STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

HON. DEBORAH A. HAENDIGES, J.S.C, presiding

THE PEOPLE OF THE STATE OF NEW YORK

v.

[redacted]

Defendant.

NOTICE OF MOTION

Motion *in Limine*

Indictment No. [redacted]

PLEASE TAKE NOTICE, that upon the application of Gary W. Hackbush, Assistant District Attorney, of counsel to JOHN J. FLYNN, District Attorney of Erie County, the People will move this Court, located in Part 9 of the Erie County Courthouse at 25 Delaware Avenue, Buffalo, New York, on [redacted]022, at 2:00 p.m., or as soon thereafter as counsel can be heard, for an Order: permitting the People to introduce into evidence the 911 call of [redacted] (victim's brother-in-law) as an excited utterance; and for such other and further relief as may be just and proper.

DATED: May __, 2023
Buffalo, New York

Respectfully submitted,

JOHN J. FLYNN
ERIE COUNTY DISTRICT ATTORNEY

By: GARY W. HACKBUSH
Assistant District Attorney
25 Delaware A venue
Buffalo, New York 14202

cc:

Hon. Deborah A. Haendiges, J.S.C.

[redacted]

STATE OF NEW YORK
COUNTY COURT: COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK:

AFFIRMATION IN SUPPORT OF MOTION IN LIMINE

v.

Indictment No [redacted]

[redacted]

Defendant.

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

Gary W. Hackbush, being duly sworn, deposes and states:

1. I am an attorney duly admitted to practice law in the State of New York.
2. I am an Assistant District Attorney, appearing of counsel to JOHN J. FLYNN, the District Attorney of Erie County, on behalf of the People of the State of New York.
3. I make this Affirmation in Support of Motion in Limine for an Order: permitting the People to introduce into evidence the 911 call o[redacted] (victim's brother-in-law) as an excited utterance; and for such other and further relief as may be just and proper.
4. Unless otherwise stated herein, this affidavit is made upon information and belief, the source of which is my investigation of the confidential file of the District Attorney's Office, records of all proceedings heretofore had, a reading of the moving papers filed herein, and conversations with witnesses hereto.

5. The defendant is the subject of a multiple count indictment currently pending in New York State Supreme. The indictment is currently scheduled for trial by jury to commence on [redacted] 2023.

Admission of A[redacted]911 call

6. In this indictment, it is alleged that on [redacted] 2021, at approximately 4:30 p.m., inside [redacted] New York, defendant entered the home of his estranged wife, [redacted], in violation of an Order of Protection issued on [redacted]021, by the Hon. Mark A. Montour, J.S.C., and fatally stabbed her. [redacted]he victim's brother-in-law who also resided at [redacted] was in an upstairs bedroom when he heard the victim scream. [redacted]an downstairs, saw the victim had been severely injured, and ran outside in an attempt to catch the perpetrator. [redacted] saw defendant entering into his white Toyota Corolla which was parked across the street from the victim's home. [redacted] then punched and kicked defendant's car was the defendant began to drive away from the scene. Immediately thereafter, [redacted] in an extremely excited tone of voice and in broken English stated, "the husband came and hurt the wife and she's bleeding so badly" (a copy of the 911 call is attached).

7. In *People v. Brown*, the Court of Appeals outlined the standard for admitting a hearsay statement as an excited utterance,

> "The admissibility of an excited utterance is entrusted in the first instance to the trial court. In making that determination, the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still [her] reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling

event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. *Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection*".

8. Additionally, there is no requirement that the declarant be unavailable for admission of an excited utterance (*see People v. Buie*, 86 N.Y.2d 501 [1995]).

9. In this case, [redacted]s clearly describing a "stressful external event" - namely, the severity of the victim's injuries as well as the identity of the perpetrator. Just as importan[redacted] reports the information to the 911 Operator immediately after observing the victim's injuries and chasing after the defendant. Based on these factors, the statements in the 911 call were not made "under the impetus of studied reflection", but rather were made under the stress of startling event.

10. Further, admission of [redacted] statements in the 911 call does not violate defendant's right of confrontation under *Crawford v. Washington*, 541 U.S.36 [2004]). Out-of-court statements by witnesses that are testimonial in nature are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross examine them (*see Crawford*).

11. Statements are deemed to be nontestimonial, however, when they are made in the course of police questioning under circumstances indicating that the primary purpose of the questioning is to enable police to meet an ongoing emergency. Nontestimonial statements do not trigger the Confrontation Clause (*Davis v. Washington*, 547 U.S.813 [2006]).

12. In this case, the statements of [redacted] to the 911 Operator were clearly made for

the purpose of obtaining police presence to combat an emergency situation and to catch the perpetrator of the attack. As such, [redacted]'s statements to the 911 Operator are nontestimonial, and their admission into evidence does not violate the Confrontation Clause under *Crawford* (*see People v. Harvey*, 57 A.D.3d 1446 [4th Dept. 2008]).

13. As such, the People seek permission to introduce such evidence at trial.

WHEREFORE, the People respectfully request this Court issue an Order for the relief requested herein.

[redacted]

Subscribed and Sworn to and before me
This 2nd of May, 2023

[redacted]

Commissioner of Deeds/Notary Public
State of New York
Qualified in Buffalo/~~Erie County~~
My Commission Expires On 2/31/24

At a Criminal Special Term of the Supreme Court, held in and for the County of Erie, in Erie County Hall, City of Buffalo, New York, on the 24th day of April, 2023.

PRESENT: HON. DEBORAH HAENDIGES
Judge Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF MOTION

v.

[redacted]

FILE No [redacted]

Defendant

PLEASE TAKE NOTICE, that upon reading and filing of the annexed affirmation of [redacted], Assistant District Attorney, appearing of counsel to John J. Flynn, District Attorney of Erie County, dated [redacted]2023, that the undersigned will move the Erie County Court, Hon. Deborah Haendiges presiding, at a term to be held as soon as may be convenient for the Court, for a hearing and determination of an order pursuant to People v. Molineux, 168 N.Y.2d 556 (1901), allowing the introduction of evidence of prior and subsequent bad acts, as discussed herein, of the defendant in the People's direct case, and People v. Sandoval, 34 N.Y.2d 381 (1974), allowing for the cross-examination of the defendant with said prior bad acts should he choose to testify; and for any other and further relief as this court may find just and proper.

DATED: [redacted]2023

Very truly yours,

JOHN J. FLYNN.
ERIE COUNTY DISTRICT ATTORNEY
BY: Cathleen M. Roemer., Of Counsel
ASSISTANT DISTRICT ATTORNEY

TO: [redacted] Esq.
[redacted] Esq.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff

vs.

[redacted]

Defendant

AFFIDAVIT

ECDA No. [redacted]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

[redacted] being duly sworn, deposes and says:

1. Your deponent is an attorney duly admitted to the practice of law in the State of New York.

2. Your deponent is an Assistant District Attorney, appearing of counsel to JOHN J. FLYNN, District Attorney of Erie County, on behalf of the People of the State of New York.

3. Unless otherwise stated herein, this affidavit is made upon information and belief, the source of which is your deponent's investigation of the confidential file of the District Attorney's Office, records of all the proceedings heretofore had, a reading of the moving papers filed herein, and conversations with witnesses hereto.

4. That I make this affirmation, pursuant to People v. Molineux, 168 N.Y. 2d 556 (1901) and its progeny, in support of the People's motion in the above captioned case, for a determination of an order to introduce evidence on the People's case-in-chief at the trial hereof of the defendant's prior bad acts as set forth herein.

5. The People are requesting that the court permit the People to elicit testimony during the People's direct case about certain prior bad acts of the defendant which are not charged in the

indictment, including the facts relating thereto and any corroboration of these witnesses thereof.

6. Additionally, the People are requesting that the court permit the People to cross-examine the defendant, should he choose to testify, about said prior bad acts, as discussed herein, pursuant to People v. Sandoval, 34 N.Y.2d 381 (1974), regardless of whether said evidence is deemed admissible in the People's case in chief.

I. Preliminary Statement

A. Statement of Facts in the Instant Indictment

7. The defendant is charged with one count of Murder in the First degree in violation of Penal Law § 125.27(1)(a)(vii), one count of Murder in the Second Degree in violation of Penal Law § 125.25(1), and one count of Aggravated Criminal Contempt in Violation of an Order of Protection in violation of Penal Law § 215.52(1).

8. In regard to the charge of Murder in the First degree on or about November 20, 2021, the victim [redacted] was killed while the defendant was in the course of committing a burglary in the first or second degree.

9. In regard to the charge of Murder in the Second Degree, on or about [redacted] 2021, the defendant, with intent to cause the death of another person, to wit: [redacted], caused the death of that person.

10. In regard to the charge of Aggravated Criminal Contempt, on or about [redacted] 2021, Justice Mark Montour issued the most recent order of protection for [redacted] and her son, Aneal Nasir.

11. After explaining each section of the order of protection, Justice Montour also stated that if the defendant failed to conform to each section of the order of protection, he would be in violation of the order, even if he was invited by either [redacted] or her son.

12. This defendant is a 40-year-old [redacted]ale who moved to Buffalo from Afghanistan with his then wife [redacted] At the time of the commission of the crime, the defendant and [redacted] lived separately. The defendant lived at [redacted] Apartment B-8 in the city of [redacted] while [redacted]ved at [redacted]n the city of Depew with her son, her sister [redacted] her brother-in-law [redacted] her three (3) nieces, and one (1) nephew.

13. Several years prior to the commission of this crime, [redacted] attempted to end the relationship by verbally informing the defendant, moving out of the home she shared with the defendant, and moving in with her sister's family. The defendant reacted with physical violence, at different points in time. The defendant would approach [redacted] and grab her to prevent her from fleeing, leaving bruising and red marks along her arms and back. (*See* section B paragraph 18). Multiple times after [redacted] moved in with her sister's family, the defendant broke multiple orders of protection by coming to [redacted], stating he wanted to talk with her and frequently causing injuries to [redacted] when she tried to retreat to the house or walk away from the defendant.

14. After each incident between the defendant and [redacted] the [redacted] Police Department were called and brought the defendant to the department for questioning. After each incident, [redacted] pressed charges against the defendant for violating the order of protection and for assaulting her.

15. On [redacted], 2021, the defendant attacked [redacted], and committed the crimes described in paragraphs 7-12. When Depew Police officers arrived on location, [redacted] stated he saw the defendant at the scene and that the defendant drove away in his Toyota Camry, which [redacted] had kicked and punched before the defendant fled the scene.

16. Approximately two (2) hours after the attack, the defendant was arrested by Amherst Police officers and photographed. On his clothes appeared to be red staining, which the arresting officers believed resembled blood. After sending the defendants clothes to be analyzed, the crime lab determined that the red stains on the defendant's clothes were blood that were a match to [redacted] DNA profile.

B. Prior and Subsequent Bad Acts of the Defendant

17. In reaction to [redacted]'s desire to end the relationship, the defendant became physically aggressive and violated several protective orders. After [redacted]s first informed the defendant about her intent to end the relationship, the defendant, violently grabbed [redacted] at different points of time. In these altercations [redacted] defended herself, but still sustained bruising and red marks. (*See* paragraph 13). The defendant would also attempt to contact [redacted] through both text messages and phone calls, in which the defendant stated that he would get someone to attack her if she wouldn't speak with him.

18. On [redacted] 2018 defendant pled guilty to one count of attempted Assault in the Third Degree in violation of Penal Law 110/120.00(1). The victim in that case is the now deceased [redacted]

19. On [redacted] 2021, defendant violated the order of protection by showing up at the victim's residence and threatened to kill the victim and her son. The victim called her sister who heard the defendant's voice over the phone.

20. On [redacted] 2021 defendant pled guilty to one count of Criminal Trespass in the Second Degree in violation of Penal Law 140.15(1). That guilty plea was in satisfaction to an incident which occurred on May 8, 2020 wherein the defendant went to [redacted]. to give the victim a portion of a stimulus check. After giving the victim the money, the defendant ripped

the money back out of her hand, shouted, "its my money" and began punching her multiple times in the forehead, left cheek, back of her neck and back. The defendant also pulled out some of her hair.

21. Between three (3) and six (6) months before the incident, the defendant came to his brother-in-law's store located at [redacted] in Cheektowaga, NY. The defendant started a verbal and physical altercation with the brother-in-law over the defendant's wife. The defendant wanted his wife to return home and he accused the brother-in-law of having a sexual relationship with her.

22. Between the defendant's sentencing for the May 2020 incident, and this homicide, the defendant called the victim multiple times on her cell phone. The last of which was immediately prior to death.

23. In the several weeks leading up to the murder the deceased's sister and brother-in-law both observed the defendant in the area around their house. Additionally, the neighbor observed the defendant driving around the house.

II. The People are Seeking to Introduce the Prior Bad Acts of the Defendant in Their Direct Case for Purposes of Establishing Motive and Intent, Lack of Mistake/Accident, Common Scheme or Plan and to Complete the Narrative

24. Generally, evidence of prior bad acts is not admissible as evidence in chief that a defendant committed a charged crime. Exceptions to that rule allow for such evidence if it is relevant to motive, intent, modus operandi, absence of mistake or accident, identity, common scheme or plan, background information, placing the present charges in context, or completing the narrative. People v. Molineux, 168 N.Y. 264 (1901); People v. Carter, 77 N.Y.2d 95 (1990).

25. The aforementioned circumstances are not, however, exhaustive of the permissible

reasons for which evidence of prior bad acts may be admitted. Molineux, 168 N.Y. at 293; People v. Carter, 77 N.Y.2d 95 (1990). Indeed, they are merely a few of a large variety of reasons for which such evidence may be admitted. People v. Vails, 43 N.Y.2d 364 (1977).

26. Such evidence may also be admitted to refute a defendant's contentions at trial, or rebut the defendant's assertion that the allegations against him are incredible. People v. Rojas, 97 N.Y.2d 32, 38 (2001); People v. Luck, 294 A.D.2d 618 (3rd Dept. 2002); People v. Acosta, 180 A.D.2d 505 (1st Dept. 1992); People v. Dorm, 47 A.D.3d 503 (1st Dept. 2008).

27. Significantly here, the Court of Appeals has held that admission of evidence of uncharged crimes and prior bad acts is "especially warranted" where, as in the instant case, "the crime charged has occurred in the privacy of the home and the facts are not easily unraveled." People v. Henson, 33 N.Y.2d 63 (1973).

28. When evidence has such proper basis for admission, it may be received if its probative value outweighs its prejudice to the defendant. People v. Till, 87 N.Y.2d 835, 836 (1995). However, "[t]here is no litmus paper test for determining when the probative value of the evidence outweighs its potential for prejudice." People v. Ventimiglia, 52 N.Y.2d 350, 359-60 (1981).

A. Evidence of the Defendant's Bad Acts Should be Admissible at Trial to Establish Motive and Intent.

29. "It is obvious that in every criminal trial, when proof of motive is an essential ingredient of the evidence against a defendant, the motive to be established is the one which induced the commission of the crime charged." People v. Molineux, 168 N.Y. at 294. Determinations of the motive underlying another individual's conduct are often difficult to discern where only the facts of a single incident are available and understanding this difficulty, courts in New York have a long history of allowing evidence of prior crimes where they tend to substantiate the defendant's motive. People v. Cortez, 923 N.Y.S.2d 544 (1st Dept. 2011) (In

murder prosecution, evidence of defendant's hostility toward women generally, and not limited to victim, had bearing on motive and was not unduly prejudicial, so as to be admissible against him).

30. Motive and intent are distinguishable under the law. "In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to affect such result. …[C]riminal intent is always essential to the commission of crime." People v. Molineux, 168 N.Y. 265, 297 (1901).

31. Evidence of defendant's prior uncharged crimes is admissible "to negate an innocent state of mind," i.e., "successive repetition of similar unlawful acts tends to reduce the likelihood of the actor's innocent intent on the particular occasion in question." Hon. Lee H. Elkins and Jane Fosbinder, Esq., New York Law of Domestic Violence, in New York Family Law Practice, 229 (West 1998). The Courts in the Fourth Department, as well as other New York Courts have admitted evidence of prior bad acts and prior incidents of domestic violence to establish defendant's motive and intent of the crime charged.

32. Although prior bad acts cannot be used to show criminal propensity, "[p]rior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the aggression and bad acts are focused on one particular person, demonstrating the defendant's intent [and] motive." People v. Westerling, 48 A.D.3d 965, 966 (3d Dept. 2008).

33. Similarly, in December of 2007, in People v. Freece, 46 A.D.3d 1428, 848 N.Y.S.2d 468 (4th Dept. 2007) the Fourth Department upheld a decision of the lower court which allowed testimony of prior bad acts in a criminal contempt and aggravated harassment trial. Specifically, the Fourth Department held that the probative value of the prior acts outweighed its prejudicial

effects because the acts demonstrated the defendant's intent to both threaten and alarm the complainant. *See also*, People v. Guiteau, 701 N.Y.S.2d 230, 267 A.D.2d 1094 (4th Dept. 1999) (evidence of prior domestic assaults against victim was admissible in assault prosecution to establish motive, intent and absence of mistake or accident); People v. Avellanet, 662 N.Y.S.2d 345, 346, 242 A.D.2d 865 (4th Dept. 1997) (admitting "evidence of defendant's prior conviction of menacing as a part of the people's direct case" against defendant for setting fire to the house of his former girlfriend. The Fourth Dept. held "that conviction involved the same victim, and the evidence was relevant on the contested issues of intent and motive,"); People v. Williams II, 663 N.Y.S.2d 1023, 241 A.D.2d 911 (4th Dept. 1997) (admitting "evidence of four prior domestic violence incidents involving defendant and his former girlfriend. That proof was admissible to show … defendant's motive and intent with respect to the crimes charged,"); People v. Wright, 562 N.Y.S.2d 301, 167 A.D.2d 959 (4th Dept. 1990) (admitting evidence of defendant's prior acts of violence against his ex-wife); People v. Castrechio, 521 N.Y.S.2d 960, 134 A.D.2d 877 (4th Dept. 1987) (evidence containing "proof of defendant's prior acts of violence against his former girlfriend were admissible to show his intent and motive,").

34. The Fourth Department has admitted evidence of a defendant's prior threats or harassment to prove motive and intent for the charged crime. In People v. Champion, the defendant was convicted of attempted murder and two counts of burglary in the second degree. 273 A.D.2d 899, 899 (4th Dept. 2000). The Fourth Department upheld the trial court's admission of evidence of defendant's "obsessive behavior toward the victim" and his threats to kill his first wife under similar circumstances because that evidence "was admissible to demonstrate defendant's motive and intent in attacking the victim." Id. at 900. In People v. Roides, the defendant was convicted of arson and assault. 124 A.D.2d 967 (4th Dept. 1986). The prosecution introduced evidence on its case-in-chief regarding defendant's prior bad acts in the month

preceding the crime charged, including threats to give his wife "a good beating," to cut her throat, and to put her and her friends in their graves, and also that the defendant slashed his wife's tires and broke the windows on her car and home. Id. at 967-68. The Fourth Department held that this evidence was properly admitted as "probative of his intent to set fire to his wife's house and the possible motive for doing so." Id. at 968.

35. The New York courts have admitted evidence of prior assaults or other physical violence to establish the defendant's intent and/or motive. For example, in People v. Gorham, the defendant was convicted of "various crimes" for attacking his wife in their apartment. 17 A.D.3d 858 (3d Dept. 2005). The trial evidence revealed that the defendant's behavior throughout the relationship was violent, abusive, controlling, and alienating. Id. at 859. The Third Department upheld the trial court's ruling allowing the People to introduce evidence of the defendant's prior bad acts, including facts underlying defendant's previous two assaults on the victim. Id. at 860. The court held that the evidence of defendant's prior violence was probative of several disputed issues, including the defendant's intent in committing the charged crime. Id.

36. The Fourth Department has admitted evidence of a defendant's prior assaults or other physical violence to establish motive and intent. In People v. Huck, the defendant, the complainant's former boyfriend, was convicted of aggravated criminal contempt and assault in the second degree. 1 A.D.3d 935, 936 (4th Dept. 2003). The Fourth Department held that evidence of the defendant's three prior assaults on the complainant was properly admitted to prove the defendant's motive and intent for the charged crimes. Id. In People v. Castrechino, the defendant was convicted of coercion and unlawful imprisonment after he abducted and raped his former girlfriend. 134 A.D.2d 877 (4th Dept. 1987). The court held that evidence of the

defendant's prior acts of violence against the complainant was properly admitted to show his motive and intent. Id.

37. New York courts also have admitted evidence of a defendant's prior threats or harassment to prove motive and intent for the charged crime. In People v. McGowan, the defendant was convicted of two counts of first-degree criminal contempt for violating an order of protection directing him to stay away from his former girlfriend. 45 A.D.3d 888 (3d Dept. 2007). The defendant had violated the order of protection by chasing the victim in his vehicle throughout the city, after which he got out of his car, shouted obscenities at her, and threatened to kill her. Id. at 889. At trial, the court allowed the People to introduce evidence of the defendant's prior bad acts of vandalism and harassing and threatening conduct toward the victim. Id. at 890. The Third Department held that the evidence was properly admitted as probative of motive and intent for the crimes charged. Id.

38. Evidence of defendant's prior bad acts toward the complainant is commonly admitted in assault cases to prove defendant's motive or intent. In People v. Smalls, the Fourth Department, upholding defendant's conviction for assault in the first degree, held that the trial court properly admitted evidence of the defendant's prior assaults against the victim. 70 A.D.3d 1328, 1329-30 (4th Dept. 2010). The court noted "[u]nlike evidence of general criminal propensity, evidence that a particular victim was the focus of a defendant's aggression may be highly relevant." Id. (quoting People v. Ebanks, 60 A.D.3d 462, 462 [3d Dept. 2009]). The court said that the prior incidents, in which the defendant bit the victim, were probative of the defendant's intent in committing the charged crime and established the "assaultive nature" of their relationship. Id. The Fourth Department has commonly upheld the admission of defendant's prior bad acts in prosecutions for assault when the bad acts are probative of the defendant's motive or intent for

the charged crime. See People v. Agee, 57 A.D.3d 1486 (4th Dept. 2008); People v. Mosley, 55 A.D.3d 1371 (4th Dept. 2008); People v. Huck, 1 A.D.3d 935 (4th Dept. 2003).

39. In November of 2007, the Fourth Department, in People v. Fowler, 45 A.D.3d 1372, 845 N.Y.S.2d 599 (4th Dept. 2007) addressed the issue as to whether prior acts against an eye witness could be admitted into evidence at trial. Fowler involved an assault first, criminal possession of a weapon and criminal use of a firearm. In this case, the victim was shot while standing in a group of people with his friends and the eyewitness. The lower court held, and the Fourth Department affirmed, that testimony involving a prior altercation between the defendant and the eye witnesses was relevant with regards to motive and intent because the witness was with the victim when he was shot.

40. Specifically, the crime of Criminal Contempt crimes as a prior bad acts has been held to be relevant to motive and intent. Evidence of defendant's prior bad acts toward complainant is often admissible in criminal contempt or harassment cases to prove defendant's motive or intent. In People v. Woodson, the Second Department upheld the trial court's admission of the facts underlying a previous conviction for attempted assault to show intent for the charged crimes of criminal contempt and trespass. 31 A.D.3d 678, 678 (2d Dept. 2006). The court held that this evidence was probative because "knowledge and intent could not easily be inferred from the defendant's presence at the complainant's home." Id. at 679. The Fourth Department has also held that defendants' prior bad acts are properly admitted in contempt or harassment cases to prove motive and intent. See People v. Wilson, 55 A.D.3d 1273 (4th Dept. 2008); People v. Freece, 46 A.D.3d 1428 (4th Dept. 2007).

41. Evidence of this defendant's prior bad acts goes directly to motive. The defendant's actions in this case are all geared toward the escalating goal of convincing Nazeefa Tahir to get

back together with him, threatening her to get back together with him, and finally punishing her for not getting back together with him.

B. Evidence of Defendant's Prior Bad Acts Should be Admissible to Show Common Scheme or plan

42. Evidence of prior bad acts can be admitted to show "common plan or scheme." People v. Molineux, 168 N.Y. 264. 305 (N.Y. 1901). For proof of extraneous crimes to be admitted into evidence at trial, "there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme." Id.

43. The Fourth Department has upheld the admission of evidence of other bad acts where it helps to establish a common plan or scheme. In People v. Hill, the defendant was convicted of murder, criminal contempt, and various other charges. 163 A.D.2d 813 (4th Dept. 1990). The defendant began stalking his ex-girlfriend in January of 1987, and began a course of conduct that ultimately led to the defendant stabbing her to death in August of that year. Id. at 813. The Fourth Department held that evidence of the defendant's prior bad acts was properly admitted because the incidents "showed defendant's relentless and obsessive efforts to injure the victim, [and] were relevant to the issues of motive, intent, identity and common scheme or plan." Id.

44. Similarly, in People v. Washpun, the defendant was convicted of assault in the second degree for attacking his ex-girlfriend. 134 A.D.2d 858 (4th Dept. 1987). The Fourth Department held that the trial court properly denied the defendant's motion to sever the assault count with burglary and criminal mischief charges that the defendant was facing for acts against the same victim. Id. at 858. The court held that evidence concerning the burglary and criminal mischief charges were admissible to establish a common scheme or plan. Id. This reasoning can also be

applied to Molineux evidence. Furthermore, the Fourth Department noted that because of all the crimes involved the defendant's girlfriend, the admission of the evidence satisfied the requirement set by the Court of Appeals in People v. Fiore that when evidence of other bad acts is introduced to show common scheme or plan, the acts must be similar in character. Id. (citing People v. Fiore, 34 N.Y.2d 81, 84-85 [1974]).

45. In People v. Leeson, the Fourth Department held that evidence of defendant's prior bad acts was admissible in a prosecution for criminal contempt in the first degree to show defendant's "common scheme or plan to kill or otherwise harm the victim." 299 A.D.2d 919 (4th Dept. 2002).

46. Other New York appellate courts have held that evidence of prior instances of domestic violence are admissible to prove common scheme or plan when the prior bad acts were committed against the same victim. In People v. Jau Kud Su, the defendant was convicted of assault in the first degree after he repeatedly struck his estranged wife's head into the edge of cement steps. 239 A.D.2d 703, 703 (3d Dept. 1997). The Third Department held that the trial court properly admitted evidence of two of defendant's prior violent acts against his wife to show motive, intent, and common scheme or plan. Id. at 704. In People v. Colon, the court held that although the defendant was charged with assault with a knife, the trial court properly admitted evidence that the defendant had tried to run the victim over in a vehicle to show a "pattern or continuing plan or scheme to inflict injury." 442 N.Y.S.2d 346, 347 (App. Term 1st Dept. 1981).

47. The present case is similar in fact to People v. Hill in that this defendant also engaged in a began a course of conduct that ultimately led to the defendant stabbing her to death. The

defendant's prior bad acts in this case are relevant to show the defendant's relentless efforts to injure the victim and are indicative of his common scheme or plan.

C. Evidence of Defendant's Prior Bad Acts is Relevant to Prove Absence of Mistake

48. Prior bad acts of the defendant are admissible to show the absence of mistake. "[P]ossible or probable defense of accident or mistake may be rebutted upon the direct case of the prosecution." People v. Molineux, 168 N.Y. 264, 300 (1901). Generally, the defendant must have raised the defense of accident or mistake in some way before the prosecution may introduce evidence of prior bad acts for this purpose. For example, in People v. Rolf, the Fourth Department held that because the defendant argued that the victim's death was accidental, the trial court properly admitted evidence of the defendant's prior threats and acts of violence toward the victim to rebut the defense of accident. 185 A.D.2d 656 (4th Dept. 1992). Similarly, in People v. Feldman, the defendant argued that his wife's fatal head injuries were sustained as the result of a fall while doing yard work. 219 A.D.2d 665, 666 (2d Dept. 1995). The Second Department held that witness testimony about observing bruises on the victim prior to her death and the defendant's abusive conduct was properly admitted to rebut the defense of accident. Id.

49. The Court of Appeals has held that evidence of defendant's prior bad acts is admissible to prove absence of mistake. In People v. Henson, a child abuse case, the Court of Appeals held that prior bad acts are admissible to negate the defense of accident or mistake, and that "it is especially warranted in cases … where the crime charged has occurred in the privacy of the home and the facts are not easily unraveled." 33 N.Y.2d 63, 72 (1973). Furthermore, in Henson, because the defendant alleged that there was no proof that her version of events was not true, the Court of Appeals stated "[t]his argument, of course, overlooks what is precisely the theory underlying the admissibility of such evidence – namely, that the credibility of the

'accident' explanation diminishes as the instances of similar alleged 'accidental' injury increase." Id. at 73.

50. In People v. Guiteau, the Fourth Department held that because the defendant claimed that the victim's injuries occurred in his absence or due to an accident, evidence of prior domestic assaults was admissible as probative of the crime charged. 267 A.D.2d 1094 (4th Dept. 1999). The Fourth Department has often upheld the admission of prior bad acts in domestic violence cases to prove the absence of mistake or accident. See, e.g. People v. Nelson, 57 A.D.3d 1441 (4th Dept. 2008); People v. Spotford, 217 A.D.2d 901 (4th Dept. 1995).

51. Other Appellate Division departments have also held that prior bad acts are admissible to prove absence of mistake or accident in domestic violence cases. For example, in People v. Gorham, the defendant, charged with assaulting his wife, initially instructed his wife in front of police officers to tell them that she had fallen. 17 A.D.3d 858, 859 (3d Dept. 2005). The Third Department held that the trial court properly admitted evidence of defendant's prior violence, abuse, and controlling behavior to show, among other issues in dispute, the absence of mistake or accident. Id. at 860. In People v. Underwood, the Second Department held that in a prosecution for assault and weapon possession, the prosecution was properly permitted to introduce evidence of defendant's prior assaults against the victim to refute the defendant's assertion that the victim's injuries were accidental. 255 A.D.2d 405, 406 (2d Dept. 1998). In People v. Dunston, the defendant was convicted of assault in the first degree for slashing his former girlfriend's face with a razor blade. 159 A.D.2d 387, 387 (1st Dept. 1990). The defendant claimed he had no knowledge of how the complainant was injured, and suggested that it occurred during the confusion that ensued during an argument with the complainant's daughter and her daughter's boyfriend. Id. at 387-88. The First Department held that the trial court

properly allowed the People to introduce evidence of past acts of violence by the defendant toward the complainant after she had attempted to end the relationship or deny the defendant sexual access, because this evidence was relevant to "refute the defense theory that the slashing did not involve defendant and was accidental." Id. at 388.

52. The defendant in this case has violated this specific order of protection multiple times. He has been arraigned on the charge multiple times; he has been through the court system multiple times. The prior bad acts and prior violations of the order are necessary to show that the defendant is well aware of the workings of the court system of the rules of an order of protection and that that going to the victim's house was no mistake.

D. Evidence of Defendant's Prior Bad Acts is Relevant to Complete the Narrative

53. Evidence of a defendant's prior bad acts is often admissible to complete the narrative for the jury, in order to allow the jury to understand the evidence in context and provide them with background information. The Court of Appeals upheld the admission of prior bad acts for this purpose in People v. Dorm. 12 N.Y.3d 16 (2009). In Dorm, the defendant was charged with assault, unlawful imprisonment, and stalking arising from an incident in which, during an argument, the defendant prevented his girlfriend from leaving, punched her, and choked her. Id. at 18. The People were allowed to introduce evidence of the defendant's other conduct toward the same victim, including prior instances when the defendant prevented the victim from leaving certain locations, a subsequent incident where the defendant appeared uninvited at the victim's work, and the defendant's frequent arguments with the victim during the course of their relationship. Id. The Court of Appeals held that the evidence was properly admitted to prove motive and intent, but also because "it provided necessary background information on the nature of the relationship and placed the charged conduct in context." Id. at 19.

54. Background material is admissible when it is necessary to explain an ambiguous but material fact in the case through "[e]vents antecedent to and independent of a crime." People v. Green, 35 N.Y.2d 437, 441 (1974). For example, in People v. Simpson, the defendant was indicted on several criminal charges stemming from an incident in which he abducted his estranged wife, drove her to a remote area, tied her and choked her with a rope, hung her from a tree limb, and forced her at knifepoint to perform sexual acts. 235 A.D.2d 960, 961-62 (1997). The Third Department found that evidence regarding why the victim left the marital residence and sought an order of protection was properly admitted, because "the circumstances underlying the deterioration of the marriage of defendant and the victim were inextricably interwoven with the events underlying the indictment and were necessary to put the other trial evidence into proper context." Id.

55. The Fourth Department has upheld the admission of defendant's prior bad acts in domestic violence cases in order to complete the narrative for the jury. In People v. Nelson, the Fourth Department held that evidence of the defendant's prior abuse of the victim was admissible in a prosecution for, among other charges, kidnapping and assault as "background material to aid the jury in understanding the relationship between defendant and the victim." 57 A.D.3d 1441 (4th Dept. 2008). In People v. Cook, the court held that in a trial for first-degree sexual abuse, the defendant's prior abusive conduct toward the victim, his paramour, was properly admitted as "background material" to aid the jury in understanding the relationship between the defendant and victim. 251 A.D.2d 1033 (4th Dept. 1998).

56. The other departments of the Appellate Division have frequently admitted evidence of a defendant's prior bad acts in order to complete the narrative for the jury. For example, in People v. Galloway, the People introduced evidence that ten months before the charged crimes

of rape and criminal sexual act, the "defendant punched the victim, his girlfriend, over a perceived infidelity." 61 A.D.3d 520, 520-21 (1st Dept. 2009) The First Department held this evidence was properly admitted because it was "highly probative background information that tended to explain the relationship between defendant and the victim," and because it "placed the victim's testimony in a believable context." Id. at 521. Similarly, in People v. Poquee, the defendant was convicted of sodomy, rape, and assault stemming from a three-day attack on the victim in her home. 9 A.D.3d 781, 781 (3d Dept. 2004). The complainant testified about previous acts of domestic violence which, like the crimes charged, were motivated by the defendant's perception of the complainant's infidelity. Id. The Third Department held that this evidence was properly admitted as background material. Id. In People v. Wright, the Second Department held that in a prosecution for burglary, assault, and criminal contempt, the trial court properly admitted evidence of the defendant's prior abuse and physical assaults against the complainant to "enable the jury to understand the defendant's relationship with the complainant, his ex-girlfriend." 288 A.D.2d 409 (2d Dept. 2001).

III. Evidence of Defendant's Prior Bad Acts Should be Admissible Pursuant to Sandoval to Impeach the Defendant Should he Choose to Testify

57. People v. Sandoval, 34 N.Y.2d 381 (1974) and its progeny allows for the People to cross-examine the defendant about prior bad acts for impeachment purposes should he choose to testify. *See* People v. Kennedy, 47 N.Y.2d 196 (1979) (Explaining that the considerations applicable to convictions apply equally to immoral, vicious, or criminal acts); *see* People v. Allen, 198 A.D.2d 789 (1993) ("When a defendant takes the stand, however, he can be cross-examined on prior convictions or bad acts that bear on his credibility.").

58. The scope of the cross-examination on such prior bad acts rests solely within the trial court's discretion. People v. Bennette, 56 N.Y.2d 142 (1982).

59. The People are seeking to cross examine the defendant on all of the aforementioned bad acts for impeachment purposes should the defendant decide to testify.

60. Should the defendant chose to take the stand and testify; the People anticipate he will testify that he has a gap in memory from a time a few minutes before the attack until several hours later when Amherst Police officers pulled him over. The People anticipate that he will also state that [redacted] had invited him over to her home. It is the People's position that such testimony will be elicited for the purpose of showing that the defendant had no motive or intent to kill [redacted] as they were reconciling.

61. If the defendant makes these claims, the People should be able to cross-examine the defendant on past behaviors which instead demonstrate that the defendant behaves in a rational and calculated way when responding to [redacted] desire to end her relationship with the defendant.

Conclusion

62. As articulated above, evidence of the defendant's prior bad acts is highly probative in establishing motive and intent.

63. The People submit that any prejudicial effect here would be far outweighed by the probative value of the evidence sought to be admitted. In support of this proposition, the People provided the long line of jurisprudence which has allowed similar evidence on a variety of grounds.

64. The New York Court of Appeals has also expanded this line of jurisprudence as bearing on the credibility of the defendant: "we have never held—nor is it the law—that evidence of a prior crime or bad act is admissible only if it passes through the Molineux prism. Indeed, a jury may consider [a] defendant's prior crimes as bearing on credibility." People v. Rojas, 97 N.Y.2d 32, 38 (2001).

65. Finally, any potential prejudice to the defendant can be mitigated by a proper limiting instruction which commands the jury to consider the admitted evidence only of the permissible purposes mentioned above and not to establish the defendant's general propensity toward criminal behavior.

WHEREFORE, the People respectfully request that this trial court grant the People's application and motion permitting the People to introduce evidence of a defendant's prior bad acts on our direct case pursuant to People v. Molineux, 168 N.Y.2d 556 (1901), with appropriate limiting instructions, and also during cross-examination of the defendant or defense witnesses pursuant to People v. Sandoval, 34 N.Y.2d 381 (1974).

[redacted]

Subscribed and Sworn to before me
this 24 day of April, 2023.

[redacted]

Qualified in Erie County
My Commission Expires 8/24/24