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Pre-Trial Motions & Hearings

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Presented by:
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1.0 MCLE Professional Practice

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Pre-Trial Motions & Hearings

By
Daniel M. Killelea, Esq.

PRE-TRIAL MOTIONS

I. Discovery and Bills of Particular—Not Formal Motions (yet…)

A. CPL Article 240: Demand to Produce (CPL §240.20)

i. It's a written notice served by and on a party to a criminal action, without leave of the court (CPL §240.10[1])

ii. Available for all accusatory instruments except Felony Complaints, and Simplified Traffic Informations charging non-criminal offenses (CPL §240.20[1])

iii. CPL §240.20(1)(k) is specific to V&T offenses such as DWI

iv. There's a codified list of additional materials defendant is entitled to (CPL §240.20[1][a] through [j]), but nothing prohibits expansion of requests

v. Details of Prosecution deals with witnesses are discoverable under People v. Novoa (70 NY2d 490 [1987])

vi. Unless material is subject to protective order, prosecutor "shall disclose and…make available for inspection, photographing, copying or testing"

B. CPL Articles 200 and 100: Request for a Bill of Particulars (CPL §200.95; CPL §100.45[4])

i. A Bill of Particulars is a written statement by the prosecutor specifying items of factual information which are not recited in the accusatory instrument and which pertain to the offense charged, including the substance of each defendant's conduct and whether he was an accomplice or a principal (CPL §200.95[1][a])

ii. A Request for a Bill of Particulars is a written request served by the defendant upon the People without leave of the Court requesting a Bill of Particulars, specifying the items of factual information desired, and alleging that the defendant cannot adequately prepare or conduct his defense without the information requested (CPL §200.95[1][b])

iii. Doesn't require the ADA to include matters of evidence relating to how the People intend to prove the elements of the offense charged or how the People intend to prove any item of factual information included in the BOP (CPL §200.95[1][a])

    a. What type of "firearm" is an appropriate request, but…

    b. Caliber of weapon is matter of evidence

iv. BOP is available for all accusatory instruments except Felony Complaints and Simplified Informations (CPL §§100.45[4], 200.95)

v. In most DWI prosecutions, the prosecutor will respond that the defendant has already received a Bill of Particulars at his arraignment—the "DWI Longform/Bill of Particulars" (DCJS Form 3204)

vi. Despite not being a "written response by the prosecutor," it's likely there will be more information included in the DWI Longform than in a formal written response by the prosecutor

vii. Timely request is within 30 days of arraignment or first appearance of counsel (CPL §200.95[3])

viii. Upon timely request by defendant, People have 15 days to comply (CPL §200.95[2])

ix. People's refusal to comply (either in whole or in part) must be in writing (CPL §200.95[4])

x. Request for a Bill of Particulars must allege that defendant cannot adequately prepare or conduct his defense without the information requested (CPL §200.95[1][b])

C. Cross Demand

i. CPL §240.35 allows for Discovery Upon Demand of Prosecutor

a. Written Report or Document concerning a physical or mental examination, or scientific test, experiment, etc.

b. Any photograph, drawing, tape or other electronic recording which the defendant intends to introduce at trial

ii. Only applies in criminal prosecutions

iii. Prosecutor can also demand a Notice of Defense(s) (CPL Article 250)

a. Psychiatric Defense (CPL 250.10) (within 30 days)

b. Alibi Defense (CPL §250.20)

1. Prosecutor's Demand must be within 20 days

2. Defendant's Response must be within 8 days of Prosecutor's Demand

c. Defenses (found at PL §156.50) Relating to Use of Computers (within 45 days of Arraignment, but not more than 20 days before Trial)

II. Pre-Trial Motions (CPL §255)

A. Standard timeframe is within 45 days of arraignment, unless Court grants additional time upon defendant's request (CPL §255.20[1])

B. All motions must be made at the same time wherever practical (CPL §255.20)

C. <u>Dismissal</u>

i. Geographical Jurisdiction (CPL Article 20)

a. An offense committed within five hundred yards of the boundary of a particular county with an adjoining county in NYS may be prosecuted in either county (CPL §20.40[4][c])

b. An offense committed upon any bridge having terminals in different counties may be prosecuted in either county (CPL §20.40[4][e])

c. An offense committed in a private vehicle during a trip extending through more than one county may be prosecuted in any county through which such vehicle passed in the course of such trip (CPL §20.40[4][g])

d. These same principles apply to the determination of geographical jurisdiction over offenses as between cities, towns, and villages within a particular county (CPL §20.50[1])

e. Where an offense prosecutable in a local criminal court is committed in a city (other than NYC), town or village but within 100 yards of any other city, town or village, it may be prosecuted in either locale (CPL §20.50[2])

ii. Statutory Bases for Motions to Dismiss in Local Court (CPL §170.30)

a. Defective accusatory instrument (CPL §§170.30[1][a], 170.35)

b. Defendant has immunity (CPL §§170.30[1][b], 50.20, 190.40)

c. Double Jeopardy has attached (CPL §§170.30[1][c], 40.20)

d. Statute of Limitations (CPL §§170.30[1][d], 30.10)

e. Speedy Trial Violation (CPL §§170.30[1][e], 30.20, 30.30)

1. Adjournments with Consent of defendant or attorney are excludable from calculation (CPL §30.30[4])

2. In misdemeanors, People must be ready for trial within 90 days of commencement of action, and readiness must be placed on the record (People v. Kendzia, 64 NY2d 331 [1985])

3. Post-readiness delay (i.e., when the People cannot proceed to trial after declaring readiness) is calculated using the same analysis as pre-readiness delay

4. Burden is on the Defendant to establish a *prima facie* case of violation of the statute; the People must then show that there is excludable time (People v. Berkowitz, 50 NY2d 333 [1980])—a hearing may be necessary to make final determination

5. Factors for establishing violation of Constitutional Speedy Trial rights (i.e., CPL §30.20) are found in People v. Taranovich (37 NY2d 442 [1975])

f. Some other jurisdictional or legal impediment to conviction of defendant for the offense charged (CPL §170.30[1][f])

g. In furtherance of (or "in the interests of") justice (CPL §170.30[1][g])

iii. Furtherance of Justice (CPL §§ 170.30[1][g], 170.40; 210.20[1][i], 210.40)

a. Applies to Vehicle & Traffic law offenses, as well as Penal Law offenses (CPL §§170.40[1], 210.40[1])

b. Dismissal required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice (Id.)

c. List of factors to be considered by Court in making determination includes "any other relevant fact indicating that a judgment of conviction would serve no useful purpose" (CPL §§170.40[1][j], 210.40[1][j])

iv. Failure to file charges with Court

a. Occasionally, when defendants are given Appearance Tickets with early return dates on them, copies of those accusatories are not filed with the Court in time for "arraignment"

b. Some local courts will consequently, and upon defense motion, dismiss the accusatory instruments served upon the defendants

c. Double jeopardy does not attach, however, since there was neither a conviction nor a trial—and there was no accusatory instrument filed in a court (CPL §40.30[1])

D. Discovery

i. Upon motion of defendant, Court must order discovery of any materials sought in defendant's Demand to Produce if prosecutor's refusal is "not justified" (CPL §240.40[1][a])

iii. Upon motion of defendant, and unless the prosecutor can show good cause for it not to, the Court must order discovery of any materials sought in defendant's Demand to Produce if prosecutor has not filed a written refusal, or must order one of the other remedies provided by CPL §240.70(1):

a. The Court may grant a continuance;

b. The Court may issue a protective order;

c. The Court may prohibit the introduction of the evidence; or

d. The Court may "take any other appropriate action"

1. Dismissal of Charge (People v. Churba, 76 Misc2d 1029 [NYC Crim. Ct. 1974]; People v. Nieves, 133 AD2d 234 [2nd Dept. 1987])

2. Adverse Inference Charge (PL §450.10[10]; People v. Sosa, 255 AD2d 236 [1st Dept. 1998])

E. Bills of Particulars

i. Upon appropriate written motion of defendant for a Bill of Particulars where the prosecution has refused to comply in writing, the Court must (absent a protective order) order the prosecutor to comply with the request (CPL §200.95[5])

ii. Upon appropriate written motion of defendant for a Bill of Particulars where the prosecution has not timely refused to comply, the Court must (absent good cause) order the

prosecutor to comply with the request, or order one of the other remedies provided by CPL §240.70(1):

a. The Court may grant a continuance;

b. The Court may issue a protective order;

c. The Court may prohibit the introduction of the evidence; or

d. The Court may "take any other appropriate action"

F. Motions to Remove the Action to Another Court

i. CPL §170.15(3) governs removal from one court to another

ii. Applies due to incapacity or disqualification of judge(s)

iii. Applies when Court cannot form a jury

iv. Recusal of Judge is covered under Judiciary Law §14

G. Motions to Suppress

i. Physical Evidence (Mapp v. Ohio, 367 U.S. 643 [1961])

a. Defendant must allege standing in pleadings, then must establish standing at Hearing

b. Standing must be alleged to contest seizure of evidence (CPL §710.20)

c. People v. Ponder (54 N.Y.2d 160 [1981]) describes standing as either a present possessory interest or an expectation of privacy in the area or premises searched

d. Grounds for Motions to Suppress are found CPL §710.20

ii. Statements

a. People v. Huntley (15 N.Y.2D 72 [1965])

1. To determine if a statement made to public official or one working in cooperation with public official was voluntarily made, and therefore admissible

2. Prosecution has the burden of showing beyond a reasonable doubt that the statement was voluntarily made

3. Defendant must have been put on notice of statement(s) made to a public servant, within 15 days of Arraignment (CPL §710.30[2]) for it to be admissible in People's case-in-chief

4. If no notice is served, statement is to be precluded from use at trial unless defendant has moved to suppress it (CPL §710.30[3])

5. Where a defendant claims a statement should be suppressed because of involuntariness, no factual allegations need be alleged to be entitled to a Hearing (CPL §510.50[3][6])

b. Berkemer v. McCarty (468 U.S. 420 [1984])

1. Roadside questioning is non-custodial for purposes of Miranda

2. Not an absolute, however—if situation evolves into what constitutes custodial questioning, Miranda will apply

c. People v. Berg (92 N.Y.2d 701 [1999])

1. "Reciting the alphabet and counting are not testimonial or communicative" (Berg, at 705)

2. Left open the question of whether the refusal to perform SFSTs is testimonial or non-testimonial

iii. Identifications (U.S. v. Wade, 388 U.S. 218 [1967])

a. CPL §710.30 requires Defendant be given notice of any police-arranged identification proceedings within 15 days of arraignment

b. No notice required if witness and defendant know each other, or if the pre-trial identification is not the result of police conduct

c. Absent Notice, identifications must otherwise be precluded (CPL §710.30[3]), regardless of any independent basis for the ID (People v. Perez, 177 A.D.2d 657 [2d Dept. 1991], *appeal denied by* 79 N.Y.2d 951 [1992])

iv. Vehicle Stops

a. People v. Ingle (36 N.Y.2d 413 [1975])—articulable reason to stop the vehicle, which must be rational and not due to whim, caprice or prejudice

b. Delaware v. Prouse (440 U.S. 648 [1979])—police cannot stop vehicles absent an articulable reason or reasonable suspicion of criminal activity

c. People v. Rose (67 A.D.3d 1447 [4th Dept. 2009])—"in the time since Ingle 'the Court of Appeals has made it "abundantly clear"…that "police stops of automobiles in this state are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or where there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime"…or where the police have "probable cause to believe that the driver…has committed a traffic violation"' (People v. Washburn, 309 A.D.2d 1270, 1271; *see* People v. Robinson, 97 N.Y.2d 341, 348-349; People v. Spencer,

84 N.Y.2d 749, 752-753, *cert denied* 516 U.S. 905; People v. White, 27 A.D.3d 1181)"

d. Mistakes of Law

1. Matter of Byer v. Jackson (241 A.D.2d 943 [4th Dept. 1997])—"Where the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal"

2. People v. Rose (*supra*)—flashing of high beams

3. People v. Smith (1 A.D.3d 965 [4th Dept. 2003])—missing front plate

v. Roadblock Stops

a. A roadblock or checkpoint stop is a seizure within the meaning of the Fourth Amendment (People v. Scott, 63 N.Y.2d 518 [1984]; In the Matter of Muhammad F., 94 N.Y.2d 136 [1999]; Michigan Dept. of State Police v. Sitz, 496 U.S. 444 [1990])

b. It's only Constitutional if it follows certain requirements:

1. Must not intrude upon privacy of motorists approaching checkpoint (People v. Scott, *supra*)

2. Must be maintained in accordance with a uniform procedure which affords little discretion to individual officers (Id.) regarding, for example:

I) Which vehicles are to be stopped

II) Which questions are to be asked

III) Which Standardized Field Sobriety Tests ("SFSTs") are to be conducted

c. Must have adequate precautions to safety, lighting and fair warning of its existence (Ibid.)

d. The plan or directive used by the police in the selection and operation of the checkpoint must be in writing (In the Matter of Muhammad F., *supra*)

e. Checkpoint stops are presumptively unconstitutional, and will be held unconstitutional unless the primary purpose of the checkpoint was not merely to serve the general interest in crime control or to detect evidence of ordinary criminal wrongdoing (City of Indianapolis v. Edmond, 531 U.S. 32 [2000])

f. This cannot be done merely by calling the roadblock a "sobriety checkpoint" (City of Indianapolis v. Edmond, *supra*)

g. The prosecution has the burden of showing that the stated purpose of a checkpoint was its actual purpose (People v. Jackson, 99 N.Y.2d 125 [2002]; *see also*, People v. Trotter, 28 A.D.3d 165 [4th Dept. 2006], *leave to appeal denied by* 6 N.Y.3d 839 [2006])

h. To prove the primary purpose of the checkpoint, the prosecution will be required to present the testimony of a high-ranking police official involved in policy making, not merely an officer who conducted the checkpoint (City of Indianapolis v. Edmond, *supra*)

vi. Probable Cause for Arrest

a. Dunaway v. New York (442 U.S. 200 [1979])

b. Absent probable cause to arrest for DWI/DWAI, evidence obtained subsequent to arrest should be suppressed

1. Statements

2. Observations

3. Chemical Test Results

c. If Court won't grant a stand-alone Dunaway (i.e., "probable cause") hearing, it should at least allow challenging of probable cause in a Huntley or Mapp hearing (People v. Wise, 46 N.Y.2d 321 [1978])

vii. Court may grant the Motion to Suppress where the People do not deny the allegations in defendant's pleadings (CPL §710.60[2][a])

viii. Court may deny the Motion to Suppress where defendant's pleadings fail to set forth any of the grounds for suppression listed above, or if the facts alleged—even if true—are insufficient as a matter of law to support the Motion (CPL §§710.60[3][a], 710.60[3][b]; People v. Lomax, 50 NY2d 351 [1980])

H. Motions for Separate Trials

i. CPL §100.45 applies CPL §§200.20 & 200.40 to misdemeanor informations and complaints

ii. Co-Defendant represented by attorney who previously represented defendant (People v. Gomberg, 38 NY2d 307 [1975])

iii. Co-Defendant makes a statement that exonerates himself and implicates defendant; jury is unable to follow instruction to ignore statement as it relates to guilt of remaining defendant(s); defendant is entitled to severance (Bruton v. United States, 391 U.S. 123 [1968])

I. Motions for Brady Material

i. Brady v. Maryland (373 U.S. 83 [1963])

ii. United States v. Agurs (427 U.S. 97 [1976])

iii. United States v. Bagley (473 U.S. 667 [1985])

iv. Kyles v. Whitley (514 U.S. 419 [1995])

v. People v. Geaslin (54 N.Y.2d 510 [1981])

vi. United States v. Gleason (265 F.Supp. 880, 886 [S.D.N.Y. 1967])

vii. United States v. Gil (297 F.3d 93, 104 [2nd Cir. 2002])

vii. CPL §240.20(1)(h): "Anything required to be disclosed prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States"

J. Sandoval Motions

i. People v. Sandoval (34 N.Y.2d 371 [1974])—burden on defense

ii. CPL §240.43—burden on prosecution

K. Molineux/Ventimiglia Motions

i. People v. Molineux (168 N.Y. 264 [1901])—prior uncharged crimes

ii. People v. Ventimiglia (52 N.Y.2d 350 [1981])—hearing must be held to determine admissibility

L. Motions *In Limine*

i. Horizontal Gaze Nystagmus

a. Now accepted by NYS Courts: "Such tests have been found to be accepted within the scientific community as a reliable indicator of intoxication and, thus, a court may take judicial notice of the HGN test's acceptability" (People v. Tetrault, 53 A.D.3d 558 [2nd Dept. 2008], *leave to appeal denied by* 11 N.Y.3d 835 [2008]; *citing*,

People v. Hammond, 35 A.D.3d 905 [3rd Dept. 2006], leave to appeal denied by 8 N.Y.3d 946 [2007]).

b. BUT…Considered a "standardized" field sobriety test; therefore, standard procedures must be followed to allow its admission at trial

c. In absence of compliance with NHTSA's specific procedures for administration of test, motion in limine should be made to prevent its admission at trial

ii. Roadside Breath Test ("Alco-Sensor")

a. Evidence relating to administration of Alco-Sensor test, as well as to the results of an Alco-Sensor test, are inadmissible at trial (People v. Thomas, 121 A.D.2d 73 [4th Dept. 1986], order *affirmed*, 70 N.Y.2d 823 [1987])

b. Admission of such evidence is subject to harmless error analysis, however (People v. Thomas, *supra*), so pre-trial motion in limine should be made

iii. Chemical Test to Determine Blood Alcohol Content

a. CPL §710.20(5) authorizing a motion to suppress "a chemical test of the defendant's blood" is also applicable to chemical tests of defendants' breath (People v. Ayala, 89 N.Y.2d 874 [1996])

b. Even where there is no ground for suppression, however, a motion in limine should be made where the breath test was administered improperly (e.g., more than two hours after arrest; by an uncertified operator; on an improperly working instrument; etc.)

iv. Breath Documents

a. Discovery Response containing incorrect documentation

b. Remote Calibration of breath-testing instrument

v. Discovery not provided (CPL §240.70[1])

PRE-TRIAL HEARINGS

I. Pre-Trial Hearings

A. Effort of Defense to limit Prosecution's Evidence

B. Therefore, most often granted based upon Motions to Suppress

C. Requires sworn testimony of witnesses

D. Rosario rule applies

i. Normally, People v. Rosario (9 NY2d 286 [1961]) and CPL §240.45(1) require the Prosecution, after the jury has been sworn and before the People's opening statement, to make available to defendant any written or recorded statement made by an individual whom the prosecution intends to call as a witness at trial

a. Criminal History of Witness

b. Pending Charges Against Witness

c. Sworn Statements of Witness (Including Testimony)

d. 911 Tapes and Police Reports, Notes, etc.

ii. Rosario Rule also applies to Pre-Trial Hearings (CPL §240.44), but obligation attaches after People's direct examination of their witness

iii. Reverse Rosario Rule: CPL §240.44 specifically applies to "each party"—i.e., the Defense as well

E. Hearsay is admissible (CPL §710.60[4])

F. Following Hearing(s), Court must make Findings of Fact and Conclusions of Law on the record (CPL §710.60[6])

G. Huntley Hearings

i. To determine whether a statement made by the defendant to a public servant was involuntarily made and is thus suppressible

ii. People must prove Beyond a Reasonable Doubt that the statement was *voluntarily* given

a. To establish voluntariness, People can show that Miranda warnings were given

b. To demonstrate that Defendant waived his right to counsel, the People will attempt to show that there were no threats, duress or coercion

c. Interrogation must have ceased if defendant requested a lawyer (People v. Cunningham, 49 NY2d 203 [1980])

iii. People will generally call the officer who obtained the statement from Defendant, though hearsay is admissible to establish any material fact (CPL §710.60[4])

iv. Spontaneous utterances of the Defendant which were not the product of any conduct on the part of the police will be admissible (People v. Ferro, 63 NY2d 316 [1984])

v. Defendant may testify—though this is rare

a. Defendant's testimony at the Hearing may be confined to the circumstances surrounding the taking/obtaining of his statement

b. If defense counsel "opens the door" on direct examination of Defendant, however, the People can cross examine Defendant on the issue of his guilt

c. If Defendant does testify, his testimony is inadmissible at trial except to impeach him (should he testify)

H. Mapp Hearings

i. Concerns the admissibility of physical evidence or contraband obtained by law enforcement pursuant to a search and seizure

ii. The Fourth Amendment to the United States Constitution and Article I, Section 12 of the New York State Constitution are identical: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

iii. Defendant must establish standing at the Hearing

iv. Once Hearing is granted (based upon Motion Papers), Prosecution has the Burden of Proof of showing the legality of the police conduct; then the Defense has the burden of proving the illegality of the search/seizure by a preponderance of the evidence

a. A search and seizure violates the U.S. and State Constitutions unless conducted pursuant to a valid search warrant, by consent, or incident to a lawful arrest

1. Exceptions include: Exigent Circumstances;

2. Plain View Seizures;

3. Vehicle Exception ("grabbable area")

4. Inventory Searches

5. Roadblocks

6. Telephone tips to the Police (but these must pass the Aguilar-Spinelli test and establish the Caller's Reliability and the Basis of the Caller's Knowledge; known citizens are presumed reliable)

b. Where a warrantless seizure has been effected, the burden of proof is on the People to establish that the seizure was justified, and if that is established, the burden shifts to the Defendant to prove illegality (People v. Pettinato, 69 NY2d 653 [1986])

c. Where the justification for a warrantless seizure is consent, the People must show that the consent was voluntarily given

d. If Defendant is able to show that the Search and Seizure was a "fruit of the poisonous tree", then the burden falls once again upon the People to prove admissibility by clear and convincing evidence, independent source, or inevitable discovery

I. Wade Hearings

i. To challenge the police conduct in a police-arranged identification proceeding (i.e., was the show-up, line-up or photo array "unduly suggestive"?)

ii. Defense has the burden of showing that the identification procedure was unduly suggestive; the People then have to show that there is an independent basis for the in-court identification to be made, and they must show this by clear and convincing evidence

iii. Defendant, even if unsuccessful at the pre-trial Hearing, can argue credibility of the identifier at trial (People v. Ruffino, 110 AD2d 198 [2nd Dept. 1985])

iv. Identification proceedings which were merely "confirmatory" are not subject to suppression (i.e., where there is a strong independent basis, such as a familiarity with the Defendant)

J. Sandoval Hearings

i. If Defendant intends to testify at trial, his attorney will seek a ruling regarding whether proof of prior "bad acts" (e.g., convictions or commission of uncharged crimes) may be used at trial for cross-examination purposes

ii. Burden is on the Defense to show that the prejudicial value of the prior bad acts outweighs the probative value to the finder of fact

iii. "Sandoval Compromise"—allows proof of fact of conviction, but not the underlying facts

K. Molineux/Ventimiglia Hearings

i. Similar to Sandoval Hearings, but relates to the use of defendant's prior bad acts in the People's case-in-chief

ii. Burden of proof is on the People to show that the probative value of the information outweighs the prejudicial effect

II. Felony Hearings (CPL Article 180)

A. CPL §180.80

B. The People have 120 hours (5 days), or 144 hours (6 days) if there's a weekend or Holiday

C. No hearsay is admissible, except reports of experts and other documents admissible in the Grand Jury (CPL §180.60[8])

D. People have the burden of proof, and must show that there is reasonable cause to believe a felony was committed by the Defendant—not required to be the felony Defendant stands charged with (CPL §180.70[1])

E. Cross-Examination is permitted of all witnesses (CPL §180.60[4])

F. Defendant has a right to testify BUT he may only call defense witnesses if permitted by the Court in its discretion (CPL §180.60[7])

G. The Court may exclude the public upon application of the Defendant and order that no disclosure be made of the proceedings (CPL §180.60[9])

H. Felony Hearings should be conducted in 1 day, but may be adjourned by the Court in the interests of justice (though absent a showing of good cause, the adjournment may not be for more than 1 day)

I. If the People do not run the Hearing in the allotted time, the Court must release the defendant on his own recognizance unless the People can show good cause, e.g., the victim is still in the hospital, etc. (CPL §180.80[3])

Findings of Fact

FINDINGS OF FACT/ CONCLUSIONS OF LAW (CPL 710.60)

Defendant Sammy Simple having moved by and through his attorneys Gilmour & Killelea, LLP, Daniel M. Killelea, Esq., of counsel, for suppression of the stop of his motor vehicle and all evidence flowing therefrom, and a hearing having been had upon defendant's motion, and defendant having been heard in favor of the motion, and the People having been heard in opposition, and due deliberation having been had thereon, the following Findings of Fact and Conclusions of Law are hereby made:

Findings of Fact

On August 23, 2018, Trooper Jay Hoy, a grizzled veteran of the NYSP, was on routine patrol in a marked State Police vehicle in the Village of Warsaw, County of Wyoming, State of New York. He received a complaint via radio from the Wyoming County Sheriff's Department reporting that a black Chevrolet pick-up truck with dual rear wheels had backed into a light pole at the Tractor Supply Company parking lot and had left the scene. Trooper Hoy was close enough at the time of the radio call to see a black Chevy with dual rear wheels exiting the Tractor Supply Company parking lot; he observed the vehicle to have rear-end damage. He observed the vehicle making a right turn out of the parking lot, southbound onto Route 19. Trooper Hoy activated his overhead lights and the vehicle pulled over. Trooper Hoy identified the defendant as the operator of the vehicle. The defendant admitted to Trooper Hoy that he backed into the pole but was running late and in a hurry. He also admitted to having a couple of beers prior to the operation of the motor vehicle. Lastly, the defendant stated, "I was more drunk the last time I was arrested than this time."

Trooper Hoy had the defendant perform five (5) field tests; in this experienced Trooper's opinion, the defendant passed two (2) of them and failed three (3) of them. The defendant submitted to a pre-screen test which revealed the presence of alcohol. The defendant was subsequently arrested for Driving While Intoxicated, Criminal Mischief in the Fourth Degree, and Failure to Signal.

Conclusions of Law

The stop of a motor vehicle is lawful in New York State where the officer has probable cause to believe that a traffic violation occurred or reasonable suspicion to believe that a crime has been committed, is being committed, or is about to be committed. Here, Trooper Hoy gave as his basis for stopping the vehicle the defendant's failure to signal upon exiting the Tractor Supply Company parking lot. The defendant was under no such duty to signal upon exiting a parking lot, as that section of law does not apply to parking lots.

Trooper Hoy did, however, have reasonable suspicion to believe that the crime of criminal mischief had just been committed, in that he observed a vehicle matching the description given to him just previously by the Wyoming County Sheriff's Department Dispatch,

and which was provided to dispatch by the eyewitness, Michael Hockey, whose supporting deposition to that effect was duly introduced into evidence at the hearing. In addition, Trooper Hoy had ample probable cause to believe that two (2) other traffic violations had occurred, those being Leaving the Scene of a Property Damage Accident and Unsafe Backing. It does not matter that the Trooper did not charge the defendant with these violations.

Therefore, I find the stop of the defendant's vehicle lawful, and accordingly **DENY** defendant's motion to suppress all evidence flowing therefrom.

MOTION TO DISMISS FOR FACIAL INSUFFICIENCY

Defendant also moved by Omnibus Motion for dismissal of the accusatory instrument charging Criminal Mischief in the Fourth Degree on the basis of facial insufficiency. New York Law requires that for an accusatory instrument to be sufficient on its face, it must contain non-hearsay allegations of fact supporting every element of the offense being charged. This can be accomplished through the sworn factual allegations of the complainant himself, or through sworn allegations of fact appended to the complaint via a supporting deposition from someone having personal knowledge of the facts sufficient to establish each of the elements of the offense.

Here, Trooper Hoy's complaint merely asserts in conclusory fashion that the damage to the property of the Tractor Supply Company was "…in excess of $250" without stating some sort of a basis for his conclusion, and without appending any sworn statement(s) from someone with personal knowledge of the amount of the damage—such as someone from Tractor Supply Company or a light pole repairman.

Accordingly, under People v. Alejandro and Article 100 of the Criminal Procedure Law, the accusatory instrument charging Criminal Mischief in the Fourth Degree is insufficient as a matter of law, and is hereby **DISMISSED**.

Sample Omnibus Motion

STATE OF NEW YORK : COUNTY OF WYOMING
JUSTICE COURT : VILLAGE OF WARSAW

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

NOTICE OF MOTION

vs.

SAMMY A. SIMPLE,

Defendant.

MOTION BY: Daniel M. Killelea, Esq.
Attorney for Defendant

DATE, TIME, PLACE: Village of Warsaw Justice Court
Warsaw, New York 14569
On September 5, 2018 at 5:00 p.m.

SUPPORTING PAPERS: Affidavit of Daniel M. Killelea, Esq., dated August 24, 2018

RELIEF REQUESTED:

(1) Dismissal of the accusatory instruments as defective pursuant to CPL §§20.40, 20.50, 100.10(1),(4); 100.15; 100.30; 100.40(1)(4); 170.30, and 170.35;

(2) Suppression of the stop of defendant's vehicle, pursuant to People v. Ingle (36 N.Y.2d 413 [1975]), People v. Robinson (97 NY2d 341 [2001]) and Byer v. Jackson (241 A.D.2d 943 [4th Dept. 1997]);

(3) Motion for continuing Discovery and inspection under CPL §§240.20 and 240.40;

(4) Delivery to defendant of all exculpatory or favorable material pursuant to Brady v. Maryland (373 U.S. 83 [1963]);

(5) Preclusion of any statement(s) allegedly made by defendant and not noticed pursuant to CPL §710.30;

(6) Suppression of those statements of defendant contained in the People's CPL §710.30 notice, pursuant to People v. Huntley (15 N.Y.2d 72 [1965]);

(7) Preclusion of any identification(s) of defendant not noticed pursuant to CPL §710.30;

(8) Suppression of that identification of defendant contained in the People's CPL §710.30 notice, pursuant to U.S. v Wade (388 U.S. 218 [1967]);

(9) Notice of the people's intent to use evidence of defendant's uncharged conduct, pursuant to CPL §240.43, People v. Sandoval (34 N.Y.2d 371 [1974]) and People v. Ventimiglia (52 N.Y.2d 350 [1981]);

(10) Leave to make such other and further motions as may be deemed appropriate and to supplement these motions as necessary.

DATED: Attica, New York
August 24, 2018

Respectfully submitted,

GILMOUR & KILLELEA, LLP
DANIEL M. KILLELEA, ESQ.
Attorneys for Defendant,
SAMMY A. SIMPLE
Office and Post Office Address
121 Prospect Street, Suite 1
Attica, New York 14011
(585) 937-8987

TO: HON. DONALD G. O'GEEN
WYOMING COUNTY DISTRICT ATTORNEY
147 North Main Street
Warsaw, New York 14569

ATTN: **VINCENT A. HEMMING, ESQ.**
First Assistant District Attorney

STATE OF NEW YORK : COUNTY OF WYOMING
JUSTICE COURT : VILLAGE OF WARSAW

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

AFFIDAVIT OF
DANIEL M. KILLELEA, ESQ.
IN SUPPORT OF
NOTICE OF MOTION

vs.

SAMMY A. SIMPLE,

Defendant.

STATE OF NEW YORK)
COUNTY OF WYOMING) ss:
TOWN OF BENNINGTON)

DANIEL M. KILLELEA, ESQ., being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York and am a Partner in the law firm of Gilmour & Killelea, LLP with offices at 121 Prospect Street, Suite 1, in Attica, New York.

2. I represent the defendant, SAMMY A. SIMPLE, who is charged with one count of Criminal Mischief in the Fourth Degree, in violation of §145.00(3) of the Penal Law, two counts of Driving While Intoxicated, in violation of §§1192(2) and 1192(3) of the Vehicle and Traffic Law, and one count of Failure to Signal, in violation of §1163(a) of the Vehicle and Traffic Law.

3. I am fully familiar with the facts and circumstances surrounding this case through my investigation of this matter and review of the pleadings previously filed, as well as through my conversations with my client and members of law enforcement.

4. This affidavit is made in support of a number of different requests for relief. For the convenience of the Court and opposing counsel, it has been divided into subheadings reflecting the particular type of relief sought.

I
DISMISSAL OF THE ACCUSATORY INSTRUMENT AS DEFECTIVE

A. A Sufficient Pleading Is a Jurisdictional Pre-Requisite

5. A valid and sufficient information is a fundamental and non-waivable jurisdictional pre-requisite to a criminal prosecution (*see*, People v. Alejandro, 70 N.Y.2d 138 [1987]; People v. Hall, 48 N.Y.2d 927, [1979]; and People v. Case, 42 N.Y.2d 98 [1977]).

6. CPL §100.40(1) sets forth the express conditions that must be met by an Information. The absence of one or more conditions renders the Information fatally defective. First, the entire Information must conform to the requirements of CPL §100.15, which prescribes the form and content for Informations and Complaints. Next, the factual part of the Information must meet two conditions: (1) the allegations set forth in the Information must provide reasonable cause to believe that the defendant committed the offense; and (2) non-hearsay allegations, if true, must establish every element of the offense charged (People v. Alejandro, *supra*).

7. The Alejandro Court specifically noted that:

> The factual part of such instrument must contain a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charges. CPL §100.15(3).

Id. at 137 (emphasis added).

8. The Alejandro Court further noted the important purpose behind the strict requirements for the contents of an Information:

> The reason for requiring the additional showing of a prima facie case for an information lies in the unique function that an information serves under the statutory scheme established by the Criminal Procedure Law. An information is often the instrument upon which the defendant is prosecuted for a misdemeanor or a petty offense. Unlike a felony complaint (CPL 180.10), it is not followed by a preliminary hearing and a grand jury proceeding. Thus, the people need not, at any time prior to trial, present actual evidence demonstrating a prima facie case, as with an accusatory instrument following a felony complaint…
>
> That it was this distinguishing characteristic of an information – its use as the sole instrument upon which the defendant could be prosecuted – which prompted the legislature to write in the special restrictions applicable to informations found in CPL 100.40(1)(c) and 100.15(3) is confirmed by the legislative history leading to the enactment of these sections as part of the Criminal Procedure Law... [A]n "information" (charging a misdemeanor or petty offense) must demonstrate both "reasonable cause" and a "legally sufficient" or prima facie case – *a much more demanding standard* [than that necessary for a felony complaint].

Id. at 137-139.

9. The Court of Appeals thus concluded that the showing of a prima facie case through non-hearsay allegations of an evidentiary nature alleging every element of the offense is a non-waivable jurisdictional pre-requisite (Alejandro, *supra*).

10. In addition, for the Information to be sufficient on its face, the allegations of its factual part, together with those of any supporting depositions which accompany it, must provide reasonable cause to believe the defendant committed the offense charged in the accusatory part and the non-hearsay allegations of the factual part and/or any supporting depositions must establish, if true, every element of the offense charged and the defendant's commission thereof (CPL §100.40[1]).

11. An Information which fails to satisfy the requirement that it contain facts of an evidentiary character tending to support the charges and non-hearsay allegations which

establish, if true, every element of the offense charged, is therefore fatally defective (*see*, CPL §§ 170.35-1[a], 100.40[1], and 100.15[3]).

12. Furthermore, CPL §100.45(3) makes clear that the only permissible amendment to a facially insufficient accusatory is to add a count supported by the factual allegations and/or the supporting depositions. There is no provision for amendment by the addition of facts not already alleged (*see, also*, People v. Kurtz, 175 Misc. 2d 980 [Crim. Ct. Queens Co. 1998]).

B. The Accusatory Instrument

13. As mentioned above, SAMMY A. SIMPLE is charged with one count of Criminal Mischief in the Fourth Degree, in violation of §145.00(3) of the Penal Law.

14. On August 23, 2018, New York State Trooper Jay A. Hoy signed the accusatory instrument charging this offense.

i. PL §145.00(3) (Criminal Mischief in the Fourth Degree)

15. Defendant is charged with one count of Criminal Mischief in the Fourth Degree. That section states:

> A person is guilty of criminal mischief in the fourth degree when, having no right to do so nor any reasonable ground to believe that he or she has such right, he or she recklessly damages property of another person in an amount exceeding two hundred fifty dollars.

16. Defendant moves to dismiss the accusatory instrument charging Criminal Mischief in the Fourth Degree based upon the fact that nothing contained within the four corners of the accusatory instrument provides non-hearsay allegations of fact from which it can be

concluded that defendant acted recklessly, or that the damage allegedly committed by defendant was in excess of two hundred and fifty dollars ($250.00).

17. Specifically, the accusatory instrument alleges that defendant recklessly damaged the property of the Tractor Supply Company:

> "…by being intoxicated…and striking the light pole in the parking light [*sic*]."

18. It further states that:

> "…the manner in which the light pole was damaged due to the defendant being intoxicated was reckless."

19. In addition, the accusatory describes the damage to the light pole as:

"…in excess of $250."

20. This, however, is precisely the type of conclusory language proscribed by People v. Alejandro, *supra*, wherein the Court of Appeals plainly stated that such language was inadequate to establish the elements of an offense, or to provide facts sufficient to form a conclusion that he had committed it.

21. It has, after all, been consistently held that mere intoxication does not establish recklessness in relation to the commission of a crime (People v. Bast, 19 NY2d 813 [1967]; Matter of Johnston, 75 NY2d 403 [1990]; People v. Figueroa, 164 Misc.2d 814 [City Crim. Ct. 1995]).

22. In fact, the Figueroa Court specifically noted that:

> "The allegation, if true, that defendant was driving under the influence of alcohol when she rear ended another vehicle would not make her culpable per se…without any allegations related to how the accident occurred or whether the defendant was driving in an erratic, reckless or negligent manner. Even if the act of defendant's driving her vehicle under the influence of alcohol constitutes a gross deviation from the required standard of care, there are insufficient

> allegations in the information which would show that the accident resulted from defendant's alleged "recklessness..."

Id., at 818-819.

23. Were this not the case, then nearly every intentional crime committed in Wyoming County could also be charged under a theory of recklessness, since the overall blood alcohol content of our population of criminal wrong-doers hovers at around .19%.

24. But beyond the absence of any factual allegations to support the claim that defendant acted recklessly, it must be noted that Trooper Hoy's bare allegation that defendant caused damage to a light pole belonging to the Tractor Supply Company which was "in excess of $250" is merely hearsay, and without any factual support.

25. For while it is generally accepted that every resident of Wyoming County is familiar with the entire inventory of the Tractor Supply Company's store, there is no specific factual allegation from Trooper Hoy that he possesses some sort of expertise beyond that basic knowledge which would allow for his accurate appraisal of the damage to the Tractor Supply Company's light pole.

26. Without such an allegation of specific expertise, and in the absence of a supporting deposition by the property's owner attesting to its value, the element of this crime relating to the value of the damage is also absent.

27. Accordingly, as the accusatory instrument charging Criminal Mischief in the Fourth Degree fails to set forth non-hearsay allegations of fact establishing every element of the offense—in this case, that defendant acted recklessly, and that the damage he allegedly caused was in excess of two hundred and fifty dollars ($250.00)—that charge must be dismissed as facially insufficient.

II

INGLE MOTION

28. Defendant was operating his 2007 Chevrolet pick-up truck on the afternoon of August 23, 2018 when he was subjected to an apparently pretextual stop by the New York State Police on State Route 19 in the Village of Warsaw.

29. As the alleged operator, defendant has standing to contest the stop and to move to suppress evidence obtained subsequent to that stop under the fruit of the poisonous tree doctrine (Brendlin v. California, 127 S. Ct. 2400 [2007]; United States v. Mosley, 454 F.3d 249 [3d Circuit 2006]; s*ee also,* Wong Sun v. United States, 371 U.S. 471 [1963]; People v. Robinson, 13 N.Y.2d 296 [1963]).

30. Upon information and belief, Trooper Hoy did not have a valid, lawful reason to stop defendant's vehicle; Trooper Hoy issued defendant a traffic ticket for a violation of VTL §1163(a) for failing to signal his turn out of the Tractor Supply Store parking lot onto State Route 19, and that ticket purportedly serves as his justification for the stop of defendant's vehicle.

31. Vehicle and Traffic Law Section 1163(a) states section states:

> No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided.

32. Trooper Hoy's belief that defendant had committed a traffic infraction in failing to signal when exiting a private driveway was therefore erroneous, and cannot serve to justify the stop of defendant's vehicle, even if his belief was in good faith (Byer v. Jackson, 241

A.D.2d 943 [4th Dept. 1997]: "Where the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal"; *see also*, People v. Rose, 67 A.D.3d 1447 [4th Dept. 2009]; People v. Smith, 1 A.D.3d 965 [4th Dept. 2003]).

33. In addition, the New York Court of Appeals' recent decision in People v. Robinson (97 N.Y.2d 341 [2001]) seems to have increased the quantum of information necessary for a vehicle and traffic stop in a pretext case such as this from mere reasonable suspicion (the standard previously enunciated in People v. Ingle [36 N.Y.2d 413 (1975)] and Delaware v. Prouse [440 U.S. 648 (1979)]) all the way to probable cause (*see*, Robinson, *supra*, and People v. Wright, 98 N.Y.2d 657 [2002]).

34. Robinson, *supra*, noted that the stop of a motor vehicle is justified only where the police have probable cause to believe the driver has committed a traffic violation or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime (*see also*, People v. Washburn, 309 AD2d 1270 [4th Dept. 2003]).

35. Even assuming, *arguendo*, that Trooper Hoy had received a complaint regarding a vehicle damaging a light pole in the Tractor Supply Company's parking lot, the purported description of that vehicle as recited by Trooper Hoy in his Incident Report was not sufficiently particularized so as to have given Trooper Hoy probable cause to have stopped defendant's vehicle.

36. The display of a Confederate flag decal in the back window of a pick-up truck with dual rear wheels being operated by a white male is so ubiquitous in Wyoming County as to render it no more specific than if the purported eye-witness had simply said, "I saw a car."

37. Accordingly, without a valid, lawful reason to have effected the traffic stop of defendant's vehicle, this Court must suppress the stop of that vehicle and all evidence derived therefrom pursuant to Ingle, *supra*, and its progeny.

III

DISCOVERY

38. Defendant timely served a Demand to Produce (attached hereto as Exhibit A) upon the People on August 23, 2018, and the People responded the same date.

39. Accordingly, defendant requests that this Court reiterate to the People their continuing obligation to disclose those items demanded in defendant's Demand to Produce which the People have not yet obtained or discovered.

IV

DEMAND FOR BRADY MATERIAL

40. Defendant hereby demands disclosure by the prosecution of any evidence or information which may reasonably tend to prove favorable to him with respect to an ultimate determination of guilt or innocence upon the trial of this case, or which may be utilized to impeach any prosecution witness, or which may affect the severity of any sentence to be imposed in the event of ultimate conviction of any of the charges (Brady v. Maryland, 373 U.S. 83 [1963]; United States v. Agurs, 427 U.S. 97 [1976]; United States v. Bagley, 473 U.S. 667 [1985]; Kyles v. Whitley, 514 U.S. 419 [1995]; and People v. Geaslin, 54 N.Y.2d 510 [1981]). Defendant notes that the evidence need not be competent evidence or admissible at trial (United States v. Gleason, 265 F.Supp. 880, 886

[S.D.N.Y. 1967]; United States v. Gil, 297 F.3d 93, 104 [2nd Cir. 2002]). This demand includes, but is not limited to, the following:

(a) Any information which may indicate that defendant did not commit any act or offense alleged in the accusatory instruments;

(b) Any information which may tend to indicate that a person other than defendant may have committed any act or offense alleged in the accusatory instruments;

(c) Any information which is in any manner contrary to the People's theory with respect to the commission of the offenses;

(d) Any information suggesting that evidence has been destroyed, lost or altered;

(e) Any statements, transcripts, notes, reports, records, other information or other documents, in any form, which may indicate that any prospective prosecution witness has, in the course of the investigation undertaken with respect to the instant matter, given contradictory information or has engaged in lying, deceitful or otherwise mendacious activity;

(f) Any information in any form which may indicate that any prospective prosecution witness has given information contradictory to, or materially at variance with information received from any other source or sources (People v. Ambrose, 52 A.D.2d 850 [2d Dept. 1976]; People v. Zimmerman, 10 N.Y.2d 430 [1962]);

(g) Any information which may indicate that any potential prosecution witness was motivated to cooperate with the authorities by a desire either to avoid being prosecuted or to procure a plea to a reduced charge;

(h) Any information which may indicate that the cooperation of any potential prosecution witness was induced by a threat, express or implied, that unless such cooperation was forthcoming, the potential witness would be prosecuted;

(i) Any information which may indicate that any potential prosecution witness has engaged in an erratic course of behavior or has in the past made false or misleading reports of criminal or otherwise improper conduct;

(j) Any information which may indicate that the instant prosecution is based on or derived from evidence acquired as a result of governmental action which may have been violative of constitutional standards. This request expressly encompasses any information which might affect the Court's decision on a suppression issue in a fashion favorable to defendant (People v. Geaslin, *supra*);

(k) Any information or documentation reflecting misidentification or non-identification (by person, voice, photograph or otherwise) of defendant as a participant in the charged offenses;

(l) Any information as any prospective prosecution witness having a history of mental or emotional disturbance;

(m) Any information, documentation and/or other evidence which tends to show that any prospective prosecution witness could reasonably be considered to be an accomplice to the offenses alleged in the accusatory instruments;

(n) Any evidence or information as to prior charged or uncharged instances of criminal conduct by any prospective prosecution witness, or any pending charge(s) against any prospective prosecution witness, including a copy of any and all charges, accusatory instruments, police reports, transcripts of proceedings, etc. (CPL §240.45[1][c]);

(o) Any information which may indicate that any prospective prosecution witness was under the influence of alcohol, medication or any drug at or near the time of the events charged in the accusatory instrument or at or near the time of the events about which the potential witness may be called to testify; and

(p) Any other information or evidence, regardless of whether it is admissible at a trial, which could be used to impeach any prospective prosecution witness (United States v. Bagley, *supra*).

41. Defendant notes that Criminal Procedural Law §240.20(1)(h) requires that before trial the prosecution must provide the defense with any material that must be disclosed under

the New York State or the United States Constitution, and defendant notes that the Due Process clause of the United States Constitution requires the disclosure of evidence in the prosecutor's possession, custody or control that is favorable to the defense and material to the guilt or punishment of the defendant (Brady v. Maryland, *supra*; People v. Vilardi, *supra*; People v. Santorelli, 95 N.Y.2d 412 [2000]).

42. This statutory requirement is not the only reason an Assistant District Attorney must provide this kind of disclosure. In fact, a prosecutor is ethically obliged to make available to the defense any and all evidence that tends to negate the guilt of the accused (Rules of Professional Conduct, Rule 3.8).

43. It is not up to the People to decide whether particular favorable evidence is reliable; that determination is for defense counsel to make (People v. Jackson, 198 A.D.2d 301 [2d Dept. 1993]). Nor can a court substitute its judgment on the value of evidence for that of defense counsel (People v. DaGata, 86 N.Y.2d 40 [1995]).

44. And as is noted *supra*, material that can be used to impeach a witness is considered Brady material (United States v. Bagley, *supra*; People v. Harris, *supra*).

V

PRECLUSION OF STATEMENTS

45. Defendant moves to preclude the admission at the trial of this matter of any statement he allegedly made to any public servant which was not contained in a timely filed Notice pursuant to CPL §710.30.

46. Defendant was duly arraigned in this Court on the accusatory instruments, at which time a Notice pursuant to CPL §710.30 was duly served upon him.

47. As explained by the Court of Appeals, CPL §710.30 is a notice statute intended to facilitate a defendant's opportunity to challenge, before trial, the voluntariness of statements made by him (*see*, People v. Lopez, 84 N.Y. 2d 425 [1994], *citing*, People v. O'Doherty, 70 N.Y. 2d 479, 484 [1987]; People v. Greer, 42 N.Y. 2d 170, 179 [1977]; People v. Huntley, 15 N.Y. 2d 838 [1965]).

48. CPL §710.30 provides that:

> Whenever the people intend to offer at trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made, would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20 or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence to be offered.
>
> Such notice must be served within fifteen days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence. For good cause shown, however, the Court may permit the people to serve such notice thereafter, and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.
>
> In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70.

49. In addition, in People v. O'Doherty, *supra*, the Court advised that section 710.30 requires strict compliance with the fifteen (15) day filing rule.

50. It should also be noted that the definition of "public servant" is broad and encompasses "any public officer or employee of the state or any political subdivision thereof or

of any governmental instrumentality within the state *or any person exercising the functions of any such public officer or employee* (People v. Brown, 143 Misc. 2d 325 [Sup. Ct., Bronx Co., 1989] citing PL §10.00[15]) (emphasis added).

51. Therefore, pursuant to CPL §710.30(3), defendant moves to preclude any alleged statement(s) not contained a timely filed CPL §710.30 Notice without the People demonstrating just cause why any such statement(s) should otherwise be admitted.

VI

SUPPRESSION OF STATEMENTS

52. As noted *supra*, at paragraph 46, defendant was duly served with a CPL §710.30 Notice at his arraignment in this Court. That Notice concerned certain statements allegedly made by defendant to Trooper Jay A. Hoy of the New York State Police.

53. Upon information and belief, and upon examination of the People's CPL §710.30 Notice, such statements were taken involuntarily or otherwise in violation of defendant's rights under the New York State and United States Constitutions.

54. Those statements contained in the CPL §710.30 Notice were involuntarily made within the meaning of CPL §60.45; were in violation of defendant's right against self-incrimination; were taken in violation of defendant's right to counsel; were taken prior to the administration of Miranda warnings; and were taken in the absence of a knowing, voluntary or intelligent waiver of defendant's rights.

55. Defendant therefore moves this Court to suppress those statements contained in the CPL §710.30 Notice, or, in the alternative, to grant a hearing pursuant to People v. Huntley (*supra*) to determine their admissibility.

VII

PRECLUSION OF IDENTIFICATION

56. Defendant also moves to preclude any in-court identification of him at trial by anyone whose pre-trial identification of him was not contained in a timely filed Notice pursuant to CPL §710.30.

57. As noted, *supra* at paragraphs 46 and 52, defendant was duly served with a CPL §710.30 Notice upon his arraignment in this Court.

58. And as noted previously, CPL §710.30 is a notice statute; it is intended to facilitate a defendant's opportunity to challenge evidence before trial. And it is well settled that where there has been a violation of the mandatory disclosure provision of CPL §710.30, both the out-of-court and in-court identifications must be excluded regardless of the existence of an independent basis for the identification (People v. Perez, 177 A.D.2d 657 [2d Dept. 1991], *appeal denied by* 79 N.Y.2d 951 [1992]).

59. Therefore, pursuant to CPL §710.30(3), defendant moves to preclude any alleged identification(s) not contained in a timely served CPL §710.30 Notice without the People demonstrating just cause why any such identification(s) should otherwise be admitted.

VIII

SUPPRESSION OF IDENTIFICATION

60. As noted *supra*, at paragraphs 46, 52, and 57, defendant was duly served with a CPL §710.30 Notice at his arraignment in this Court.

61. Upon information and belief, the identification of defendant referenced therein was made under circumstances which were impermissibly suggestive and was made in violation of defendant's rights under the Constitutions of the State of New York and of the United States.

62. Furthermore, and upon information and belief, that identification of the defendant was unduly suggestive and was conducive to a substantial likelihood of misidentification (Stoval v. Denno, 388 U.S. 293 [1967]; Simmons v. United States, 390 U.S. 377 [1968]).

63. Therefore, defendant requests that the identification referenced herein be suppressed pursuant to CPL §710.20(6), or in the alternative, that a hearing be granted pursuant to United States v. Wade (388 U.S. 218 [1967]) and CPL § 710.60(4).

IX

UNCHARGED CONDUCT EVIDENCE

64. Defendant requests, pursuant to CPL §240.43, that the People notify the defense of any and all specific instances of his alleged prior uncharged criminal, vicious or immoral conduct of which the People have knowledge and which the People intend to use at trial for purposes of impeaching his credibility.

65. Defendant hereby moves this Court pursuant to People v. Sandoval (34 N.Y.2d 371 [1974]) to preclude the use at trial of any and all alleged prior uncharged criminal, vicious or immoral conduct for purposes of impeaching his credibility as a witness.

66. In addition, defendant moves this Court to direct the prosecution to disclose any and all information regarding specific instances of his alleged prior uncharged criminal, vicious

or immoral conduct which the prosecution will seek to prove at trial during their case in chief (People v. Molineux, 168 N.Y. 264 [1901]; People v. Ventimiglia, 52 N.Y.2d 350 [1981]).

67. This information includes, but is not limited to, the specific date, time, place and substance of each illegal and/or wrongful act which is not referred to in the accusatory instruments and which the prosecution will attempt to prove at trial (People v. Ventimiglia, *supra*).

X

OTHER MOTIONS

68. Pending the Court's granting of the relief requested in these papers, defendant respectfully reserves the right to make further and additional motions which may be required and advisable in light of the Court's ruling or the relief sought herein.

69. I have endeavored to encompass within the instant pleadings all prayers for relief which I believe may properly be advanced before trial at this time. Nonetheless, it is entirely possible that as a result of my ongoing investigation or as a result of the relief granted pursuant to this motion, as well as the People's response to Court-ordered discovery, other matters will be revealed to me which will necessitate further applications to this Court.

70. This Court is respectfully requested to entertain at a future date any and all future motions as may be just and appropriate under the circumstances.

DANIEL M. KILLELEA

Subscribed and sworn to before me this
24th day of August, 2018.

Notary Public