

BUFFALO CITY COURT
COUNTY OF ERIE : STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

**DEFENDANT'S NOTICE
OF MOTION**

v.

Case No.: CR- [REDACTED] -23

[REDACTED],

Defendant.

PLEASE TAKE NOTICE that, upon the affirmation of PETER P. GARTNER, Esq., attorney for the Defendant, dated September 27, 2023, and the attached exhibits, a motion will be made before the Honorable Peter J. Savage III at the Buffalo City Court, 50 Delaware Avenue, Buffalo, New York 14202, Part 12, as soon as Counsel may be heard, for an Order granting Defendant the following relief:

1. Invalidating the People's Certificate of Compliance & Statement of Readiness;
2. Dismissal of the action pursuant to CPL § 30.30;
3. Leave to File Additional/Later Motions;
4. Such further and other relief as the Court may deem just and equitable.

Pursuant to CPLR § 2214(b), answering papers, if any, are required to be served upon the undersigned at least seven (7) days before the scheduled return date of this motion.

DATED: Buffalo, New York
September 27, 2023

Peter P. Gartner

Peter P. Gartner

TOWEY LAW, PLLC

Attorneys for Defendant

403 Main Street, Suite 715

Buffalo, New York 14203

P: (716) 300-8233

F: (716) 804-7327

peter@briantoweylaw.com

cc: ADA [REDACTED]
Buffalo City Court Bureau

BUFFALO CITY COURT
COUNTY OF ERIE : STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

AFFIRMATION IN SUPPORT

v.

Case No.: CR-██████-23

██████████

Defendant.

██████████, ESQ., an attorney duly licensed to practice in the State of New York, affirms the following under penalty of perjury, pursuant to CPLR § 2106:

1. I am the attorney for the Defendant in the above-captioned action and I make this affirmation in support of the relief sought in the annexed Notice of Motion.
2. Unless otherwise stated, the factual allegations set forth herein are made upon information and belief and are based upon information obtained by or provided to Defense Counsel thus far, including the accusatory instrument and other papers filed in connection with this action, and an investigation of the facts related to this case. No previous request for the relief sought herein has been made.
3. The Defendant, ██████████, has been charged with one count of Assault in the Third Degree (PL § 120.00(1)), an “A” misdemeanor, one count of Criminal Mischief in the Fourth Degree (PL § 145.00(1)), an “A” misdemeanor, and one count of Harassment in the Second Degree (PL § 240.26(1)), a noncriminal violation. A copy of the accusatory instrument is attached hereto as **Exhibit A**.
4. ██████████’s case commenced when she was arraigned on June 22, 2023 and entered pleas of not guilty. She has not waived CPL § 30.30 speedy trial time.

5. Pursuant to CPL § 30.30(1)(b), the People must be ready for trial within ninety (90) days of the commencement of a criminal action where a defendant is accused of an “A” misdemeanor and no felonies.

6. On September 5, 2023, Defense Counsel received the People’s Certificate of Compliance (COC) and Statement of Readiness via US Mail, dated September 1, 2023. A copy of the People’s COC is attached hereto as **Exhibit B**.

7. Upon review of the People’s COC and corresponding discovery disclosures, Defense Counsel found that extensive discovery materials are missing. Pursuant to CPL § 245.50(4)(b) and its duty to attempt to resolve any gaps in discovery prior to bringing it to the Court’s attention by way of written motion, seven (7) days after receipt of the People’s COC, Defense Counsel notified the Erie County District Attorney’s Office of these outstanding materials by email on September 12, 2023, a copy of which is attached hereto as **Exhibit C**. The People did not respond.

8. At a scheduled court appearance on September 13, 2023, the Court accepted the People’s COC and corresponding Statement of Readiness, acknowledged Defense Counsel’s reservation of their right to challenge the same, and adjourned this action. The Defense was directed to file motions relative to the sufficiency of the People’s COC and Statement of Readiness by September 27, 2023.

The People are in violation of CPL § 245.

9. Pursuant to CPL § 245.20(1), “the prosecution shall disclose to the defendant . . . all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution’s direction or control.”

10. In filing their COC, the People certified that they had complied with all discovery obligations under CPL § 245.20(2), which states that “[t]he prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section.”

11. At this time, the People have not complied with all discovery obligations pursuant to CPL § 245 and must disclose all discoverable materials to Defense Counsel prior to declaring ready for trial.

12. The COC filed with this Court is incomplete for the following reasons and is, therefore, insufficient. Defense Counsel is also objecting to the People’s Statement of Readiness, in that it is illusory, due to the People’s failure to comply with their discovery obligations pursuant to CPL § 245.

13. Defense Counsel moves this Court to find the same, and to charge all CPL § 30.30 time to the People because required discovery is still outstanding.

Contact information required to defend these charges is undisclosed.

14. Under the section titled “C. **ADEQUATE CONTACT INFORMATION FOR WITNESSES AND OTHERS**” in the People’s COC, the People state their disclosure to Defense Counsel of “the names and adequate contact information for persons, other than law enforcement personnel, whom the prosecutor knows to have evidence or information relevant to any offense charged **or to any potential defense thereto.**” *See Exhibit B* (emphasis added). This language mirrors that of CPL § 245.20(1)(c).

15. This section then goes on to list two people: (1) [REDACTED] (the complainant); and (2) [REDACTED], whose contact information is listed as “Erie County Central Police Services.” *See Exhibit B.*

16. However, upon review of the People’s COC and as set forth below, there are multiple outstanding individuals whom the People know, or should know, to have information that is relevant to the defense of this action.

i. [REDACTED]:

17. Ms. [REDACTED] alleges, in her first supporting deposition dated April 26, 2023, that an individual named “[REDACTED]” was present during the subject incident. A copy of her first supporting deposition is attached hereto as **Exhibit D**. Ms. [REDACTED] is also recorded on body-worn camera stating that [REDACTED] was present during the alleged incident.

18. Ms. [REDACTED] again states that [REDACTED] was present during the alleged incident in her second supporting deposition, dated May 12, 2023. A copy of her second supporting deposition is attached hereto as **Exhibit E**.

19. Ms. [REDACTED]’s third supporting deposition, dated August 31, 2023¹, was disclosed with People’s COC. A copy is attached hereto as **Exhibit F**. In this deposition, Ms. [REDACTED] again states that [REDACTED] witnessed the alleged incident. *See Exhibit F.*

20. Despite Ms. [REDACTED]’s numerous references to [REDACTED], her presence at the alleged incident, and her knowledge of the subject allegations, [REDACTED] is not listed as required in the People’s COC. *See Exhibit B.*

¹ The third, most detailed supporting deposition was taken 128 days after the alleged incident.

ii. [REDACTED]:

21. In addition, while unmentioned in her first and second supporting depositions, Ms. [REDACTED] states in her third supporting deposition that [REDACTED]'s sister was present at the scene and witnessed the alleged incident. *See Exhibit F.* Ms. [REDACTED] also states on body-worn camera that "[REDACTED]" (who, upon information and belief, is [REDACTED]'s sister) was present at the scene and witnessed the alleged incident.

22. Despite Ms. [REDACTED]'s multiple references to [REDACTED]'s sister, her presence at the alleged incident, and her knowledge of the subject allegations, she is not listed as required in the People's COC. *See Exhibit B.*

iii. Ms. [REDACTED]'s daughter:

23. Furthermore, in her third supporting deposition, Ms. [REDACTED] states that her daughter was present during the alleged incident. *See Exhibit F.*

24. Despite Ms. [REDACTED]'s statement about the presence her daughter at the alleged incident, she is not included in the People's COC. *See Exhibit B.*

iv. The gentleman:

25. Likewise, in her third supporting deposition, Ms. [REDACTED] states the presence of yet another individual who was present at the alleged incident; she previously referred to this individual on body-worn camera as "a colored gentleman." *See Exhibit F.*

26. Despite Ms. [REDACTED]'s multiple statements about the presence of this individual at the alleged incident, he is not included in the People's COC. *See Exhibit B.*

v. Ms. [REDACTED]'s husband:

27. Finally, based on Defense Counsel's review of the limited body-worn camera files disclosed by the People to date, a person believed to be Ms. [REDACTED]'s husband is seen dictating the

incident to Buffalo Police officers and writing Ms. [REDACTED]'s first supporting deposition. Despite this, he is not listed as required in the People's COC. *See Exhibit B.*

28. In total, the contact information for at least five (5) people who possess evidence and/or information relevant to the charged offenses have not been disclosed by the People to the Defense.

29. To meet their discovery obligations, the People "shall" disclose "the names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto." CPL § 245.20(1)(c) (emphasis added).

30. CPL § 245.20(1)(c) is clear. It does not require that the People only disclose contact information for the individuals with knowledge of criminal allegations and whom they intend to call as witnesses during their case in chief. Every person with information relevant to the charges must be disclosed. Anything else would critically jeopardize a defendant's ability to defend herself against criminal allegations.

31. Moreover, contact information which may appear immaterial to the People is crucial to the analysis and defense of an action. This is particularly true for witness contact information, regardless of a prosecutor's subjective appraisal of that information. Here, the People are clearly in the best position to obtain and supply this information to the defendant.

32. CPL § 245.20(7) pertinently states that "[t]here shall be a presumption in favor of disclosure when interpreting . . . subdivision one of section 245.20." Thus, judicious disclosure of witness information is paramount, even if the People believe that this information is insignificant or have no intention of calling certain individuals to testify. This information may be the difference between a plea or trial.

33. Ultimately, the abovementioned individuals are known to have information relevant to the charged offenses, but their contact information remains undisclosed. Therefore, it remains impossible for Ms. [REDACTED] to even attempt to determine the significance of the knowledge possessed by these individuals. Consequently, the People can neither certify their compliance nor declare ready for trial until all of this information is turned over pursuant to the requirement of CPL § 245.20(1)(c).

Written & recorded discoverable materials are missing.

34. Pursuant to CPL §§ 245.20(1)(e) and 245.20(1)(g), the People are respectively required to disclose “[a]ll statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports” and “[a]ll tapes or other electronic recordings . . . made or received in connection with the alleged criminal incident.”

35. Under the sections titled “**E. ALL OTHER WRITTEN OR RECORDED STATEMENTS**” and “**G. TAPES AND ELECTRONIC RECORDINGS**” in the People’s COC, the People indicate their complete disclosure of information pursuant to the above statutes. *See Exhibit B.* However, requisite discoverable materials under these statutes similarly remain outstanding at this time. Until the successively listed materials are turned over, the People cannot certify compliance with the discovery statute or declare ready for trial.

i. Body-worn camera files are missing:

36. The People disclosed three (3) body-worn camera files on June 30, 2023, along with corresponding audit trails, attributable to Buffalo Police Officers [REDACTED] and [REDACTED]. *See Exhibit B.*

37. Upon review of these files, it is clear that there are outstanding body-worn camera files attributable to Buffalo Police Officers [REDACTED], [REDACTED], and [REDACTED], all who had direct involvement in the investigation of the alleged incident and/or subsequent arrests.

ii. Officer notes are missing:

38. Upon further review of the disclosed body-worn camera files, Officer [REDACTED] is seen taking notes relative to this incident. These notes have not been disclosed by the People.

iii. Recordings of the key prosecution witness's statement to BPD are missing:

39. Most critically, the People disclosed a two (2) page Buffalo Police Case Management report. *See Exhibit B* (“Two (2) page Buffalo Police Department Case Management Report Assault”). A copy of this report is attached hereto as **Exhibit G**.

40. In the report, Buffalo Police Detective [REDACTED] writes that, on May 12, 2023, Ms. [REDACTED] “came into headquarters for a statement.” *See Exhibit G.*

41. Detective [REDACTED] then reports “[s]tatement audio and video recorded, saved to file.” *See Exhibit G.*

42. Neither the audio nor video recording of Ms. [REDACTED]’s statement have been disclosed by the People.

43. CPL § 245.20(2) states that “all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution.”

44. It follows that all information that is in the possession of the Buffalo Police Department is deemed to be in the possession of the Erie County District Attorney’s Office and is required to be disclosed to Defense Counsel. Here, this means that the Erie County District Attorney’s Office is deemed to be in possession of the audio and video recording of Ms. [REDACTED]’s statement.

45. In addition, the People are obligated to give to the defendant any nonconfidential written or recorded statements of a prosecution witness that relate to the subject matter of the witness’s testimony. *See People v. Banch*, 80 NY2d 610, 615 (1994) (emphasis added); *see also People v. Rosario*, 9 NY2d 286 (1961).

46. If the People intend to call Ms. [REDACTED] as a witness, the audio and video files must be disclosed.

The People’s COC is insufficient, and their Statement of Readiness is illusory.

47. Under CPL § 245.50(3), “the prosecution shall not be deemed ready for trial purposes of section 30.30 of this chapter until it has filed a proper certificate.” The People cannot validly state that they are ready for trial under CPL § 30.30 until all CPL § 245.20(1) disclosures have been made.

48. Due to the People’s failure to disclose the above materials pursuant to CPL § 245.20(1), the Court should find that the People’s COC is premature, improper, and insufficient pursuant to CPL § 245.50(3).

49. Further, given that the People have not complied with the discovery obligations of CPL § 245.20(1) and have not provided any arguments as to why good cause exists to permit the filing of an incomplete COC, any Statement of Readiness is also insufficient. “A statement of readiness at a time when the People are not actually ready is illusory and insufficient to stop the running of the speedy trial clock.” *People v. Gaskin*, 214 AD3d 1353, 1354 (4th Dep’t 2023).

50. Defense Counsel submits that the Court should reject the People’s COC and Statement of Readiness and charge all additional time that has passed from Ms. [REDACTED]’s arraignment to the People.

Ms. [REDACTED]’s right to a speedy trial has been violated.

51. Under CPL § 30.30(1)(b), a motion to dismiss “*must* be granted where the People are not ready for trial . . . within ninety (90) days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor . . . and none of which is a felony.” CPL § 30.30(1)(b) (emphasis added).

52. As noted above, the criminal case commenced against Ms. [REDACTED] on June 22, 2023, when she was arraigned on the accusatory instrument, which charged two (2) “A” misdemeanors and one (1) violation. *See Exhibit A*.

53. Therefore, the People were required to be ready for trial within ninety (90) days from the arraignment date (i.e., by September 20, 2023), excluding the day of arraignment. However, through the date of the filing of this motion, this case has been pending with the above-listed discovery materials outstanding and no valid Statement of Readiness.

54. Importantly, the Court of Appeals has long held that “[t]he statutory right to dismissal granted a defendant if the prosecutor is not ready for trial . . . is based upon policy

reasons and does not require consideration of prejudice to defendant.” *People v. Lawrence*, 64 NY2d 200, 205 (1984) (emphasis added); *see also Barker v. Wingo*, 407 US 514 (1972), 530; *People v. Taranovich*, 37 NY2d 442, 445 (1975).

55. Since the People have failed to make a valid Statement of Readiness within the statutorily required ninety (90) days, a showing of prejudice is not required, and Defense Counsel requests the dismissal of this case in accordance with CPL § 30.30.

LEAVE TO SUBMIT FURTHER MOTIONS AS NECESSARY

56. Defense Counsel has attempted to include all possible pretrial requests for relief, based on the information now available. It is requested that the Court grant Defense Counsel leave to submit later motions, should facts discovered through this motion indicate that additional motions may be warranted.

WHEREFORE, it is respectfully requested that the Court grant the relief requested in the various branches of this motion and afford Ms. [REDACTED] such other and further relief as is just under all the other circumstances of this case.

Peter P. Gartner

PETER P. GARTNER