STATE OF NEW YORK
COUNTY COURT : COUNTY OF CHEMUNG

THE PEOPLE OF THE STATE OF NEW YORK

versus

[redacted] and

DEFENSE MEMORANDUM OF LAW FOLLOWING SUPPRESSION HEARING

Indictment Nos. [redacted]

Submitted on [redacted]

By: [redacted]

To: HON. RICHARD W. RICH, JR.
CHEMUNG COUNTY COURT JUDGE

ADA ANNE STARK
ADA ZACHARY PERSICHINI
Chemung County District Attorney's Office

PROCEDURAL POSTURE

Defendants [redacted] and [redacted] were charged jointly with criminal possession of a weapon in the second degree (Penal Law § 265.03[3]) after a traffic stop and search of their vehicle turned up a loaded pistol. The pistol was registered out of state, but not in New York State. After being indicted, both defendants moved to suppress the weapon, challenging both the stop of the vehicle and the search of the vehicle, and a hearing was held on [redacted] The prosecution called three police witnesses. This memorandum is submitted on behalf of both defendants in favor of suppression of evidence and statements.

FACTS

On [redacted], New York State Trooper [redacted] was on duty, and was sitting stationary in his marked patrol vehicle on Watkins Road in the Village of Millport (5; numbers in parentheses refer to pages in the transcript of the suppression hearing). Trooper [redacted] was assigned to a "Community Stabilization Unit," designed for gun violence and the possession of illegal guns (30). The officers in that unit are focused on guns and are trained on how to climb the so-called *DeBour* ladder following traffic stops (32-34).

Around 1:33 PM, he and his partner (Trooper [redacted]) observed a vehicle traveling northbound on Watkins Road (6). He noticed that the housing that typically covers the drivers side-view mirror was missing (7). As the Trooper was behind the vehicle, he saw that there was an aftermarket mirror affixed (42). He acknowledged that he was not sitting in the Malibu and could not see whether the mirror was adjustable from the interior nor whether the driver had a full view through the mirror (42, 58).

At that point, the troopers pulled behind the vehicle, ran the registration, and conducted a traffic stop. It was Trooper [redacted] opinion that the mirror violated the Vehicle and Traffic Law (10). Shortly after the stop, the Trooper determined that [redacted] had active warrants out of the City of Hornell (14). The troopers immediately placed [redacted] into custody (15). In fact, body camera footage indicates that [redacted] was in custody two to three minutes after the stop (43).

After taking [redacted] into custody, Trooper [redacted] told [redacted] to "sit tight" (16). The Trooper testified that a reason he kept [redacted] at the scene is so that she could be notified of where to pick up [redacted] (44). However, in the age of cellular phones, it was not necessary to detain [redacted] on that basis (44). The Troopers then proceeded to ask [redacted] several questions without benefit of *Miranda* warnings (20).

At this point, the Troopers noticed that the vehicle was messy and there were trinkets and jewelry consistent with a trip to an antique store about the vehicle (23). Troopers asked [redacted] for permission to search the vehicle (23). This consent was requested about 24 minutes after the traffic stop that was ostensibly for a mirror violation, and 21-22 minutes after [redacted] was already in custody (43).

The consent to search was questionable, and it is captured on bodycam video entered into evidence. The Trooper asked [redacted] for consent to search, and she first brushed it off and changed the subject (47). He asked her a second time, stating "Do you mind if I take a look so I can get you out of here (49; People's Exhibit 4 at 23:48). Even the officer acknowledged that his request could have been construed as meaning that the person's freedom to leave was conditioned upon giving consent to search (49-50). Trooper [redacted] testified that, while he felt [redacted] was free to leave, he would have concluded otherwise if he knew the wording of Trooper [redacted] question (77).

While this consent issue was going on, Trooper [redacted] was interrogating [redacted], who was in custody and had not been *Mirandized* (78). He was accusing [redacted] of being a burglar based on him having jewelry and trinkets in his vehicle (79). On cross examination, Trooper [redacted] agreed that there were other items besides jewelry in the vehicle that were consistent with shopping at an antuique store, such as trinkets and coins, and that such items were consistent with the [redacted] assertions that they had just left a jewelry store (83).

When [redacted] did not immediately respond to the second request for consent, the Trooper asked yet a third time, and Ms. [redacted] finally agreed (48-49). She was never informed that she was not required to consent or that she could leave absent consent (48).

Officers searched the vehicle and found the firearm in question (27).

The officer acknowledged that he understood that he had to be at level two of *DeBour* to ask consent to search, which is a founded suspicion of criminality afoot (47).

During the 20-plus minutes between the stop and the request for consent to search, both [redacted] and [redacted] told officers: that they stayed at the Travel Inn, that they were going to see [redacted] son in Rochester, and that they had been at an antique store (45). Items in the vehicle corroborated the claim that they were at an antique store (45). The officers also noted that the route of travel was not the most direct route from the Travel Inn to Rochester (45). As the

Court noted, this is a more than reasonable route to Rochester, and the officer acknowledged that there can be more than one way to get from one place to another (46).

After the gun was located, both parties were arrested and transported to the station, where they were *Mirandized* and interrogated. Both parties gave statements at the station.

POINT ONE

THE TRAFFIC STOP WAS NOT BASED UPON PROBABLE CAUSE THAT A TRAFFIC VIOLATION HAD BEEN COMMITTED, REQUIRING SUPPRESSION OF THE FRUITS OF THE TRAFFIC STOP AND SEARCH.

As outlined above, the basis of the traffic stop was the officer's perception that the driver's side-view mirror violated the state vehicle and traffic law. Because the purported reason for the stop was insufficient to warrant a lawful traffic stop, the evidence must be suppressed and the indictment dismissed.

Under New York Law, a traffic stop is a forcible seizure of the vehicle and all of its occupants (*People v Spencer*, 84 NY2d 729 [1995]). A stop is lawful only when it is "based upon probable cause that a driver has committed a traffic violation" (*People v Robinson*, 97 NY2d 341, 349-350 [2001]). Under the exclusionary rule, any evidence obtained as a result of an unlawful traffic stop must be suppressed.

Here, the ostensible basis for the stop was the drivers side-view mirror. The trooper testified that the casing was missing, but that there was a mirror affixed. He conceded that he could not tell whether the mirror was adjustable from the inside nor whether the mirror gave the driver a full view as required by the Vehicle and Traffic Law. The relevant statute requires the following:

"Every motor vehicle, when driven or operated upon a public highway, shall be equipped with a mirror or other reflecting device so adjusted that the operator of such vehicle shall have a clear and full view of the road and condition of traffic behind such vehicle," and, for vehicles manufactured after 1969, that the mirror be adjustable from the interior (Vehicle and Traffic Law 2[a][10]).

Here, the trooper readily acknowledged that he could not tell if the mirror was adjustable from the inside and had no idea what view it gave the driver, as he was not in the driver's vantage point. Inasmuch as the officer readily conceded same, the only remaining issue is whether the officer's mistaken belief that the mirror violated the Vehicle and Traffic Law was a reasonable mistake of law (*People v Guthrie*, 25 NY3d 130 [2015]). In *Guthrie*, a vehicle passed a stop sign that appeared to any observer to be valid but was technically not. The Court found that the test was not the "good faith" of the officer, but whether the officer's mistaken belief was reasonable.

Here, the officer did not even harbor a belief that the mirror was not adjustable nor that it provided an insufficient view—he readily conceded that he had no idea. Thus, the reasonable belief test should not apply. To put it another way, any interpretation of the statute concluding that the [redacted] vehicle was in violation of a statute was not reasonable, given the officer's admission that he did not have any idea whether the mirror was adjustable nor what view it gave the driver.

Moreover, the troopers' work detail becomes relevant here. As part of their detail, the troopers were looking for guns, and using traffic stops to find said guns. This cuts against any good faith reasonableness interpretation of their actions that day.

Here, unlike *Guthrie*, the statute in question by its own language was easily interpretable and fairly straightforward. The stop cannot be justified on this basis. Interestingly enough, ignorance of the law is not a defense to criminal defendants. On these facts, it should not be a defense to the extensively-trained and gun-motivated trooper's unlawful stop of the vehicle.

POINT TWO

THE OFFICER WAS NOT PERMITTED TO DETAIN DIANE BAILEY FOR 24 MINUTES NOR TO REQUEST CONSENT TO SEARCH THE VEHICLE. MOREOVER, THE CONSENT WAS NOT VOLUNTARY. THUS, THE EVIDENCE MUST BE SUPPRESSED.

[redacted] was detained for 24 minutes before being asked consent to search the vehicle. This exceeded the scope of any permissible traffic stop. Moreover, the officer lacked the requisite founded suspicion required to ask that consent. Finally, the consent was not voluntary. For the following reasons, the gun must be suppressed.

Detention Past the Bounds of an Ordinary Traffic Stop

Where a traffic stop is based upon a traffic violation, the police may not detain the motorist past the time necessary for the purpose of the stop (*see People v Banks*, 85 NY2d 558 [1995]). Any consent given during an unlawful detention is invalid and ineffective (*id.*). Here, [redacted] was detained for some 24 minutes prior to being asked to consent, which was far longer than the time necessary to write a summons for an insufficient mirror. It must be noted that all parties agreed that [redacted] had a valid license and could have taken the vehicle away.

The trooper offered as a reason for the prolonged detention that [redacted] needed a ride after he was brought before a Judge. However, the trooper acknowledged during cross examination that, in the age of cell phones, [redacted] or someone else could have simply called her to notify her when and where to pick [redacted] up. For an example of a proper analysis

of an unlawfully prolonged traffic stop, see *People v May* (52 AD3d 147 [2nd Dept 2008] [40 minute detention for double parking was unlawful]).

Lacking Founded Suspicion to Ask Consent to Search

Moreover, police may not ask for consent to search a vehicle following a traffic stop absent a founded suspicion—Level Two of *DeBour* (*see People v Garcia*, 20 NY3d 317 [2012]; *People v Turriago*, 219 AD2d 383 [1st Dept 1997]). Here, such suspicion was lacking.

Officers claim that the messy condition of the vehicle with trinkets and antiques was a basis for the level two request for consent to search. However, there is no authority for any proposition that a messy car provides such a basis. Nor does the path of travel. As the Court noted, sometimes people take different routes to places, and the Court took the exact route taken by the [redacted] not too long ago.

To the extent that the prosecution claims that there were conflicting answers given by the [redacted] as to where they were coming from and going, that contention is without merit. They both indicated that they left a hotel that morning, were going to Rochester to see [redacted] s son, and that they had stopped at an antique store that morning. Their attendance at an antique store was corroborated by the items in their vehicle. There was nothing suspicious about the [redacted] travels that would warrant such a question.

For this reason alone, the consent must be invalidated and the fruits of the search suppressed.

Voluntariness of Consent

In cases where consent is claimed, the prosecution bears a heavy burden of proving the voluntariness of said consent (*People v Gonzalez*, 39 NY2d 122 [1976]). Here, the consent was involuntary. Pursuant to *Gonzalez,* factors to be considered include: the background and criminal justice experience of the consenter (here there was none, as Ms. [redacted] had no record), the number of police (here, at least 3), whether the person was told they had a right to refuse (she was not so told). An analysis of these factors alone would compel the conclusion that the prosecution failed to carry their "heavy burden."

However, perhaps the most important factor here is that the Trooper, on BodyCam (People's Exhibit 4), seemed to condition Ms. [redacted] leaving the scene on her consent when he said "Do you mind if we search the vehicle **so we can** get you out of here" (Emphasis Added). To any listener, the conclusion would be simple—the officer searching the vehicle was a prerequisite to her leaving. Both Troopers acknowledged that it would ordinarily be taken that way. Here, it cannot be said that Ms. [redacted] consent was the product of voluntary free will. Much to the contrary. The fruits of the search following that purported consent must be suppressed.

POINT THREE

EVEN IF THE GUN IS NOT SUPPRESSED, ANY STATEMENTS MUST BE SUPPRESSED.

In the unlikely event that the gun is not suppressed, any and all statements must be suppressed. Both individuals were interrogated extensively at the side of the road prior to the gun being found. For Mr. [redacted] he was unquestionably in custody at the time, and no *Miranda* was administered to either person. For Ms. [redacted], she was detained far past the appropriate amount of time for a traffic stop.

Given the improper questioning, any post-miranda statements must also be suppressed, as the prosecution failed to prove any attenuation.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE PHYSICAL EVIDENCE AND STATEMENTS MUST BE SUPPRESSED AND THE INDICTMENT DISMISSED.

Submitted by:

[redacted]

[redacted]

[redacted]