

STATE OF NEW YORK  
ERIE COUNTY SUPREME COURT

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THE PEOPLE OF THE STATE  
OF NEW YORK

v.

**AFFIRMATION**

IND [REDACTED]

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

[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 counsel for the defendant, [REDACTED], who is charged in this indictment with criminal possession of a weapon in the second degree (Penal Law § 265.03[3]).

2. I make this affirmation (i) in opposition to the prosecution's motion for a jury instruction on the legality of the police conduct and (ii) in support of my motion to preclude any reference to a "shots fired" call.

3. Unless otherwise stated, the factual part of this affirmation is made upon information and belief, the source of which is my review of the case file, discovery, and motion papers.

4. The prosecution asks this Court to instruct the jury that the search of the vehicle was lawful. This request is based on the Court's denial of the defendant's motion to suppress the firearm.

5. In support of its request, the prosecution cites *People v. Hamlin* (71 NY2d 750 [1988]). But this case does not hold that such an instruction is appropriate, or even permissible.

6. The legality of the search is not an issue in this trial, and the instruction would improperly bolster the officers' testimony.

7. Unless it comes up, there is no need to instruct the jury on the issue at all. If it does, the instruction should be simply that "matters involving searches are questions of law, not fact" (*People v. Baker*, 32 AD3d 245, 249 [1st Dept. 2006]).

8. The request should be denied.

9. It is anticipated that the prosecution will seek to elicit testimony that the officers responded to a "shots fired" call. It should be precluded from doing so.

10. All evidence, even if relevant, may be precluded if "its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*People v. McCullough*, 117 AD3d 1415, 1416 [4th Dept. 2014]).

11. There is no proof that the defendant fired any shots, so the testimony is irrelevant to the question of his guilt. It is, however, highly prejudicial, as it may cause the jury to speculate that the defendant fired the shots -- and therefore possessed a firearm.

12. The prosecution may argue that it needs to explain the officers' reason for being in the area. It would be sufficient for the officers to testify that they were responding to a call, without specifying the nature of the call.

For the reasons stated, the prosecution's motion should be denied, and the defendant's motion should be granted.

DATED: [REDACTED] 2023  
Buffalo, New York

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[REDACTED], ESQ.