STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF MOTION TO SET ASIDE THE VERDICT PURSUANT TO CPL 330.30[1]

vs.

Indictment No. [redacted]

[redacted]

PLEASE TAKE NOTICE, that upon the annexed affirmation of [redacted], 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 setting aside the verdict of guilty of kidnapping in the second degree as an improper verdict, and for such further relief as to the Court appears to be just and proper.

Dated: [redacted] By: [redacted]
[redacted]
Attorneys for Defendant [redacted]

To: HON. SUSAN M. EAGAN
Judge, Erie County Court

ADA [redacted], ESQ.
ADA [redacted] ESQ.
Attorneys for the Prosecution

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION

vs.

Indictment No. [redacted]

[redacted]

[redacted], ESQ., 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 motion affirmation is made in support of defendant [redacted] motion to set aside the verdict convicting him of kidnapping in the second degree, a class B violent felony, after a jury trial.

4. The defendant was indicted upon several counts relating to two incidents, one occurring on [redacted], and one occurring on [redacted].

5. At the close of the prosecution case, and after the defense declined to put forth any proof, this Court granted the defense motion for a trial order of dismissal on all counts related to or depending upon proof of the September incident.

6. The remaining counts, all solely dependent upon the [redacted] incident, went to the jury. At the defense request, original counts 18 and 19 (submitted as counts one and two), charging

kidnapping in the first degree and kidnapping in the second degree, were charged to the jury in the alternative. This instruction was proper, as kidnapping in the second degree is an inclusory concurrent count of kidnapping in the first degree (*see People v Diaz*, 65 AD2d 929 [4th Dept 1978]).

7. Granting the defense request, the Court administered the standard CJI charge with respect to those counts, directing the jury that the counts were to be considered in the alternative to one another. In short, and as will be set forth below, the jury was properly instructed not to consider kidnapping in the second degree without first rendering a not guilty verdict on kidnapping in the first degree.

8. Notwithstanding that instruction, the jury failed to reach a verdict on count 18 (kidnapping first), but yet proceeded to render a verdict on count 19 (kidnapping second). This was the sole count upon which the defendant was convicted.

9. The defense made a timely objection to this verdict as defective or improper, alerting the Court to the specific perceived defect. The objection was made prior to the jury being discharged, at a time when the Court could have remedied the error. The Court rejected the defense objection and accepted the verdict without further inquiry. Thus, the issue is duly preserved for appellate review. The relevant pages of the transcript are attached hereto as "Exhibit A."

10. Pursuant to CPL 330.30[1], this Court may set aside a verdict based upon "Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court."

11. Here, the verdict was defective inasmuch as the jury failed to follow the Court's *acquit-first* instruction taken directly from the CJI, and an appellate court would be required to find as such.

Kidnapping in the Second Degree is an Inclusory Concurrent Count of Kidnapping in the First Degree

12. CPL 300.30[4] defines inclusory concurrent counts as follows: "Concurrent counts are "inclusory" when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater. All other kinds of concurrent counts are "non-inclusory."

13. Here, it cannot be argued that kidnapping in the second degree is not an inclusory concurrent count of kidnapping in the first degree, as it is wholly subsumed within the statutory definition of first degree kidnapping (*see* Penal Law §§ 135.20; 135.25).

As Such, the Court Properly Submitted Those Counts In the Alternative Upon Defense Request

14. Where an indictment charges multiple counts, some of which are concurrent and some of which are not, submission of those counts to a jury is governed by CPL 300.40[4]).

15. That statute delineates that groups of concurrent counts must be submitted in the manner specified in CPL 300.40[3]. CPL 300.40[3][b] states:

> (b) With respect to inclusory concurrent counts, the court must submit the greatest or inclusive count and may or must, under circumstances prescribed in section 300.50, also submit, but in the alternative only, one or more of the lesser included counts. A verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted, but not an acquittal thereon. A verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted.

16. Here, pursuant to CPL 300.40[3][b], as incorporated by CPL 300.40[4], the count charging kidnapping in the second degree had to be submitted in the alternative to the count charging kidnapping in the first degree, as it was an inclusory concurrent count of kidnapping in the first degree (*see People v Boettcher*, 69 NY2d 174 [1987]).

17. Regarding the manner in which they are submitted, there is no distinction between lesser included offenses specifically charged in the indictment (named inclusory concurrent counts) and lesser included offenses that are being submitted under a greater charged count (*see* CPL 300.40[4]; [3][b]).

18. CPL 300.50 further illustrates that there is no distinction for these purposes between lesser included offenses specifically charged in the indictment and those that are submitted as lesser at the request of a party. That statute states that lesser offenses must be submitted in the alternative (CPL 300.50[1]) and specifically states that it applies to equally to lesser crimes charged in the indictment and those that are not (CPL 300.50[3]).

19. In *Boettcher*, the Court of Appeals held that the trial court's transition instructions between inclusory concurrent counts must reflect the 'acquit-first' principle, meaning that in considering inclusory concurrent counts in the alternative, the jury must be instructed that they must first acquit of the greater offense before considering the lesser offense.

20. The standard CJI charge on lesser included offenses states that the jury must first consider the greater charge, and if it convicts on the greater charge, it must not consider the lesser charge. If it acquits of the greater charge, it may then consider the lesser charge (*see* CJI2d[NY] Lesser Included Offenses). This charge cites *Boettcher* and CPL 300.40 in its footnotes, and is intended to convey the 'acquit-first' principle, requiring the jury to first decide the higher count before making any decision on an inclusory concurrent count that has been submitted in the alternative.

21. This Court twice instructed the jury that if it found the defendant not guilty of kidnapping in the first degree, then it could move on and consider kidnapping in the second degree—once during its main charge and once when the jury asked for the legal definitions of the kidnapping counts. Those portions of the transcript are attached hereto as Exhibit "B."

22. The prosecution argued below that the sole purpose of the acquit-first rule is to avoid appellate courts vacating lesser counts. However, one of the purposes of this mandatory instruction, which has been incorporated into the CJI, is to prevent jury compromise. As the Court in *Boettcher* stated:

> More importantly, however, we reject *Tsanas (supra)* and its progeny because they give insufficient weight to the principle that it is the duty of the jury not to reach compromise verdicts based on sympathy for the defendant or to appease holdouts, but to render a just verdict by applying the facts it finds to the law it is charged (*People v. Mussenden,* 308 N.Y. 558, 562, 127 N.E.2d 551, *supra).* It is no doubt true, as we have noted in the past, that in jury rooms, as well as all other deliberative bodies, some strong members are able to impress their will upon the weaker (*People v. De Lucia,* 20 N.Y.2d 275, 278, 282 N.Y.S.2d 526, 229 N.E.2d 211); but acknowledgment of the imperfection of human nature is quite a different thing from the creation of an environment conducive to such behavior. For the same reason, we must reject the defendant's contention that the *Tsanas* charge promotes efficient use of judicial resources by obviating the need for protracted deliberations when a jury becomes deadlocked on the top count by providing a lesser included offense upon which a compromise can be reached.

23. It should be noted that, even if the prosecution were to argue that the instruction was improperly given, that instruction was given without objection, and has become the law of the case (*see People v Leon*, 227 AD2d 925 [4th Dept 1996]). Thus, the jury was required to acquit the defendant of kidnapping in the first degree before considering kidnapping in the second degree.

The Jury's Failure to Follow the Court's Instructions Necessitated Rejection of the Verdict, Further Instruction, and Continued Deliberation.

24. The jury's verdict, was thus, defective and should have been rejected. Insofar as the defense brought the issue to the Court's attention at a time when it could have been rectified, the Court was required to reject the verdict, provide further instructions, and allow the jury to continue deliberating.

25. The Court of Appeals has stated that there are only two circumstances in which a trial court may reject a verdict: where it is repugnant, or "where it is legally defective e.g., where the jury failed to follow the court's instructions" (*People v Rivera*, 15 NY3d 207 [2010, fn. 2]). In *People v Salemmo*, 38 NY2d 357 [1976], after the jury convicted of two charges where the court had instructed the jury that they could only convict of one, the Court of Appeals upheld the trial court's rejection of the verdict, stating:

> Here, the trial court's action in resubmitting to the jury a verdict finding the defendant guilty of two serious drug charges, contrary to its instructions that only one charge of the three counts submitted could be sustained by the court upon a finding of guilty, was not intended, nor did it, in fact, prejudice the defendant, but was only intended to implement a legitimate State policy of accepting and recording proper verdicts rendered in compliance with the law of the case.

26. The procedure to be followed in the event of a verdict that is not in accordance with the Court's instructions is delineated in CPL 310.50. That statute states, in relevant part:

> 1. The form of the verdict must be in accordance with the court's instructions, as prescribed in article three hundred.
>
> 2. If the jury renders a verdict which in form is not in accordance with the court's instructions or which is otherwise legally defective, the court must explain the defect or error and must direct the jury to reconsider such verdict, to resume its deliberation for such purpose, and to render a proper verdict.

27. Here, upon the defense's timely request, the Court was required to reject the verdict, reinstruct the jury on the acquit-first principle in relation to the inclusory concurrent counts of kidnapping in the first and second degrees, and allow the jury to resume its deliberations.

28. This exact situation presented itself in *People v Jimenez* (101 AD3d 513 [2nd Dept 2012]). In that case, the court submitted three counts of burglary in the second degree with three corresponding lesser offenses of criminal trespass in the second degree. On one of

the sets, the jury followed the 'acquit-first' instruction, acquitting the defendant of burglary in the second degree and convicting him of criminal trespass in the second degree. On the other two sets, the jury could not reach a verdict on burglary in the second degree; however, a verdict sheet was marked "guilty" as to criminal trespass in the second degree. The defense argued that the purported guilty verdicts on the lesser counts constituted acquittals on the greater offenses. The Second Department rejected that argument, ruling that even if the checked boxes on the verdict sheet constituted verdicts:

> **In any event, trespass convictions not preceded by corresponding burglary acquittals would have been defective (see CPL 310.50) because they would have violated the court's instruction to consider the lesser offenses only if the jury found the defendant not guilty of the corresponding greater offenses (see People v. Boettcher, 69 N.Y.2d 174, 182–183, 513 N.Y.S.2d 83, 505 N.E.2d 594 [1987]). Furthermore, guilty verdicts on the trespass counts without any verdicts on the burglary counts would have demonstrated the jury's confusion as to the order in which to proceed. Accordingly, the court did not err when it repeated its acquit-first instruction and directed the jury to resume its deliberations on the counts upon which it had not reached a verdict** (*id.; emphasis added)*.

29. Here, as in *Jimenez*, the conviction on the lesser offense without first acquitting on the greater was defective, was in violation of this Court's CJI-approved *Boettcher* instruction, and demonstrated the jury's confusion as to the order in which to proceed. Accordingly, the Court was required to, as the trial court did in *Jimenez*, reject the verdict.

30. In short, considering the Court's instruction and the applicable case law, the verdict convicting the defendant of kidnapping in the second degree without first acquitting on kidnapping in the first degree is a nullity and must be vacated.

Potential Prosecution Arguments

31. It is anticipated that the prosecution will argue that the fact that kidnapping in the second degree was specifically charged in the indictment changes the analysis. It does not, as CPL 300.50 specifically states that charged inclusory concurrent counts must be submitted in the alternative just as requested lessers are (*see pgphs.* 17-18, above).

32. There is no legal support for any notion that there is a distinction between lessers charged in the indictment and those that are not in this regard. In fact, in Criminal Procedure in New York, a leading treatise, it is stated that "If the lesser included offense is specifically charged in another count of the indictment the same principles which apply to the submission of a lesser included offense which is not specifically charged apply" (3 Criminal Procedure in New York § 46:44).

33. Moreover, the prosecution may argue, as it did in opposing the initial objection to the verdict, that the Court's deadlock instruction superseded the properly-given *Boettcher* instruction. To the contrary, the instruction, attached hereto, concerned the possibility of a partial verdict versus a deadlock on all counts, and did nothing to vitiate the Court's prior instruction regarding the kidnapping counts. Those counts were never specifically mentioned, and the Court's prior instruction on the order of consideration of those counts remained in effect. This final instruction is attached hereto as "Exhibit C."

Conclusion

34. For all of the foregoing reasons, the verdict convicting defendant [redacted] of kidnapping in the second degree is improper and cannot stand.

WHEREFORE defendant [redacted] respectfully requests that this Court set aside the verdict convicting him of kidnapping in the second degree under Count 19 of the original indictment (Count Two of the submitted counts), and for any such other and further relief as to the Court appears just and proper.

Dated: [redacted]

By:

[redacted]
[redacted]
Attorneys for Defendant [redacted]