STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

**THE PEOPLE OF THE STATE OF NEW YORK,**

*Plaintiff,* **NOTICE OF MOTION**

-vs-

Indictment No.

[redacted]

*Defendant.*

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 3rd day of [redacted], at 9:30 in the forenoon, or as soon thereafter as counsel may be heard, for an Order granting the following relief:

I. Dismissal of the counts of the indictment charging counts related to FM, or in the alternative;

II. Reconsidering the denial of the defense severance motion, or in the alternative;

III. Instructions to the jury that the two sets of counts are to be considered separately, and preclusion of the prosecution from insinuating that proof of one set of offenses tends to establish the other.

DATED: [redacted]

[redacted].
**Attorney for** [redacted]

**TO:** **HON. SUSAN M. EAGAN**
Judge, Erie County Court

**CATHLEEN ROEMER AND HILARIE HENRY**
Assistant District Attorneys, Erie County

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

**THE PEOPLE OF THE STATE OF NEW YORK,**

*Plaintiff,* **AFFIRMATION**

-vs-

Indictment No.

[redacted]

*Defendant.*

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[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. I submit this motion for various pre-trial relief, as set forth on the notice of motion and in the following paragraphs.

4. It is anticipated that the prosecution may argue that the motion is not timely. It should be noted that the genesis of this motion is the defense meeting with CPS laboratory experts prior to trial on [redacted] Moreover, the defense received additional laboratory reports on [redacted] and [redacted] and the defendant, [redacted], has now been excluded as a contributor to more items found in FM's home.

5. In any event, the motions to dismiss, or in the alternative, to sever, were timely made and decided. The purpose of this motion is to bring additional information to the Court's attention that may have been overlooked in deciding the prior motion.

6. Thus, "in the interest of justice and for good cause shown," the Court should entertain the merits of this motion (*See* CPL 255.20).

7. As a preliminary matter, this Court should dismiss all charges pertaining to the incident at FM's home on [redacted] for insufficient evidence before the grand jury to support those counts of the indictment, and because insufficient evidence currently exists.

8. The only competent evidence is DNA found on a cigar tip that was found at the home. On that cigar tip, a mixture of genetic material from three people was found. [redacted] is 14.1 trillion times more likely than a random person to be a contributor. [redacted] is 531 billion times more likely than a random person to be a contributor. And the defendant, [redacted] is a mere 64 times more likely than a random person to be a contributor.

9. The statistic referring to defendant [redacted] is classified by the Central Police Services lab as mere "limited scientific support" for the proposition that he contributed to the genetic mixture.

10. There is no other proof connecting [redacted] to these crimes occurring on [redacted] In fact, in her grand jury testimony, [redacted] refers to a 21 year-old with dark hair, a bald person, and a person who hid his face.

11. While there are several cases in which DNA evidence, standing alone, was sufficient to prove identity, all such cases deal with much higher likelihood ratios. Here, the DNA evidence is near inconclusive: the defendant's number is 64.

11. Under CPL 190.65(1)(a), a grand jury is authorized to indict a person for an offense when the evidence presented is legally sufficient to establish the defendant's commission of that offense. "Legally sufficient evidence" is defined in the CPL as "competent evidence which, if accepted as true, would establish every element of the offense charged and the defendant's commission thereof, except that such evidence is not legally sufficient when corroboration required by law is absent." CPL 70.10(2).

12. Here, the only evidence adduced at the grand jury as to [redacted] guilt was the low-confidence DNA evidence outlined above. Such low numbers, unaccompanied by any other evidence of guilt, cannot furnish proof beyond a reasonable doubt.

13. Allowing the FM counts from [redacted] to proceed to trial will serve to prejudice the defendant on the remaining counts, which charge a separate incident. Thus, the FM counts should be dismissed prior to trial.

14. It should be noted that [redacted] was excluded, at the time of the grand jury presentment, as a contributor to the other cigar tip, bed sheets, and slides of various portions of FM's body. Due to ongoing testing, he has now been excluded as a contributor to a lighter found at the scene and two water bottles.

15. Given all of that evidence, there is insufficient evidence to prove that [redacted] was present at the home on [redacted]

16. Moreover, given the disparity in proof of identification, and the resultant likelihood that the jury will not be able to consider the counts separately, this Court should revisit its decision on the defense motion to sever.

17. CPL 200.20(2)(c) lists joinable offenses as those that are "same or similar in law." Here, the defendant is charged with burglary, predatory sexual assault against a child, and endangering the welfare of a child. The only charge that is "same or similar" to conduct charged in the remaining, unrelated counts, is criminal sexual act in the first degree.

18. While the defense argues that the charges related to the two incidents are not sufficiently "same or similar in law," even a finding that they are is not the end of the inquiry.

19. Where, as here, the offenses are based upon different criminal transactions and the basis for joinability is "same or similar in law" under subsection (2)(c), the Court, for good cause shown, may order severance. CPL 200.20(3) states:

> In any case where two or more offenses or groups of offenses charged in an indictment are based upon different criminal transactions, and where their joinability rests solely upon the fact that such offenses, or as the case may be at least one offense of each group, are the same or similar in law, as prescribed in paragraph (c) of subdivision two, the court, in the interest of justice and for good cause shown, may, upon application of either a defendant or the people, in its discretion, order that any such offenses be tried separately from the other or others thereof. Good cause shall include but not be limited to situations where there is:
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> (a) Substantially more proof on one or more such joinable offenses than on others and there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense.

20.. Here, it cannot be credibly argued that the proof of identity is not wildly disparate concerning the two charged incidents. For the [redacted] incident (FM), the only evidence is the aforementioned cigar tip with a relatively low likelihood ratio that provides

"limited scientific support." By contrast, the defendant's identity has been all but conclusively established regarding the [redacted] incident. Said evidence consists of DNA with much higher ratios and defendant's admission to having consensual intercourse with LR.

21. Thus, the sole question remains is whether there is a substantial likelihood that the jury would be unable to consider separately the proof related to each incident. Here, the jury would be faced with a unique challenge if called upon to do so.

22. Regarding the FM incident, the defense is identity. Regarding the LR incident, the defense is consent. Thus, in order to consider the proof separately, the jury would have to disregard the unchallenged evidence of force upon FM when deciding whether the conduct with LR was consensual or forcible. On the other side of that coin, the jury would have to disregard [redacted] presence with some of the same actors at the [redacted] incident when deciding whether he was present for the September incident.

22. There is a serious and substantial likelihood that the jury would not be able to consider the charges separately. Indeed, if the incidents are tried together, "there exists a substantial risk of a conviction by reason of their cumulative effect rather than on the strength of the specific evidence regarding each crime" (*People v Forest*, 50 AD2d 260 [1st Dept 1975]).

23. While trial courts generally enjoy broad discretion in deciding when to sever counts, there are limitations. Where there is a substantial chasm between the quality and quantity of proof regarding the separate incidents, they must be tried separately so as to avoid any danger of undue prejudice to a defendant (*People v Sable*, 138 AD2d 234 [1st Dept 1988]).

24. A denial of severance will result in the jury hearing proof regarding each incident that is inadmissible as to that incident, but will nevertheless tend to lead the jury to infer guilt as to that incident (*see People v Gadsden*, 139 AD2d 925 [4th Dept 1989]).

25. By way of illustration, when the defense claims that the interaction with LR was of a consensual nature, will the jury be able to disregard the unequivocally forcible nature of the crime committed by some of the same people against FM? There is a substantial likelihood that they will not.

26. *People v Shapiro* (50 NY2d 747 [1980]) is illustrative. There, the Court of Appeals held that a trial court abused its discretion in refusing to sever two sets of sexual offenses that had been properly joined under the "same or similar in law" theory. As the Court so eloquently noted, "Since prosecutions for sex crimes, particularly ones regarded as deviate, tend in any event to invoke prejudicial preconceptions among jurors, the joinder of the indictments created an impermissible risk. For the superficial closeness of the indictments here, resulting largely from a common focus on the same kind of aberrant sexual practices, was likely to eclipse the very fundamental difference between them" (*id.*, at 755).

27. Here, where the proof of the defendant's identity as to the 9/26 incident is several orders of magnitude than that concerning the 11/20 incident, that risk is even greater. The 9/26 incident constitutes inadmissible—yet unignorable--proof that the 11/20 incident was forcible, while the 11/20 incident constitutes inadmissible and unignorable proof that defendant Abdi Sabtow was present for the 9/26 incident.

28. Similarly, the Second Department has reversed a severance denial of "same or similar" counts resulting from separate incidents where the cumulative effect would have prejudiced the defendant on each count:

> The first three counts and last three counts of the indictment covered two separate and unrelated incidents on March 10, 1978, in which defendant allegedly engaged in assaultive and threatening behavior with a knife. Although the crimes charged were joinable as the "same or similar in law" (CPL 200.20, subd. 2, par. [c]; see *People v. Lombardi*, 20 N.Y.2d 266, 269, 282 N.Y.S.2d 519, 229 N.E.2d 206; *People v. McDowell*, 35 A.D.2d 611, 612, 312 N.Y.S.2d 477), that part of defendant's motion which was for a severance should have been granted. Separate trials should have been ordered pursuant to CPL 200.20 (subd. 3). Both incidents involved drunken arguments and the use of a knife. There was thus demonstrated a strong possibility of a conviction by reason of the cumulative effect of the evidence rather than by its separate and distinct relevance to each incident.

29. The Second Department accurately stated the applicable law in *People v Martinez*, 165 AD2d 1288 [2nd Dept 2018]) when it stated:

> Where, as here, the offenses were not part of the same criminal transaction, the determination of a consolidation application is discretionary, with the court weighing "the public interest in avoiding duplicative, lengthy and expensive trials against the defendant's interest in being protected from unfair disadvantage" (*People v. Lane,* 56 N.Y.2d 1, 8, 451 N.Y.S.2d 6, 436 N.E.2d 456; *see* CPL 200.20[5] ). " '[I]n all cases a strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses' " (*People v. Dean,* 1 A.D.3d 446, 448, 767 N.Y.S.2d 114, quoting *People v. Mahboubian,* 74 N.Y.2d 174, 183, 544 N.Y.S.2d 769, 543 N.E.2d 34). **However, "compromise of a defendant's fundamental right to a fair trial free of undue prejudice as the *quid pro quo* for the mere expeditious disposition of criminal cases will not be tolerated"** (*People v. Lane,* 56 N.Y.2d at 8, 451 N.Y.S.2d 6, 436 N.E.2d 456).
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> Here, there was a substantial disparity in the evidence tying the defendant to the offenses contained in the separate indictments, which presented a strong possibility that the jury convicted the defendant of the offenses charged in Indictment No. 8114/13 by reason of the cumulative effect of the evidence (*see People v. Daniels,* 216 A.D.2d 639, 640, 627 N.Y.S.2d 483; *People v. Stanley,* 81 A.D.2d 842, 843, 438 N.Y.S.2d 848; *cf. People v. Simpkins,* 110 A.D.2d 790, 792, 487 N.Y.S.2d 857). Furthermore, separate trials would not have resulted in the duplication of evidence (*cf. People v. Cromwell,* 99 A.D.3d 1017, 952 N.Y.S.2d 302).

30. Here, as in the above-cited cases, there is an extremely substantial disparity between the proof available for each set of offenses, and Counts 1, 10, 11, 12, 17, and 18

must be severed from the remaining counts. If said motion is granted, the defense remains available to try whichever case the Court deems proper on the scheduled trial date of [redacted]

31. Should the Court decline to sever the charges, the defense will take exception to that ruling. In the alternative, however, the defense also argues that: (1) the jury must be instructed to consider the proof of each incident separately, and (2) the prosecution should be precluded from implying or arguing that proof of one incident tends to establish the other.

32. The applicable jury instruction is NY CJI2d, General Applicability, Multiple Separate Transactions of the Same Offense (Selecting Alternative 1).

33. The only way the prosecution can avoid this would be to establish that both offenses are admissible as proof of the other under a *Molineux* exception. Because no such exception applies, the jury must be instructed to consider the groups of offenses separately.

34. Proof of these offenses is not admissible to prove identity in the other, inasmuch as they do not involve a unique modus operandi (*see People v Robinson*, 68 NY2d 541 [1986]). One involved the alleged sexual assault of a young child in her home during a home invasion burglary. The other involved a sexual encounter with a 17 year-old girl who knew of the defendants through her boyfriend. One allegedly involved a brief ransacking of a house, while the other allegedly involved a kidnapping and several sexual offenses taking place for a prolonged period, in a vehicle and a garage.

35. Moreover, identity is not an issue regarding the November incident, and it would thus be improper to allow potentially prejudicial evidence to establish same.

36. Regarding the intent exception, the Court of Appeals has noted that intent can often be inferred from the nature of the act itself in sexual cases, and thus, prior misconduct is not admissible to prove intent (*People v Leonard*, 29 NY3d 1 [2017]).

37. Similarly, regarding motive, the motive of a person committing a sexual crime is quite clear. There is no need to consider prejudicial testimony to establish it (*id.*).

38. The offenses, involving two completely different alleged victims who did not know each other, and separated in time by nearly two months, cannot be said to be part of a "common scheme or plan" (*see, People v Buskey*, 45 AD3d 1170 [3rd Dept 2007] [Evidence of sexual assaults on other victims showed only a repetitive pattern, not a common scheme or plan, and was thus inadmissible]).

39. And finally, no claim of mistake or accident is being made.

40. Even if the evidence of one incident fell within one of the *Molineux* categories regarding the other incident, the Court would still have to weigh the potential for prejudice against any slight probative value the evidence carries (*Leonard, supra*). If the Court does so, the conclusion is inescapable that any scant probative value is vastly outweighed by the danger of unfair prejudice.

41. In short, the evidence of the September FM incident is inadmissible as proof of the November LR incident, and vice versa. This Court must: dismiss the FM counts due to legal insufficiency, or in the alternative, grant severance of the counts related to one incident from those related to the other, or in the alternative, provide an instruction to the jury that they are to consider the counts separately.

WHEREFORE, the defendant [redacted] respectfully requests that the Court grant the relief requested herein, and for any such other and further relief as to the Court appears just and proper.

Dated: [redacted]
Buffalo, New York

[redacted]