STATE OF NEW YORK
SUPREME COURT:COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF MOTION

vs.

[redacted]

Indictment No. [redacted]

Defendant.

PLEASE TAKE NOTICE that upon the annexed Affirmation of [redacted] Esq., on 31st day of [redacted], upon Indictment Number [redacted], the undersigned will move this Court in the Erie County Courthouse, 25 Delaware Avenue, Buffalo, New York, the Hon. Debra Givens, J.S.C., on 31st day of [redacted] at 9:30 a.m. or as soon thereafter as counsel can be heard for an Order granting the Defendant the following relief:

1. An Order for inspection of the Grand Jury minutes in this case and for dismissal or reduction of the indictment pursuant to Criminal Procedure Law Sections 210.20 and 210.30.

2. An Order for dismissal for defective Grand Jury proceedings pursuant to Criminal Procedure Law Section 210.35.

3. An Order for dismissal of counts of the Indictment that are untimely pursuant to Criminal Procedure Law Article 30.30..

4. An Order pursuant to Criminal Procedure Law Section 200.95 requiring the Prosecution to furnish Defendant with a Bill of Particulars.

5. An Order requiring the People to produce any and all information favorable to the Defendant pursuant to **Brady v. Maryland, 376 U.S. 83 (1963).**

6. An Order requiring the Prosecution to specify all of the Defendant's prior criminal convictions that the People may seek to introduce against the Defendant at trial; **People v. Sandoval, 34 N.Y.2d 371.**

7. An Order requiring the Prosecution to state if they intend to rely on prior bad acts or uncharged crimes attributed to the Defendant in their case, and, if so, Defendant requests a hearing to determine which such evidence should be admitted at trial; **People v. Ventimiglia, 52 N.Y.2d 350; People v. Molineux, 168 N.Y.264.**

8. An Order pursuant to Sections 710.30(3) and 60.45 of the Criminal Procedure Law suppressing all of the involuntary statements made by the defendant and a **Huntley Hearing** to explore the nature of the Defendant's statements noticed on the 710.30 form provided at arraignment.

9. An Order granting a **Wade/Identification Hearing** to determine if proper procedures were utilized during the various identifications made of the defendant noticed on the 710.30 form provided at arraignment.. This request includes an Order granting a **Rodriguez Hearing** to determine the propriety of the "confirmatory" nature of the identifications noticed on the 710.30.

10. An Order for a **Mapp/Dunaway** hearing to determine the legality of the vehicle stop and search in this case.

11. An Order pursuant to **People v. Sanders** allowing defendant sufficient time to receive transcription of Court proceedings and Hearings to adequately prepare for trial.

12. An Order granting the Defendant leave to make such other and further motions as may be necessary following counsel's examination of the materials sought herein.

Dated: J[redacted]

To: Hon. Debra Givens, J.S.C.
[redacted] A.D.A.

STATE OF NEW YORK
SUPREME COURT:COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION

vs.

[redacted]

Indictment No. [redacted]

Defendant.

STATE OF NEW YORK)
COUNTY OF ERIE) SS:

[redacted] affirms under penalty of perjury that:

1. I am an attorney at law duly licensed to practice my profession in the State of New York.

2. I represent [redacted] who is charged with seven counts of Grand Larceny in the Fourth Degree in violation of Penal Law Section 155.30(1) and one count of Robbery in the Third Degree in violation of Penal Law Section 160.05. A copy of Indictment [redacted] is annexed hereto as Exhibit A.

3. I make this Affidavit in support of an Omnibus Motion on behalf of the Defendant.

MOTION TO INSPECT AND DISMISS OR REDUCE

4. Sections 210.20(1)(a) and 210.30 of the Criminal Procedure Law authorizes a Motion to Dismiss or reduce any count of an indictment where the evidence presented to the Grand Jury was not legally sufficient.

5. Your deponent requests the Court Order and conduct an examination of the

Grand Jury minutes and dismiss any counts of the Indictment that are not founded on legally sufficient evidence. Additionally, the defendant requests that the Court conduct an examination of the Grand Jury minutes and reduce any count of the Indictment to an appropriate lesser included charge, Petit Larceny, Penal Law Section 155.25.

6. The Defendant requests the Court inspect the Grand Jury minutes and to reduce any count of the Indictment to the appropriate lesser included charge, Petit Larceny, Penal Law Section 155.25, where a proof of value of theft over $1,000.00 was not established before the Grand Jury.

7. As to counts 2 and 7 of the Indictment, charging Grand Larceny (Penal Law Section 155.30[1]), from on and the property alleged to be stolen on those dates was not recovered, as per the Grand Jury testimony of District Asset Protection Manager, Exhibit B and the Grand Jury testimony of Cheektowaga Store Manager , Exhibit C, pages 30 and 35. It further appears that Mr. used some sort of "averaging" method to arrive at the value of the property alleged to be stolen, see Exhibit B, Grand Jury testimony of page 13. Under this method the "average" value of the alleged stolen property could be "higher or lower".

8. testified the alleged stolen property on the dates was not recovered, and an exact value, which to be at Felony level must be over $1,000.00, cannot be established other than an "averaging" method, which amounts to his best guess at the value of the alleged stolen property. The proof of value as to counts 1 and 3 of the Indictment is based on "averaging" and best guesses and is wholly inadequate as to proof of value. In addition, Mr. suggests to the Grand Jury that since a

shoplifter typically targets "higher end" merchandise, the merchandise at issue here is probably higher end and more expensive, without recovering the property, putting a misleading thought before the Grand Jurors about value when he clearly testifies the alleged stolen property was not recovered. See Exhibit B, pg. 13.

9. This conclusion is reinforced by Mr. [redacted] testimony (Exhibit B, page 15) where he notes that he can arrive at accurate value when property **is** actually recovered. "Because the merchandise was actually recovered by the Cheektowaga Police Department, we were able to ring a receipt through the register that accurately depicted the value of the merchandise taken that day". Counts 2 and 7 of the Indictment, Grand Larceny, in violation of Penal Law Section 155.30(1) must be reduced to Petit Larceny, Penal Law Section 155.25 based on inadequate proof of value of over $1,000.00 before the Grand Jury

10. As to count 1 of the Indictment, theft from [redacted] on [redacted] as per the Grand Jury testimony of [redacted] Protection Specialist, Exhibit D, the alleged stolen property was not recovered, Exhibit D, page 55. Mr. [redacted] used the term "roughly" to describe the value of the alleged stolen property. See Exhibit D, page 54. A value that is "roughly" is too speculative to satisfy the $1,000.00 amount needed to sufficiently allege felony Grand Larceny, Penal Law Section 155.30(1), given the fact that as per Mr. [redacted] Grand Jury testimony, the alleged stolen property was not recovered. Count 1 of the Indictment should be reduced to Petit Larceny, pursuant to Penal Law Section 155.25 as "rough" value or "roughly" the value is inadequate proof of value of over $1,000.00. A best guess does not equal value.

11.. As to the [redacted] alleged theft on [redacted], count 5

of the Indictment, [redacted], Assistant Store Manager at the West Seneca location testified at the Grand Jury that there was not "enough detail" on a drill photograph of a drill alleged to be stolen to definitively identify it; Exhibit E, [redacted] Grand Jury testimony. Guessing which model it was, and thus what price, does not assure that the total value of property on this count exceeds $1000.00. See Exhibit E, pgs. 15-16. Therefore, count 5 of the Indictment should be reduced to Petit Larceny (Penal Law Section 155.25), as testimony of pictures that have not "enough detail" to identify merchandise is inadequate before the Grand Jury to establish a value of over $1,000.00.

12. Similarly, with respect to the Grand Jury testimony of [redacted] Asset Protection at [redacted] Exhibit F, as to the alleged theft of property on [redacted] count 4 of the Indictment, the property alleged to have been stolen was not recovered, yet the "receipt" for the unrecovered property was testified to. Exhibit F, page 74. Without recovering the alleged stolen property, it would be impossible to conclusively establish a value over $1,000.00. Count 4 of the Indictment should be reduced to Petit Larceny, Penal Law Section 155.25.

13. As to count 8 of the Indictment, an alleged theft from [redacted] [redacted] the merchandise alleged to have been stolen was not recovered, yet again values of property and "receipts" for the unrecovered alleged stolen property are testified to by [redacted] Security [redacted] see Exhibit G, page 93.

It is impossible to correctly arrive at a value of over $1000.00 from "receipts" for property not recovered and count 8 of the Indictment should similarly be reduced to Petit Larceny, pursuant to Penal Law Section 155.25 due to inadequate proof of value of over $1,000.00.

14. If the value of the alleged stolen property had to be arrived at by "averaging",

"rough" estimates, unclear photographs and just plain guessing at what property was taken, the Grand Jury was given exaggerated testimony of value and a value of $1,000.00, the threshold for Felony Grand Larceny, was not conclusively established .Grand Jurors were shown "receipts" for property not recovered, misleading them as to value of property. See Grand Jury Exhibit H, receipts moved into evidence during the Grand Jury presentation for property not recovered where the various store employees were "averaging", "roughly" estimating, looking at an unclear picture and just plain guessing about total value of merchandise alleged to have been taken. This inaccurate testimony was not harmless as it resulted in the instant Indictment where most, if not all, counts reflect a value of over $1,000.00 when the same was not established before the Grand Jury.

15. As to the count 6 of the Indictment , Robbery in the Third Degree, Penal Law Section 160.10(1), the testimony of "mere touching" is not sufficient to establish the element of force, Penal Law Section 160.00(1); see **People v. Cherry, 49 A.D.2d 860** (mere "touching" of the victim was not the equivalent of physical force); **People v. Flynn, 123 Misc.2d 1021, 1023** ("although the use of actual violence is not the **sine qua non** of physical force, bodily contact alone is not its functional equivalent either, especially when it is effected by a mere touching"). Moreover, proof of value in this count before the Grand Jury was not legally sufficient, as the property in this count was also not recovered. Count 6, must be reduced to Petit Larceny, Penal Law Section 155.25. See Exhibit G, Grand Jury testimony of [redacted], page 88, pgs. 91-93.

16. If the Court reduces any of the felony counts of Grand Larceny or the Robbery, Third Degree to the misdemeanor of Petit Larceny in violation of Penal Law Section 155.25, those reduced counts must be dismissed because more than 90 days have passed

from the filing of the charges; Criminal Procedure Law Section 30.30(1)(b); Where a misdemeanor charge is joined with a felony charge based on a separate incident, the misdemeanor 30.30 provision applies (**People v. LaChance, 189 Misc2d 634, 636, (Supreme Court, Erie County**).

DISMISSAL/DEFECTIVE GRAND JURY PROCEEDINGS

17. Criminal Procedure Law Section 210.35 authorizes a motion to dismiss an Indictment where the proceedings before the Grand Jury were defective: see, **People v. Wilkins, 68 N.Y.2d 269**. Mr. [redacted] requests the Court inspect the Grand Jury minutes **in camera** regarding the instructions given to the Grand Jury by the prosecution. In conjunction with this request, we are asking the Court to release the instructions given to the Grand Jury so that additional motions can be made regarding the legal instructions given.

18. Mr. [redacted] reserves the right to supplement these papers in the event further Motions may be required after the Court inspects the Grand Jury instructions.

19. Prior to the Grand Jury presentation on [redacted] Mr. [redacted] made requests to Criminal Special Term, Judge M. William Boller, J.S.C. presiding. The People Answered and made a request to have [redacted] shackled while delivering testimony before the Grand Jury. Judge Boller granted the People's request over objection.

See Defense Grand Jury Application, People's Answer and Judge Boller Order, Exhibit I.

20. Mr. [redacted] appeared before an Erie County Grand Jury shackled, with waist chains and handcuffs on [redacted] to deliver his testimony,. flanked by two confidential

investigators from the Erie County District Office, each with a weapon visible.

21. The People cited defendant's prior criminal history as the reason for the request to shackle the defendant, a wholly inadequate reason. Judge Boller's Order deprived [redacted] of a fair and impartial Grand Jury presentation; see **People v. Cruz, 17 N.Y.3d 941**; **People v. Barnes, 96 A.D.3d 1579** and the cases cited therein.

22. This error was compounded the Erie County District Attorney's Office Natalie [redacted] twice inappropriately imploring [redacted] to "just answer the questions" during his testimony. Although Investigator [redacted] presence in the Grand Jury is authorized (Penal Law Section 190.25[3][e]), she had no role in the questioning during the Grand Jury presentation and her remarks during [redacted] testimony, which were not addressed by the People with a cautionary instruction, served to deprive [redacted] of a fair and impartial Grand Jury proceeding, providing an additional reason for the Court to find the Grand Jury presentation prejudicial and defective. See [redacted] Grand Jury transcript, Exhibit J, pgs. 37 and 39 (Investigator [redacted].

23. During the Grand Jury presentation on [redacted], Judge Boller was presiding in Criminal Special and the People secured a ruling was that Mr. [redacted] could not present exculpatory information to the Grand Jury hearing his testimony. See Exhibit K.

24. Criminal Procedure Law Section 190.50(6) provides a defendant may request witnesses to be heard by the Grand Jury to present exculpatory information. If the Grand Jury wishes to hear from the defendant's proposed exculpatory witnesses, a procedure to accomplish this is in place; see Criminal Procedure Law Section 190.50(3). Instead of following this procedure, the People short-circuited any possibility for Mr. [redacted] to present exculpatory information with a ruling from Judge Boller.

25. Moreover, Judge Boller's ruling usurped the statutory scheme provided in the Criminal Procedure Law (Sections 190.50[6] and 190.50[3]) that the Grand Jury, not a Court, decide what witnesses they can call in response to a defendant's request in the Grand Jury. The Grand Jury could very well have declined to hear Mr. [redacted] proposed witnesses, but, it was for the Grad Jurors, not the People or a Judge, to decide that; see **<u>People v. Hill</u>, 19 Misc.3d 1113**, **<u>People v. Ali,</u> 19 Misc.3d 672, <u>People v. Andino</u>, 183 Misc.2d 290.**

26. Even assuming a cautionary instruction was given regarding shackling Mr. [redacted] multiple errors are associated with this Grand Jury proceeding, namely, shackling of Mr. [redacted] without adequate reason, inappropriate comments by Investigator [redacted] (with no cautionary instruction) and the Judge Boller Order preventing exculpatory evidence from being brought to the Grand Jury. The cumulative effect of these errors was to systematically deprive Mr. [redacted] of a fair and impartial Grand Jury presentation and the Indictment should be dismissed.

27. The Indictment does not comply with Criminal Procedure Law Section 200.50(8) as it is not signed by the Grand Jury foreman and is therefore defective (Criminal Procedure Law Section 210.35). There is a place on the cover of the Indictment labeled 'Foreperson" with a line before it as well as a line underneath, both presumably spots where the foreperson could sign. Neither spot contains a signature. Furthermore, the scribbled initials below and to the right side of the stamped signature of the District Attorney do not comply with the directive that an Indictment must be "signed by the foreperson", as per statute. See Criminal Procedure Law Section 200.50(8). See Exhibit L.

28. Cases that have discussed the requirements of Criminal Procedure Law Section 200.50(8) have found statutory compliance when both the District Attorney **AND** Grand Jury

foreperson have signed the backer accompanying the Indictment, see **People v. Striplin, 48 A.D.3d 878; People v. Brown, 17 A.D.3d 869.** The instant Indictment fails to meet the statutory requirements of Criminal Procedure Law Section 200.50(8) and, read in conjunction with relevant case law, the Indictment must be dismissed.

DISMISSAL PURSUANT TO 30.30

29. Counts 2, 3 and 7 of the Indictment began in Cheektowaga Town Court. Each of those counts represents an alleged Grand Larceny [Penal Law Section 155.30(1)] from in the Town of Cheektowaga on the dates of January 5th, 7th Felony Complaints for each are attached aa Exhibit M. .

30. Mr. vas arraigned in Cheektowaga Town Court on each Felony Complaint on and a Felony Hearing on each was held on The People did not run the Felony Hearing on as to each Felony Complaint, but reduced the three Felony Complaints on their own CPL 180.50 Motion to Petit Larceny, Penal Law Section 155.25. See Exhibit M, transcript of Felony reductions. More than 90 days then elapsed and the People did not declare ready on the reduced misdemeanors. The People then indicted the three reduced misdemeanors which became counts 2, 3 and 7 of this Indictment.

31. Neither the defendant nor counsel consented to an adjournment of time; see **People v. Suppe, 224 A.D.2d 970; People v. Liotta. 79 N.Y.2d 841; People v. Collins, 82 N.Y.2d 177; People v. Alvarez. 194 A.D.3d 618, People v. Bissereth, 194 A.D.3d 317**, See Exhibit N, Felony Hearing Transcript.

32. In conversations with the People, it is expected that they will rely on congestion on the Cheektowaga Town Court calendar to argue they should not be charged with the 30.30 time to prosecute the three Felony Grand Larceny counts reduced to three Misdemeanor Petit Larcenies. This argument should be rejected. It should be noted that absolutely nothing prevented the People from declaring ready during the 90 day period from [redacted]

33. The People joined the three reduced misdemeanors into an Indictment with Felony charges based on separate incidents. Where a misdemeanor charge is joined with a felony charge based on a separate incident, the misdemeanor 30.30 provision applies to the reduced misdemeanors; see **People v. LaChance, 189 Misc2d 634, 636 (Supreme Court, Erie County).**

34. Moreover, as a separate 30.30 argument, if the Court reduces any of the Felony counts to misdemeanors on any other ground (such as inadequate proof of value before the Grand Jury) any of those dismissed misdemeanor counts are 30.30 dead because more than 90 days have passed from the filing of charges; see Criminal Procedure Law Section 30.30[1][b]), **LaChance, supra.**

BILL OF PARTICULARS

35. The Defendant requests a Bill of Particulars to enable the adequate preparation of a proper defense. With this in mind, the Defendant requests the prosecution provide a Bill of Particulars detailing the substance of the Defendant's conduct that encompasses the crime, pursuant to C.P.L. Sections 100.40 and 200.95.

BRADY MATERIALS

36. Pursuant to **Brady v. Maryland, 376 U.S. 83 (1963)**, the People must turn over to Defendant all favorable evidence. This case involves alleged stolen merchandise and the value of such merchandise. Applicable case law is **People v. Irrizari, 5 N.Y.2d 142** describing what "market value" of merchandise is, also **People v. Reid, 169 A.D.3d** 102 and Penal Law 155 definitional sections of "market value", Penal Law Section 155.20(1).

37. The trial of this Indictment will focus on the value of the alleged merchandise and the **Brady** materials Mr. [redacted] seeks directly bear on the "market value" of the alleged stolen property in each count of the Indictment. Any count of the Indictment wherein a value of one-thousand dollars cannot be established by the People cannot not lead to a felony Grand Larceny conviction. Therefore, all of the information that is being sought bears directly on the market value of the property and is potential exculpatory information that Mr. [redacted] is entitled to receive from the prosecution, which is the reason that **Brady** rules exist.

38. With this background and for each and every count of the Indictment the People are asked to provide:

a). Any and all records pertaining to the price of each item alleged stolen from [redacted] from wholesale to retail.

Include all price sheets, including original price markup after wholesale.

b). Pricing of each item alleged to stolen from [redacted] after application of all sales, discounts, markdowns, reductions and/or other promotional events impacting the pricing of items on applicable on the dates in question.

c). History of price changes for each item alleged to have been stolen for each count of the Indictment beginning with the original wholesale price.

d). Pricing of each item alleged to have been stolen after application of all discounts available through on-line shopping and on-line coupons.

e). Store-wide promotional sales, coupons, discounts applicable at [redacted] on each date for all counts of the Indictment; include "buy one get one", coupons in effect, spend a certain dollar amount get a certain amount/percentage off sale, discounts applicable if a certain credit card or store credit card is used, and the like.

f). [redacted] cash promotions applicable in the dates alleged in the [redacted] counts of the Indictment.

g). Any and all blue-light or pop-up specials at any of the retail establishments on the dates the alleged crimes were committed.

h). All price manuals/price books and store merchandise buyer information books, manuals or records from [redacted] and Target and/or description of procedures to be employed with respect to the recovery, itemization and/or merchandise lost or recovered as a result of theft and the procedures to be used by asset protection personnel at each retail establishment.

i). Provide the personnel files for all store security personnel that testified or will testify in this case, as well as their criminal records.

39. This is a continuing request as new information is made available to the People upon their receipt of further information.

SANDOVAL HEARING

40. The Defendant moves to preclude the Prosecution from introducing any and all of the defendant's prior criminal convictions against him at trial.
Or, in the alternative, that the Court conduct a hearing to determine if any such convictions should be admitted against the Defendant at trial; **People v. Sandoval, 34 N.Y.2d 371**.

VENTIMIGLIA/MOLINEUX HEARING

41. The Defendant requests the Prosecution to state if they intend to rely on the Defendant's prior uncharged criminal, vicious, or immoral conduct at trial to impeach the Defendant's credibility; **People v. Ventimiglia, 52 N.Y.2d 350.**

42. The Defendant requests the Prosecution identify all uncharged criminal activities attributed to the Defendant that the People will seek to introduce to establish either motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or, identification; **People v. Molineux, 168 N.Y.264.**

HUNTLEY HEARING/DEFENDANT'S STATEMENTS

43. The People have given notice on the 710.30 statement that the Defendant made statements which the People seek to introduce at the trial of this case, See Exhibit N. More specifically, notice has been given of two oral statements allegedly made by Mr.

one on following a traffic stop in Cheektowaga and another on in the booking room of West Seneca Police Headquarters.

44. The Defendant requests a **Huntley Hearing**, (**People v. Huntley** **15 N.Y.2d 72)** to explore the voluntariness of his statements and if the proper procedures for administration of **Miranda Warnings** were followed; **Miranda v. Arizona, 384 U.S. 436.**

45. Mr. alleges he did not receive proper **Miranda Warnings** prior to the Statement allegedly given to Cheektowaga Police Officers at the traffic stop conducted by them on and a valid waiver of **Miranda** rights did not occur.

46. Mr. further alleges that he did not spontaneously made a statement to West Seneca Detective on in the booking room of West Seneca Police Headquarters, and any statement made was while he was in custody and un-Mirandized while subject to custodial interrogation and was involuntarily made.

47. A motion for a **Huntley Hearing** must be granted if a defendant claims his statement is involuntarily made, regardless of the facts; **People v. Weaver, 49 N.Y.2d 1012**; **People v Acosta, 150 A.D.2d 166.**

48. At the **Huntley Hearing** issues of Mr. custody status, nature of interrogation and by whom, timing of and proper administration of **Miranda Warnings** and if a valid waiver of the same was obtained will be explored. Also, the circumstances and nature of the West Seneca Police alleged "spontaneous statement" made on will be explored.

49. In regard to the burden of proof at the **Huntley Hearing** and rules regarding Mr. right to counsel, custodial interrogation, administration and waiver of Miranda

Warnings, see **<u>People v Huntley</u>, 15 N.Y.2d 72; <u>Miranda v. Arizona</u>, 384 U.S. 436; <u>People v. Huffman</u>, 41 N.Y.2d 29; <u>Rhode Island v. Innis</u>, 446 U.S. 291.** Additionally, as to the alleged "spontaneous statement" made to the West Seneca Police see **<u>People v. Maerling</u>, 46 N.Y.2d 289; <u>People v Lynes</u>, 49 N.Y.2d 286; <u>People v. Dunn</u>, 195 A.D.2d 240.**

50. Mr. Ellison reserves the right to submit a full written suppression Motion to address issues related to the **Huntley Hearing** at the conclusion of said Hearing.

<u>WADE/IDENTIFICATION HEARING</u>

51. Multiple identification procedures were noticed on the 710.30 statement served upon Mr. [redacted] at his arraignment, including a show-up by Cheektowaga Police on [redacted], two photo array identifications, one on [redacted] conducted by Amherst Police at the [redacted] Department Store and another on [redacted] conducted by the Amherst Police at the Amherst Police Headquarters as well as five alleged "confirmatory" identifications made by security personnel from [redacted] and [redacted] Security on [redacted] and [redacted] based on group chats from the Organized Retail Crime Group App ("ORC"), See Exhibit N.

52. Mr. [redacted] requests a **Wade Hearing (<u>U.S. v. Wade</u>, 388 U.S. 218)** to ensure that a misleading and suggestive identification was not made in each identification procedure.

53. As to the photo arrays shown by the Amherst Police on [redacted] 2023, Mr. [redacted] alleges that the photo arrays were unduly suggestive and the identifications made should be suppressed. The People have the initial burden of going forward to show the photo arrays are not unduly suggestive and then the burden shifts to the defendant to prove that the photo arrays and the identification procedures were unduly suggestive; **<u>People v. Chipp</u>,**

75 N.Y.2d 327; **People v. Gourdine,** 223 A.D.2d 428; **People v. Vasquez**, 199 A.D.2d 444.

54. As to the show-up identification made on Mr. alleges that this identification was improper and unduly suggestive; see **People v. Pena,** 93 N.Y.2d 946, **People v. Ortiz,** 90 N.Y.2d 533.

55. The People have given 710.30 notice that 5 alleged "confirmatory" identifications of Mr. were made primarily using the Organized Retail Crime Group App "ORC" which appears to be an on-line chat group for security personnel from various retail establishments to communicate with each other and post pictures and security camera footage of retail theft suspects.

56. Mr. disputes that these identifications are "confirmatory" and requests a Hearing to dispute the alleged "confirmatory" nature of the identifications. We allege that the possibility of misidentification is enormous as anxious security personnel look for ways to identify theft suspects. In addition, a "confirmatory identification" is usually narrowly confined to situations in which the identifying witness and defendant are "family members, former friends or long-time acquaintances", see **People v. Collins, 60 N.Y.2d 214.** A Hearing is needed to determine the "confirmatory" nature of the 5 identifications; see **People v Rodriguez,** 79 N.Y.2d 445; **People v. Dixon, 85 N.Y.2d 218.**

57. Mr. reserves the right to submit a full written suppression motion after the conclusion of the **Wade** and **Rodriguez Hearings.**

MAPP/INGLE HEARING

58. Mr. requests **Mapp** and **Ingle Hearings** to determine the legality of the police stop and search of Mr. vehicle by the Cheektowaga Police on

59. Cheektowaga Police Officers Szmania and Doskocz, conducted a purported traffic on [redacted] that lacked probable cause. It appears that a general description of a vehicle was given, with no further identifying information. Mr. [redacted] alleges the information the police had was wholly inadequate to conduct a traffic stop and requests the Court conduct a Hearing to determine if the Cheektowaga Police had probable cause to stop the vehicle and detrain and search the vehicle. It should be noted that as a passenger in the vehicle, Mr. [redacted] has standing to contest the stop and search; **Brendlin v. California, 551 U.S. 249**.

SANDERS/TRANSCRIPTION REQUEST

60. Mr. [redacted] requests that the Court allow for sufficient time to receive stenographic transcripts of all court proceedings and Hearings to adequately prepare for trial; **People v. Sanders, 31 N. Y. 2d 463**.

ADDITIONAL MOTIONS

61. The Defendant reserves the right to submit additional motions and request further hearings as may become necessary following counsel's examination of the materials sought herein.

Dated: July 31st, 2023
TO: Hon. Debra Givens, J.S.C.

OMNIBUS MOTION EXHIBIT LIST – PEOPLE V. J
ERIE COUNTY INDICTMENT NUMBER 00470-2023

EXHIBIT A .... INDICTMENT NUMBER 00470-2023
EXHIBIT B .... GRAND JURY TESTIMONY OF
EXHIBIT C .... GRAND JURY TESTIMONY OF
EXHIBIT D .... GRAND JURY TESTIMONY OF
EXHIBIT E .... GRAND JURY TESTIMONY OF
EXHIBIT F .... GRAND JURY TESTIMONY OF
EXHIBIT G .... GRAND JURY TESTIMONY OF
EXHIBIT H .... "RECEIPTS" FOR UNRECOVERED PROPERTY
EXHIBIT I .... JUDGE BOLLER HANDCUFF ORDER
MOTION ARGUMENT
DEFENSE MOTION AND PEOPLE'S ANSWER
EXHIBIT J .... GRAND JURY TESTIMONY J
COMMENT
EXHIBIT K .... JUDGE BOLLER PROCEEDINGS
EXHIBIT L .... INDICTMENT BACKER
EXHIBIT M .... CHEEKTOWAGA FELONY COMPLAINTS
PEOPLE'S 180.50 REDUCTION OF COMPLAINTS
TRANSCRIPT OF PROCEEDINGS
EXHIBIT N .... 710.30 NOTICES STATEMENTS & IDENTIFICATIONS