

STATE OF NEW YORK  
ERIE COUNTY SUPREME COURT

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THE PEOPLE OF THE STATE  
OF NEW YORK

v.

**AFFIRMATION**

IND [REDACTED]

[REDACTED]  
and [REDACTED]

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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. Along with co-counsel [REDACTED], ESQ., I am the attorney for [REDACTED] [REDACTED] who is charged jointly with [REDACTED] with criminal possession of a firearm in the second degree (Penal Law § 265.03[3]).
2. I make this affirmation (i) in response to the prosecution's motion *in limine* served [REDACTED] 2023 and (ii) in support of my motion for the relief described below. Unless otherwise stated, this affirmation is made upon information and belief, the sources of which are my review of the file, motion papers, and discovery provided by the prosecution.
3. The prosecution seeks to preclude the defense from offering evidence of the defendant's jail calls. The defense stipulates that neither party is allowed to offer this information for any purpose.
4. The prosecution seeks to preclude the defense from challenging the legality of the search of the vehicle. The defense does not intend to raise this issue, although some relevant evidence may overlap the trial and suppression hearing. We must be

allowed to fully develop all testimony concerning the recovery and handling of the firearm.

5. The prosecution seeks to preclude the testimony of ██████████, the defense expert witness on DNA. The defense complied with its reciprocal discovery obligations (CPL 245.20[4][a], [1][f]). Even if there had been a discovery violation, preclusion is available as a sanction for the defense “only upon a finding that the defendant’s failure to comply with the discovery obligation or order was willful and motivated by a desire to obtain a tactical advantage” (CPL 245.80[2]). No such allegation, let alone a finding, has been made.
6. The prosecution seeks to preclude the defense from cross-examining any of the police officers concerning their 50-a material. The defense does not intend to ask PO ██████████ Deputy ██████████, or Inv. ██████████ about any of their 50-a material, but we reserve the right to ask PO ██████████ about a prior “sworn statement not supported by body-worn camera footage,” referenced on the third page of the prosecution’s affidavit. This conduct involves his honesty, and therefore his credibility as a witness.

**The testimony of the prosecution witness subject to the protective order should be precluded, or at least limited.**

7. On ██████████ 2023, the prosecution notified me that it had applied for a protective order. I was not served with that order until ██████████, 2023, nine days before trial. There is now a more limited order, and the prosecution has provided me with some discovery concerning the witness’s statement.


8. When the prosecution learns of additional discoverable information, “it shall expeditiously notify the other party and disclose the additional material and information as required for initial discovery” (CPL 245.60).
9. Part of this obligation is to disclose “[a] summary of all promises, rewards[,] and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward[,] or inducement” (CPL 245.20[1][I]).
10. The prosecution has referenced a proffer agreement. The defense is entitled to this agreement in its entirety, along with any non-written promises of, or requests for, a benefit in exchange for the witness’s testimony.
11. “When material or information is discoverable under this article but is disclosed belatedly, the court shall impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure” (CPL 245.80[1][a]).
12. Here, the appropriate remedy is preclusion. The defense cannot adequately prepare to cross-examine this witness on such a short time frame. The prejudice caused the delayed disclosure is irreparable.
13. If the witness is allowed to testify, no testimony should be allowed on the defendant’s alleged gang affiliation.
14. First, when the prosecution intends to use any alleged misconduct not charged in the indictment, it has a duty to designate whether the information is being offered as substantive proof or to impeach the defendant’s credibility (CPL 245.20[3]). This has not been done.

15. Second, the prejudicial effect of the information far outweighs its probative value. It is not relevant to the issue of whether the defendant possessed the firearm at the point in time alleged in the indictment.

For the reasons stated, the prosecution's motion *in limine* should be denied, except as consented to, and the defendant's motion should be granted in all respects.

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DATED: , 2023  
Amherst, New York

TO:  
Hon. Paul Wojtaszek  
Erie County District Attorney  
25 Delaware Ave.  
Buffalo, New York