STATE OF NEW YORK
ERIE COUNTY . HAMBURG TOWN COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF MOTION
TO SET ASIDE VERDICT
[redacted]

[redacted]

YOUR HONOR:

Please take notice that upon the attached affirmation of [redacted] ESQ., at a term of Hamburg Town Court held at [redacted]. on [redacted], the defendant will move to set aside part of the verdict pursuant to CPL 330.30(1).

[redacted]

Respectfully yours,

[redacted]
[redacted]
_____
_____
_____

TO:

Hon. Carl Morgan

Erie County District Attorney
25 Delaware Avenue
Buffalo, New York 14202

STATE OF NEW YORK
ERIE COUNTY . HAMBURG TOWN COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v. **SUPPORTING AFFIRMATION**
Docket No. [redacted]

[redacted]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.

[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 the attorney for [redacted], who was originally charged with aggravated unlicensed operation in the first degree (AUO 1st) (Vehicle and Traffic Law § 511[3][a][iv]), driving while intoxicated (Vehicle and Traffic Law § 1192[3]), criminal tampering in the third degree (Penal Law § 145.14), leaving the scene of a property damage accident (Vehicle and Traffic Law § 600[1][a]), failure to keep right (Vehicle and Traffic Law § 1120[a]), and refusal to take a breath test (Vehicle and Traffic Law § 1194[1][b]).
2. Before trial, the charge of AUO 1st was reduced to AUO in the third degree (AUO 3rd) (Vehicle and Traffic Law § 511[1][a]), and the charge of criminal tampering was dismissed.
3. A jury trial was held before this Court on [redacted].
4. The only evidence presented with respect to the AUO 3rd was the testimony of PO [redacted] that a computer check indicated that Mr. [redacted] driving privileges were suspended.
5. At the close of the prosecution's case, the defense moved for a trial order of dismissal with respect to the charge of AUO 3rd on the grounds that "there has been no factual evidence presented which the jury could make a determination of guilt" and "no factual

evidence to support the allegations that on [redacted] [redacted] license was in a state of suspension or revocation because at the time he was operating on a conditional license, not on a suspended, nor revoked" (see attached transcript, pp. 2-3). The court denied the motion (*id.*, p. 4).

6. At the close of the defense case, the defense renewed its motion for a trial order of dismissal with respect to the charge of AUO 3rd on the grounds that "there has no been no establishment of his license actually being suspended or revoked" because "no information was brought in from the DMV, no one testified with actual knowledge of the suspension of revocation" (see attached transcript, pp. 4-5). The court denied the motion (*id.*, p. 9).
7. The jury returned a verdict acquitting [redacted] of leaving the scene of a property damage accident and driving while intoxicated, but convicting him of driving while ability impaired (Vehicle and Traffic Law § 1192[1]), AUO 3rd, failure to keep right, and refusal to take a breath test.
8. He has not yet been sentenced.
9. "At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon," in relevant part, "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" (CPL 330.30[1]).
10. In light of this statute, [redacted] convictions for aggravated unlicensed operation in the third degree and refusal to take a breath test must be set aside.

The charge of AUO 3rd was not proven by legally sufficient evidence.

11. 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]).
12. For the purpose of a sufficiency analysis, competent evidence is “evidence not subject to an exclusionary rule, such as the prohibition against hearsay” (*People v. Swamp*, 84 NY2 725, 730 [1995]).
13. A person commits the offense of AUO 3rd when he “operates a motor vehicle upon a public highway while knowing or having reason to know that such person’s license or privilege of operating such motor vehicle in this state or privilege of obtaining a license to operate such motor vehicle issued by the commissioner is suspended, revoked or otherwise withdrawn by the commissioner” (Vehicle and Traffic Law § 511[1][a]).
14. In other words, the prosecution was required to prove that [redacted] license was in fact suspended, revoked, or withdrawn and that he knew or had reason to know that this was the case.
15. The only evidence presented by the prosecution that [redacted] driving privileges were suspended or revoked – [redacted] computer check of the DMV records – was not competent evidence sufficient to prove every element of the crime charged.
16. In *People v. Pierre*, a judge of the New York City Criminal Court held that evidence produced by a DMV computer check was hearsay and insufficient even for the purpose of filing charges (157 Misc2d 812, 816 [Crim Ct., New York Co., 1993]).
17. The prosecution may cite *People v. Swanston*, in which the Third Department held that evidence of the defendant’s admission that his driving privileges were revoked, confirmed by a DMV computer check, was sufficient to prove the charge of AUO 1st (277 AD2d 600, 603 [3rd Dept. 2000]).

18. However, in that case, the DMV computer check was merely corroborative of reliable, admissible evidence, not the only evidence.

19. As the motion for a trial order of dismissal was "specifically directed" at the lack of evidence that [redacted] driving privileges were suspended or revoked, this claim is preserved for appellate review (*People v. Gray*, 86 NY2d 10, 19 [1995]).

Refusal to take a breath test is a nonexistent offense.

20. The alleged traffic infraction – "refusing the breath test mandated by Vehicle and Traffic Law § 1194(1)(b) – is not a cognizable offense for which a person may be charged or convicted in a criminal court" (*People v. Adams*, 201 AD3d 1311, 1312 [4th Dept. 2022]). "A conviction for a nonexistent offense constitutes a fundamental error that cannot be waived, need not be preserved, and is not forfeited by a guilty plea" (*id.*).

For the reasons stated, the motion should be granted.

_____
[redacted]