trial upon the firearm indictment, or a guilty plea disposition thereon; and

d) Possession by the prosecution, at the time of the plea, of legally sufficient evidence to support the murder charge.

27. Prong (a) is met, as [redacted] possession of the firearm found beside [redacted]' body was clearly joinable, and part of the same criminal transaction, as [redacted] death by gun shot wound. Courts have repeatedly held that charges of possession of a weapon and use of that same weapon constitute parts of the "same criminal transaction" (*People v Ruzas*, 54 AD2d 1083 [4th Dept 1976]; *People v Crandall*, 181 AD2d 687 [2nd Dept 1992] ["However, since the defendant's possession of the loaded handgun and the shooting of the victim were, under the facts of his case, both part of the same transaction, we agree that the sentence imposed for the conviction of criminal possession of a weapon in the second degree should run concurrently with the sentence imposed for the conviction of attempted murder in the second degree, and the defendant's sentence is modified accordingly"]).

28. Prong (b) is met, as [redacted] was arraigned upon the firearm indictment on [redacted] (Exhibits A, I), while she was not charged with murder, until much later, said arraignment occurring on [redacted] (Exhibit N).

29. Prong (c) is met, as [redacted] pleaded guilty to the former indictment on November 2, 2022 (Exhibit B).

30. Prong (d) is also met, as it cannot be argued in any convincing way that the prosecution did not have legally sufficient evidence to support a murder conviction by [redacted], the date [redacted] pleaded guilty to the pending indictment charging criminal possession of a firearm.

31. Contrary to what the prosecution may argue, it is the sufficiency of the evidence at the time of the ***guilty plea*** that controls rather than at the time of the ***indictment*** (*see, People v Tabor*, 87 AD3d 829 [4th Dept 2011], *quoting People v Cole*, 306 AD2d 558 [3rd Dept 2003] [" "Inasmuch as the [assault] charges were joinable and the People possessed

sufficient evidence to sustain those charges at the time of commencement of the prior trial, prosecution of the [assault charge against the male victim] is barred by CPL 40.40"]).

32. Further analysis and argument follows on prong (d) as it is anticipated that the prosecution will oppose this motion attacking that particular prong. It is the only prong that requires any analysis whatsoever, as the other three are conclusively established and beyond argument.

33. In the first instance, Your Writer will analyze the sufficiency of the evidence possessed by the prosecution at the time of the guilty plea *without* any statements made to law enforcement by [redacted] except for spontaneous statements made at the initial scene. This will eliminate the need for extended argument on whether [redacted]' later statements were voluntary in the event that this Court, as it should, finds the other evidence possessed by the prosecution at the time of the plea to be sufficient.

34. Evidence is legally sufficient when, viewing the facts in a light most favorable to the People, "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v. Acosta,* 80 N.Y.2d 665, 672, 593 N.Y.S.2d 978, 609 N.E.2d 518 [1993], quoting *People v. Steinberg*, 79 N.Y.2d 673, 681–682, 584 N.Y.S.2d 770, 595 N.E.2d 845 [1992]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*People v Danielson*, 9 NY3d 342 [2007]).

35. Further, a court reviewing evidence for sufficiency must "indulge in all reasonable inferences in the People's favor." As this Court is well-aware, this legal standard gives jurors wide latitude in resolving factual disputes.

36. A verdict is legally sufficient if there is ***any*** valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt (*People v Denson*, 26 NY3d 179 [2015]).

37. Here, especially given the legal standard, the evidence possessed by the prosecution was more than sufficient.

38. Before even arguing this point, it is important to note that the prosecution represented to this Court on [redacted] that they had legally sufficient evidence that [redacted] possessed the .357 revolver with two spent rounds on [redacted], 2021(Exhibit J). By [redacted] the prosecution also had a CPS lab report indicating that the same .357 revolver fired the bullets found inside the house, including behind the couch (Exhibit K).

39. Simply put, if the prosecution had sufficient evidence that [redacted]—the only person with the decedent when they arrived—unlawfully possessed the murder weapon on the date in question, surely they had legally sufficient evidence that she was the person who had killed [redacted]

40. Having previously represented sufficient evidence of unlawful possession of a murder weapon, at the same date, time, and place of the murder, the prosecution should not now be heard to argue that they possessed legally insufficient evidence to charge [redacted] with murder in the second degree.

41. That representation aside, in viewing the evidence as a whole, the prosecution had a woman acting bizarrely and giving conflicting and implausible explanations for the death of her grandmother (BWC). She had her hands placed through broken windows on each side of the front entrance door (BWC 1:01). She told officers at least ten times to handcuff or arrest her within the first three minutes of their arrival (BWC 1:40-3:00). The windows and house were absolutely trashed, and there was a dead woman on the couch (BWC 10:10-10:40). But lest there be any conceivable claim that someone else broke into the house and killed [redacted] told police that she broke the windows (BWC 4:10). She also stated "I got glass everywhere" (BWC 9:07).

42. Moreover, the prosecution had evidence that [redacted] was set to inherit the house upon the death of [redacted], giving her a clear motive to commit the crime (BWC 4:25). Clearly, the inheritance of the home was on her mind within five minutes of police arrival to the scene of her dead grandmother. She also refused to give police her name, adding consciousness of guilt evidence to the mix for good measure (BWC 10:45).

43. These videorecorded statements were made by [redacted] at the scene, prior to her even being handcuffed, and many if not all of them were spontaneous (BWC 0:00-16:00). The prosecution cannot credibly argue that they had concerns about the admissibility of these statements.

44. The police located the .357 revolver near [redacted], and there were two spent rounds in it. A fired bullet lodged in the wall behind the blood-stained couch where [redacted] likely took her last breath was fired by that .357 revolver. Moreover, the prosecution had proof that [redacted] died of homicide via a gunshot wound to the chest (Exhibit G).

45. Neighbors, eager to cooperate with the police, indicated that they saw [redacted] breaking windows and yelling (BWC 26:50; BWC 32:40; BWC 34:00-35:30). One neighbor even heard [redacted] yell "What if I killed her?!?" in between window breaks (BWC 34:25; Exhibit O, Case remarks, p. 6-8). The most knowledgeable and cooperative witness of the bunch, neighbor [redacted], even gave a sworn written statement to homicide detectives about her observations (Exhibit O, p. 21).

46. Viewing all of this evidence in the light most favorable to the prosecution, a rational trier of fact could have readily found that [redacted] caused [redacted]' death. Regarding the mental state required for a prosecution of murder in the second degree, a person may be presumed to intend the natural and probable consequences of his or her actions (*see People v Getch*, 50 NY2d 456 [1980]; CJI2d NY Culpable Mental States—Intent]). Here, being that there was sufficient proof tha [redacted] sho [redacted] in the chest, there was sufficient proof that [redacted] intended to cause [redacted] death. This was especially true where [redacted] stood to inherit the house upon [redacted]' death, and was keenly aware of that fact during the initial encounter at the scene.

47. In a strikingly similar case prosecuted by this same District Attorney's Office, the Fourth Department found there to be legally sufficient evidence to support a conviction of murder in the second degree (*People v Cartagena*, 149 AD3d 1518 [4th Dept 2017]). In *Cartagena*, in ruling that the evidence was sufficient to support an intentional murder charge, the Fourth Department reasoned:

> It is well established that "[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime." The People presented evidence through expert testimony that the victim's cause of death was asphyxia by neck or chest compression. That determination was based on the medical evidence as well as the fact that the victim was found: (1) face up with her shirt raised up half way; (2) with only one sock on half way; and (3) next to a pillow on bedding that appeared to be disheveled. In addition, the People presented evidence that defendant was the only person with the victim at the time of the victim's death and that defendant provided widely inconsistent accounts of her whereabouts and actions leading up to, and following, the victim's death. Although circumstantial in nature, when viewed in the light most favorable to the People, we conclude that the evidence is sufficient to establish that defendant intentionally killed the victim (*id.*, at 1518-19, citations omitted).

48. Although the proof had similarities, the quality and type of evidence in the prosecution's possession here not only met, but exceeded the sufficient evidence in *Cartagena*. In *Cartagena*, there was evidence that the victim (defendant's child) was found disheveled and next to a pillow, and that the defendant gave "widely inconsistent accounts" of what had happened. There was also evidence that the Medical Examiner had ruled the death a homicide by asphyxiation. Here, there was proof that [redacted] appeared to have been murdered and a Medical Examiner's Report indicating that the death was a homicide by gunshot wound, which is akin to the evidence regarding the victim in *Cartagena*. Like *Cartagena*, there was proof here that [redacted] was the only person with [redacted] when she died. The proof here, however, was much more ample, as the ballistics evidence tied the gun found at the scene to the bullet that appeared to have cause [redacted]' death.

49. Any claim by the prosecution that they did not possess legally sufficient evidence by [redacted] to support a conviction of [redacted] for murder in the second degree amounts to an admission that the same office prosecuted [redacted] upon legally sufficient evidence.

50. Thus, given the presence, prior to the [redacted] plea, of inarguably sufficient evidence that [redacted] committed murder in the second degree, this Court need not even determine the admissibility of [redacted] later statements to police and/or to medical professionals.

51. However, to cover all of the bases, the defense will point out that some inculpatory statements were either observed by police as [redacted] spoke to medical personnel (Exhibit O, page 9, entry by [redacted]). During that conversation, [redacted] told Endeavor Health Services' Sarah Bonk that she handled the guns, that she watched the blood leak through her grandmother's shirt, that she moved [redacted] dead body and then got naked and broke windows so that officers wouldn't hurt her, that her grandmother wanted to die and "died with dignity,"and that nobody else was present at the time of the incident (*id.*).

52. Many of the statements to police personnel were spontaneous, and thus likely would have been ruled admissible (*see People v Dunn*, 195 AD2d 240 [2nd Dept 1994]).

53. Even the statements that are not spontaneous or made to non-law enforcement likely would have been ruled admissible by this Court, as a person confined in a medical setting is generally not considered to be 'in custody' for *Miranda* purposes (*People v Ripic*, 182 AD2d 226 [3rd Dept 1992]; *Cartagena*, 149 AD3d 1518).

54. It bears noting that the prosecution, via CPL 710.30 notice, indicated their intention to use *all* of [redacted] statements against her at trial, including those at the scene, the statements to [redacted] who they noted was not a public servant, and the statements at the hospital to Detectives [redacted] (Exhibit P, CPL 710.30 notice). Certainly, the prosecution would not attempt to use statements at trial that they felt were not made in a knowing, voluntary, and intelligent fashion.

55. In any event, as set forth above, the prosecution was in possession of ample evidence regardless of [redacted]' statements, in the form of neighbor accounts, police observations, medical evidence, and ballistics evidence. While it is likely to be the prosecution's argument in an attempt to avoid the bar against separate prosecutions (CPL 40.40[2]), the argument that the prosecution lacked legally sufficient evidence is simply without merit.

Independence of the Bar in CPL 40.40[2] From Provisions in CPL 40.20

56. The prosecution may argue that the exceptions to the separate prosecution prohibition in 40.20 apply to CPL 40.40. However, a reading of the statutes and relevant case law easily dispatches that claim.

57. CPL 40.20 states that a person may not be tried separately for two or more offenses arising out of the same criminal transaction, and then lists several exceptions to that rule (CPL 40.20[2]). Among those exceptions are when one offense charges possession of contraband and the other charges use or sale of that contraband (CPL 40.20[2][c]).

58. However, CPL 40.40 *expands* CPL 40.20 rather than being limited by it. In fact, CPL 40.40[1] unequivocally states that it applies "even though such separate prosecutions are not otherwise barred by any other section of this article."

59. Consistent with the plain language of the statute, appellate courts have read CPL 40.40 as a standalone section of article 40 and held that it applied where CPL 40.20 would not have (*see People v Cole*, 306 AD2d 558 [3rd Dept 2003]). The Fourth Department has cited *Cole* with approval, and dismissed a charge under CPL 40.40 without considering CPL 40.20[2] exceptions (*People v Tabor*, 87 AD3d 829 [4th Dept 2011]).

60. In *Tabor*, the Fourth Department stated "We agree with defendant that, [w]here the evidence against a person is in the prosecutor's hands, he [or she] may not—as a player in a game of chance-deal out indictments one at a time" (*id.*).

61. Given its approval of *Cole* and its non-consideration of the 40.20[2] exceptions when dismissing a charge under CPL 40.40[2], it is apparent that the Fourth Department reads CPL 40.40[2] as a statute that expands the compulsory joinder provisions rather than being limited by the exceptions contained in another section. The Fourth Department's view is in line with a plain reading of the statute, which states that it applies even where prosecution would not be barred by other sections (CPL 40.40[1]).

62. Practice commentators agree with this common-sense reading of the statute (*see* Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL 40.20 , at 15–16 [indicating that the "limitations in CPL 40.40 apply notwithstanding the fact that separate crimes qualify for separate prosecution under the exceptions listed in paragraphs (a) through (h) of CPL 40.20[2]]). The Fourth Department also so held in *People v Ruzas* (54 AD2d 1083 [4th Dept 1976]).

63. Yet another practice commentary, speaking specifically of the bar in CPL 40.40, states:

> It should be noted that a violation of the rules set forth in this provision may bar a subsequent proceeding "even though such separate prosecutions are not otherwise barred by any other section of this article." This is particularly applicable to the exceptions to "same criminal transaction" statutory double jeopardy, which this provision may sometimes circumvent. For example, assume that a defendant, as part of an overarching scheme to inherit property, kills a number of relatives, in a manner that makes the acts "separate offenses" constitutionally, but part of the "same criminal transaction" for statutory purposes. ***However, because there are potential statutory exceptions applicable, separate prosecutions for the killings may not be barred by the statutory double jeopardy prohibition itself. Nevertheless, if [CPL 40.40's] terms are applicable and all of its tests are***

> ***met, the mandatory joinder provision will bar separate prosecution of these crimes*** (7 NY Prac., New York Criminal Pretrial Procedure, §2:7 [2d Ed.], May 2023 Update; emphasis added).

64. CPL 40.40[1], along with Fourth Department and practice commentator interpretation thereof is consistent and clear: CPL 40.40 applies when *its* requirements are met, even where other sections would not bar subsequent prosecution

Public Policy

65. CPL 40.40 and its case law indicate a clear policy that joinable offenses based upon the same criminal transaction should be prosecuted together rather than dealing out charges one indictment at a time.

66. Here, the prosecution was not unfairly put into a position where the murder charge could be barred. In order for [redacted] to have had the opportunity to plead guilty to criminal possession of a firearm, thereby barring prosecution of second degree murder, the prosecution had to take the affirmative step of indicting [redacted] for criminal possession of a firearm without also indicting the murder charge. Even after the ballistics report was generated on [redacted] over four months elapsed before [redacted] pleaded guilty on [redacted]

67. While the prosecution will undoubtedly argue in response to this motion that the evidence of murder at the time of [redacted]' plea was insufficient, other remarks paint a different picture. For instance, on [redacted] DA John Flynn commented to the media on [redacted] initial arrest, noting that she was only charged with possessing guns found in the house and that it was unknown whether either of those guns fired the fatal shot (https://www.facebook.com/watch/?v=1009181893325092, 15:00-17:40). When

challenged by the media whether possession of the gun would indicate that she committed the murder, Flynn remarked that she had only possessed "a gun," and that is was unknown whether that gun killed [redacted]

68. Clearly, the District Attorney saw the value of such ballistics evidence when he made those remarks and implied that the evidence was lacking unless and until that evidence became available. However, no indictment occurred for over four months after that evidence became available prior to [redacted]' guilty plea.

69. On [redacted], The District Attorney made similar remarks indicating that ballistics evidence was needed, stating:

> If I'm a family member and I know that an individual is living in the home with a deceased relative of mine and the deceased relative is shot and there is a gun found in the home, and in this case, the granddaughter is charged with a gun charge, if I'm a family member, I'm saying why isn't she charged with homicide? What's the delay here, why is this going on three or four months?
>
> * * *
>
> It's not that simple. We have to build a case to determine who in fact pulled the trigger ([redacted] on Twitter: "The family of a 90-year-old grandmother shot to death last year is hoping justice will come their way @WGRZ https://t.co/940ouy9rup").

70. While the District Attorney's position that ballistics evidence would strengthen the case against [redacted] was unassailable, any argument that the lack of ballistics evidence rendered the rest of the evidence legally insufficient is simply meritless (*see*, *Cartagena*, *supra*). In any event, as noted above, the ballistics report linking the [redacted] .357 revolver to the fired bullets and the spent casings found inside the home where [redacted] was shot came into existence on [redacted], over four months prior to [redacted]' guilty plea to the E felony counts.

71. Even on the date of the plea, the prosecutor placed the following admonition on the record:

> Your Honor, we were originally scheduled this morning to conduct hearings on motions filed by Mr. [redacted] on behalf of his client, specifically we were going to run a Huntley hearing to determine the admissibility of the statements made by Ms. [redacted] throughout the day that she was arrested, that being [redacted] We had a very lengthy discussion this morning about how Ms. [redacted] wishes to proceed, and it was at that time that Mr. [redacted] indicated she wishes to withdraw her previously entered plea of not guilty and enter a plea of guilty to the indictment consisting of two counts, both Criminal Possession of a Firearm, a Class E non-violent felony. Part of that discussion entailed whether or not a plea in this circumstance would foreclose a further prosecution of an unindicted homicide charge. The conduct for which she was indicted on November [redacted] consisted of allegations of simple possession of a firearm. However, part of that investigation also covered the discovery of her grandmother's body which was deceased and the cause of death was determined to be a single gunshot wound to her chest. As I said, we had a very lengthy discussion about that and whether or not this is a case and these are circumstances that would bar subsequent prosecution for a homicide-related offense. Significant to that is the statutory language that exempts subsequent prosecutions where the evidence relied on was either non-existent or unascertained at the time of the initial indictment. Of significance to this case, just -- making this record for the benefit of ensuring the knowing and intelligence aspects of Ms. [redacted] plea. **Of significance, subsequent to the indictment, subsequent to the charges of these two possessory offenses, the People developed ballistics evidence that matched a slug recovered from the wall that we believe to be the slug that caused her grandmother's death, as well as the continuing expiration of whether or not the statements that she made which would have been the subject of the hearing earlier today would be available to use by the People for that homicide investigation as well as additional ear-witness accounts of what had been going on in the days before [redacted]. I say all of that by way of indicating the nature and type of evidence that the People developed subsequent to this indictment** (Exhibit B; emphasis added).

72. The prosecutor's comments were geared toward arguing that, while at the time of the first indictment, the evidence of murder in the second degree was insufficient, the prosecution had acquired sufficient proof by the time of [redacted] guilty plea. Of course,

however, it is not the sufficiency of the evidence at the time of the indictment that controls; rather, so long as the prosecution had legally sufficient evidence to convict of murder prior to the [redacted] plea, they are barred from prosecuting [redacted] for murder (*see* pgph 31, *above; see also*, *Tabor*, 87 AD3d 829; *Cole*, 306 AD2d 558). And in any event, the prosecution had legally sufficient evidence with or without the ballistics evidence (*Cartagena, supra*).

73. Perhaps the most telling commentary, however, is that from DA John Flynn, who said on the date of the [redacted] murder arraignment that he charged and prosecuted the weapon possession charge prior to charging the murder charge for "strategic purposes" (The Buffalo News, [redacted], https://buffalonews.com/news/local/crime-and-courts/buffalo-woman-charged-with-murder-in-her-grandmothers-2021-death/article_beb9cc00-f332-11ed-bff7-fff68aff8b90.html ["Flynn said [redacted] wasn't charged in the death of her grandmother until now because the investigation took time and, further, because for strategic purposes that he would not elaborate on he sought to resolve the gun charges before bringing the homicide case to a grand jury"]). This comment makes it clear that the reason for failing to charge the homicide between [redacted] and [redacted] was not due to legally insufficient evidence, but rather was for "strategic purposes." Choosing to strategically charge some joinable offenses while deferring on others until a later date is the exact harm targeted by CPL 40.40.

74. The comments above conclusively indicate that any argument made by the prosecution that the reason they did not charge the homicide prior to [redacted] was due to legally insufficient evidence thereof is a last-ditch grasp to avoid being barred from charging murder in the second degree.

Conclusion

75. The following requirements are met:

a) Criminal possession of a firearm and murder in the second degree using that firearm are joinable offenses based upon the same criminal transaction,

b) [redacted] was indicted for criminal possession of a firearm, and the homicide remained uncharged,

c) [redacted] pleaded guilty to criminal possession of a firearm while the homicide remained uncharged, and

d) The prosecution possessed legally sufficient evidence to convict [redacted] of murder in the second degree prior to her guilty plea.

76. Thus, under the plain language of CPL 40.40[2], and the case law interpreting same, the prosecution is BARRED and PRECLUDED from prosecuting [redacted] for murder at this juncture. This bar applies regardless of whether any other section in Article 40 would permit prosecution (CPL 40.40[1]).

77. Thus, the indictment must be dismissed.

WHEREFORE, defendant [redacted] respectfully requests that this Court DISMISS the indictment charging her with murder in the second degree, upon which she was arraigned on [redacted], and for such other and further relief as to the Court appears just and proper.

Dated: [redacted]
Buffalo, New York

_____
[redacted]