

STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE
OF NEW YORK

v.

NOTICE OF MOTION
IND [REDACTED]

YOUR HONOR:

Please take notice that upon the attached affirmation of [REDACTED], ESQ., defendant [REDACTED] will move, at a term of Erie County Court, Part 18, at 9:30 a.m. on [REDACTED] 7, 2023 or as soon as counsel can be heard, for an order precluding (i) any evidence of the Google location data, (ii) the testimony of any witness whose identity has not been disclosed, and (iii) cross-examination of the defendant, should he testify, about his prior conviction.

DATED: [REDACTED] 2023
Buffalo, New York

Respectfully,

[REDACTED]

TO:

Hon. Susan M. Eagan

Erie County District Attorney
25 Delaware Ave.
Buffalo, New York 14202

THE PEOPLE OF THE STATE
OF NEW YORK

v.

NOTICE OF MOTION
IND- [REDACTED]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.

[REDACTED], ESQ., 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 is charged jointly with co-defendant [REDACTED] with burglary in the first degree (Penal Law § 140.30[2]) and robbery in the first degree (Penal Law § 160.15[3]) for an alleged home invasion at [REDACTED] the Town of Amherst on [REDACTED] 2022.
2. I make this affirmation in support of my motion for the relief described below.
3. Unless otherwise stated, this affirmation is made upon information and belief, the source of which is my review of the case file, the discovery, and the prosecution's certificate of compliance.

Evidence of the Google location data should be precluded.

4. The prosecution plans to offer evidence of Google location data to establish the whereabouts of [REDACTED]' cell phone at the time of the alleged home invasion.
5. In the absence of a proper foundation, this evidence is inadmissible.

6. “When non-testimonial evidence ... is offered into evidence, the proponent of that evidence must properly authenticate or identify it by showing that [it] is what the proponent claims it is” (Guide to NY Evid rule 9.01[1], Authenticating or Identifying Evidence; In General).
7. The prosecution has disclosed the data, as well as analysis by FBI Special Agent John Orlando. But none of the discovery reveals the scientific method of gathering the data, so there is no way to evaluate its reliability.
8. The Google location data is the key evidence against Mr. [REDACTED]. It could convict him and send him to prison for decades. This Court should not allow its admission without assurances that it was gathered reliably.
9. The evidence should be precluded.

The testimony of any undisclosed witness should be precluded.

10. As part of its discovery obligation, the prosecution must disclose the “names and adequate contact information” of everyone with relevant information, “including a designation by the prosecutor as to which of those persons may be called as witnesses” (CPL 245.20[1][c]).
11. But three prosecution witnesses are listed as “TBD [to be determined]”: the treating physician and two cell tower attendants, one from AT&T and one from T-Mobile. Three others are listed as “custodian of records”: one from Google, one from AT&T, and one from T-Mobile.
12. This case was presented as a direct indictment, months after the fact, so the investigation should have been complete at the time of arraignment.
13. Now, nine months after arraignment and less than one month before trials, the defense still does not have the names or contact information of these crucial witnesses. Our ability to prepare for cross-examination has been irreparably impaired.
14. The testimony of these witnesses should be precluded.

The prosecution should not be allowed to cross-examine Mr. Evans on his prior criminal conviction.

15. The prosecution seeks to cross-examine Mr. [REDACTED], should he testify, about his 2012 conviction for endangering the welfare of a child (Penal Law § 260.10[1]), a class A misdemeanor.
16. It should not be allowed to do so.
17. When the defendant testifies on his own behalf, his credibility may be impeached “by asking [him] in good faith on cross-examination about a prior conviction of a specified offense to the extent authorized by the court prior to trial” (Guide to NY Evid rule 6.19[1][b][ii], Impeachment by Prior Conviction).
18. When evidence of a prior conviction “has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded” (*People v. Sandoval*, 34 NY2d 371, 375 [1974]). A trial court must balance the probative value of the conviction against the danger of unfair prejudice to the defendant, including its effect in “discouraging him from taking the stand on his own behalf” (*id.*).
19. The lone conviction is more than ten years old. It was only a misdemeanor, and it does not involve dishonesty. It has no impeachment value.
20. It may, however, result in unfair prejudice by discouraging Mr. [REDACTED] from testifying, or by clouding the jury’s evaluation of his credibility.
21. Cross-examination should be precluded.

For the reasons stated, the motion should be granted in all respects.

[REDACTED], ESQ.