

# CERTIORARI APPENDIX - Volume 1

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<sup>1</sup> We are asking that the district attorney be required to supply this to this Court under separate cover

<sup>2</sup> See footnote 1, supra

**CERTIORARI**

# **APPENDIX**

# **A**

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**Order (Centra, J), Denying Leave To Appeal to Court of Appeals**

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**No. of Pages: 02**

**Dated: 05/30/19**

SUPREME COURT OF THE STATE OF NEW YORK  
Appellate Division, Fourth Judicial Department

KA 14-01531

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

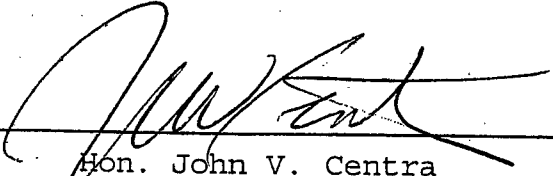
MICHAEL A. ALBERT, ALSO KNOWN AS GOTTI, DEFENDANT-APPELLANT.

Indictment No: 2013-0539

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I, John V. Centra, Associate Justice of the Appellate Division, Fourth Judicial Department, do hereby certify that, upon the motion of respondent pursuant to CPL 460.20 for permission to appeal to the Court of Appeals from the order of this Court entered April 26, 2019, which affirmed a judgment of the Monroe County Court rendered July 30, 2014, there is no question of law presented that ought to be reviewed by the Court of Appeals, and permission to appeal is hereby denied.

Dated: 5/30/19

  
\_\_\_\_\_  
Hon. John V. Centra  
Associate Justice

**CERTIORARI**

# **APPENDIX**

# **B**

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Appellate Division Order Denying Direct appeal

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**No. of Pages: 05**

**Dated: 04/26/19**

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1101

**KA 14-01531**

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL A. ALBERT, ALSO KNOWN AS GOTTI,  
DEFENDANT-APPELLANT.

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KIMBERLY J. CZAPRANSKI, FAIRPORT, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL),  
FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered July 30, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) stemming from a homicide that occurred in 2006. Although defendant was not indicted for the crime until 2013, we reject his contention that he was entitled to a *Singer* hearing to explore the reasons for the People's delay in procuring the indictment inasmuch as "the record provided County Court with a sufficient basis to determine whether the delay was justified" (*People v Rogers*, 103 AD3d 1150, 1151 [4th Dept 2013], lv denied 21 NY3d 946 [2013]; see *People v Smith*, 60 AD3d 706, 707 [2d Dept 2009], lv denied 12 NY3d 859 [2009]).

Defendant further contends that the court erred in denying that part of his omnibus motion seeking to preclude statements that he made to a private citizen who was surreptitiously recording the statements for law enforcement agents. It is undisputed that the People failed to provide defendant with a CPL 710.30 notice with respect to those statements, and we reject the People's contention that no notice was required because the citizen was not a public servant at the time defendant made his statements to her. Although the statute does not require notice of "admissions made to private parties who were not police agents" (*People v Mirenda*, 23 NY2d 439, 448 [1969] [emphasis added]; see *People v Bryant*, 144 AD3d 1523, 1524 [4th Dept 2016], lv denied 28 NY3d 1143 [2017]; cf. *People v Stern*, 226 AD2d 238, 239 [1st Dept 1996], lv denied 88 NY2d 969, 1072 [1996]), we agree with our

dissenting colleagues that the citizen in this case was acting as a police agent at the time she recorded the statements inasmuch as she was acting "at the instigation of the police . . . to further a police objective" (*People v Ray*, 65 NY2d 282, 286 [1985]; see *People v Eberle*, 265 AD2d 881, 882-883 [4th Dept 1999]; cf. *People v Smith*, 262 AD2d 1063, 1063 [4th Dept 1999], lv denied 93 NY2d 1027 [1999]).

We respectfully disagree with our dissenting colleagues, however, on the issue whether the failure to provide the CPL 710.30 notice warrants preclusion of those statements. We conclude that it does not. Where, as here, there is "no colorable basis for suppression of the statement, the failure to give notice [constitutes] a mere irregularity not warranting preclusion" (*People v Clark*, 198 AD2d 46, 47 [1st Dept 1993], lv denied 83 NY2d 870 [1994]; see *People v Rockefeller*, 89 AD3d 1151, 1152-1153 [3d Dept 2011], lv denied 20 NY3d 1064 [2013]; see also *People v Garcia-Lopez*, 308 AD2d 366, 366 [1st Dept 2003], lv denied 1 NY3d 572 [2003], cert denied 541 US 1078 [2004]; see generally *People v Greer*, 42 NY2d 170, 178-179 [1977]). In our view, there is no colorable basis for suppression of defendant's statements to the private citizen. There is no dispute that defendant voluntarily went to the citizen's home and that he was interested in pursuing a romantic relationship with her. During the entire conversation, wherein defendant admitted committing the homicide, the private citizen made no explicit or implicit promises that she would engage in sexual relations with defendant. Rather, it was defendant who offered to tell her anything she wanted to know after she expressed that she was afraid of him, and then provided her with all of the details concerning the homicide. We thus conclude that the private citizen did not make any statement or engage in any conduct that "create[d] a substantial risk that . . . defendant might falsely incriminate himself" (CPL 60.45 [2] [b] [i]; see *People v Bradberry*, 131 AD3d 800, 802 [4th Dept 2015], lv denied 26 NY3d 1086 [2015]). If anything, the citizen's expressed fear of defendant would have had a higher likelihood of inducing defendant to deny participation in the homicide. Although the private citizen ultimately engaged in sexual relations with defendant later that night, the recording establishes that she made no explicit or implicit promises that she would do so (cf. *Commonwealth v Lester*, 392 Pa Super 66, 67-73, 572 A2d 694, 695-698 [1990], appeal denied 527 Pa 609, 590 A2d 296 [1991]). The fact that defendant hoped his confession would endear him to the citizen and convince her that he was worthy of her sexual favors does not provide any arguable basis to believe that his statements were anything but "spontaneous and uncontestably voluntary" (*People v Smith*, 118 AD3d 920, 921 [2d Dept 2014], lv denied 24 NY3d 1089 [2014], reconsideration denied 25 NY3d 992 [2015]). We thus further conclude that the court did not err in refusing to instruct the jury regarding the voluntariness of his statements to that private citizen; there was no evidence at trial "presenting a genuine issue of fact concerning the voluntariness of [those] statements" (*People v Clyburn-Dawson*, 128 AD3d 1350, 1352 [4th Dept 2015], lv denied 26 NY3d 966 [2015]; see *People v Nelson*, 133 AD3d 1228, 1228 [4th Dept 2015], lv denied 27 NY3d 1003 [2016]; see generally *People v Cefaro*, 23 NY2d 283, 288-289 [1968]).

We reject defendant's contention that the court erred in refusing to suppress statements that he made to law enforcement personnel without the benefit of *Miranda* warnings. Although defendant was incarcerated on an unrelated offense, he was not subjected to custodial interrogation inasmuch as "[t]here was no 'added constraint' that would have led defendant to believe that some other restriction had been placed on him 'over and above that of ordinary confinement in a correctional facility' " (*People v Boyd*, 159 AD3d 1358, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018]; see *People v Ayala*, 27 AD3d 1087, 1088 [4th Dept 2006], *lv denied* 6 NY3d 892 [2006]; see generally *People v Alls*, 83 NY2d 94, 100 [1993], *cert denied* 511 US 1090 [1994]). We thus conclude that *Miranda* warnings were not required (see *Ayala*, 27 AD3d at 1088; see generally *People v Huffman*, 41 NY2d 29, 33 [1976]). Defendant further contends that the court erred in failing to instruct the jury on the voluntariness of his statements to law enforcement personnel. That contention is not preserved for our review inasmuch as he did not seek such an instruction for those statements (see *People v Thomas*, 96 AD3d 1670, 1673 [4th Dept 2012], *lv denied* 19 NY3d 1002 [2012]). In any event, the contention lacks merit where, as here, there was no evidence in the trial record that would raise a factual issue concerning the voluntariness of those statements (see *Clyburn-Dawson*, 128 AD3d at 1351-1352; see generally *Cefaro*, 23 NY2d at 288-289).

During jury selection, defendant raised *Batson* challenges with respect to two prospective jurors. We agree with the People that they provided race-neutral reasons to support striking those jurors. The first juror's disclosure that her father and brother had criminal convictions was offered by the People as the basis for their challenge and constitutes a race-neutral reason to strike a juror (see e.g. *People v Garcia*, 143 AD3d 1283, 1284 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]; *People v Ball*, 11 AD3d 904, 905 [4th Dept 2004], *lv denied* 3 NY3d 755 [2004], *lv denied* 4 NY3d 741 [2004]). The second prospective juror disclosed that he had recently read two books by a writer the prosecutor described as "a black revolutionary-type writer," who had "very antigovernment [sic], anti-law-and-order type views." Contrary to defendant's contention, the prospective juror's "expos[ure] . . . to 'anti-police' and 'anti-establishment' sentiments" was a race-neutral reason for the exclusion of that prospective juror (*People v Funches*, 4 AD3d 206, 207 [1st Dept 2004], *lv denied* 3 NY3d 640 [2004]).

Defendant's remaining contentions lack merit. We conclude that defendant's right of confrontation was not violated "when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" (*People v Acevedo*, 112 AD3d 454, 455 [1st Dept 2013], *lv denied* 23 NY3d 1017 [2014]; see *People v Chelley*, 121 AD3d 1505, 1506-1507 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015]; see generally *People v Freycinet*, 11 NY3d 38, 42 [2008]). Further, the court did not err in denying defendant's request for an accomplice charge inasmuch as there was no reasonable view of the evidence that the particular witness "participated in the planning or

execution of the crime[]" (*People v Jones*, 73 NY2d 902, 903 [1989], *rearg denied* 74 NY2d 651 [1989]; see *People v Young*, 225 AD2d 1066, 1067 [4th Dept 1996], *lv denied* 88 NY2d 1026 [1996]). Addressing both the preserved and unpreserved contentions concerning alleged prosecutorial misconduct (see CPL 470.15 [6] [a]), we conclude that the prosecutor did not impermissibly change the theory of the People's case (see generally *People v Mateo*, 2 NY3d 383, 402 [2004], *cert denied* 542 US 946 [2004]) and that the remaining instances of alleged impropriety on the part of the prosecutor "were either fair comment on the evidence . . . or appropriate response to arguments made in defendant's summation" (*People v Speaks*, 28 NY3d 990, 992 [2016]). We conclude that the conviction is supported by legally sufficient evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Finally, we conclude that the sentence is not unduly harsh or severe.

All concur except CENTRA, J.P., and DEJOSEPH, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent because we disagree with the majority's conclusion that the failure of the People to provide a CPL 710.30 notice with respect to statements defendant made to a private citizen who was acting as an agent of the police does not warrant preclusion of those statements.

CPL 710.30 requires, *inter alia*, that the People serve a defendant with notice, within 15 days after arraignment and before trial, if they intend to offer at a trial "evidence of a statement made by [the] defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible" (CPL 710.30 [1] [a]). "[T]he purpose of CPL 710.30 is to inform a defendant that the People intend to offer evidence of a statement to a public officer at trial so that a timely motion to suppress the evidence may be made" (*People v Rodney*, 85 NY2d 289, 291-292 [1995]). Our colleagues in the majority conclude that, because there is " 'no colorable basis for suppression of the statement, the failure to give notice [constitutes] a mere irregularity not warranting preclusion.' " The cases relied on by the majority involve circumstances where there was "no question as to the voluntariness of" the statements (*People v Rockefeller*, 89 AD3d 1151, 1153 [3d Dept 2011], *lv denied* 20 NY3d 1064 [2013]; see *People v Garcia-Lopez*, 308 AD2d 366, 366 [1st Dept 2003], *lv denied* 1 NY3d 572 [2003], *cert denied* 541 US 1078 [2004]). The same cannot be said in this case.

"It is for the court and not the parties to determine whether a statement is truly voluntary" (*People v Chase*, 85 NY2d 493, 500 [1995]), and here we conclude that there is "[a] colorable basis for suppression of the statement[s]" (*People v Clark*, 198 AD2d 46, 47 [1st Dept 1993]; see generally *Commonwealth v Lester*, 392 Pa Super 66, 67-73, 572 A2d 694, 695-698 [1990], *appeal denied* 527 Pa 609, 590 A2d 296 [1991]), i.e., that the statements were involuntary because they were



made in exchange for the promise of sexual relations. While we acknowledge that the recorded conversation between defendant and the police agent does not contain an express offer of sexual relations, we conclude that County Court could have inferred from the conversation and the police agent's testimony that defendant made the statements in exchange for an implicit promise of sexual relations. It is our position that, in cases where it is at least arguable that a defendant would "be entitled to a pretrial hearing, the statutory notice must be supplied regardless of the District Attorney's personal opinion that the defendant['s statements were voluntary] and regardless of the fact that, following a hearing, the trial court might reach the same conclusion" (*People v Brown*, 140 AD2d 266, 270 [1st Dept 1988], *lv denied* 72 NY2d 955 [1988]). In our view, that position is supported by *Chase* and *People v Greer* (42 NY2d 170 [1977]). Indeed, the Court of Appeals recognized that, in *Greer*, even though it "found that the statement in question was completely voluntary (when discovered by the police in the midst of sexual intercourse, defendant claimed the act was consensual rather than rape but, in response to the officer's question, did not know the victim's name), it precluded the statement for failure of the People to give the required notice" (*Chase*, 85 NY2d at 500).

Thus, because there is a question here whether defendant's statements to the police agent were voluntary, defendant " 'had the right to have a court review the circumstances under which the statement[s] were given and to determine [their] voluntariness' " (*People v Boone*, 98 AD3d 629, 629 [2d Dept 2012], *lv denied* 20 NY3d 931 [2012], quoting *Chase*, 85 NY2d at 500). Consequently, we conclude that defendant was entitled to notice of the statements made to the police agent pursuant to CPL 710.30 and that "the People's failure to provide such notice should have served to preclude the admission of [those] statement[s] at . . . defendant's trial" (*Boone*, 98 AD3d at 629). That error was not harmless, and therefore we would reverse the judgment, grant that part of the omnibus motion seeking to preclude the People from introducing at trial the recorded conversation between defendant and the police agent, and grant defendant a new trial on count one of the indictment (see *People v O'Doherty*, 70 NY2d 479, 489 [1987]; *People v Scott*, 222 AD2d 1004, 1004 [4th Dept 1995], *lv denied* 87 NY2d 1025 [1996]).

Entered: April 26, 2019

Mark W. Bennett  
Clerk of the Court

# APPENDIX

# C

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(Original) State Court Record

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**No. of Pages:** 301

**Dated:** 05/23/18

MONROE COUNTY COURT  
COUNTY OF MONROE, STATE OF NEW YORK

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The PEOPLE of the State of NEW YORK,

Hon. Vincent M. Dinolfo

vs.

POST-HEARING  
MEMORANDUM OF LAW

MICHAEL ALBERT,

Indictment No.: 2013-0539

Defendant.

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A *Huntley/Wade* Hearing was held on November 26, 2013. This Memorandum of Law will primarily focus on the *Huntley* Hearing portion of the testimony, and specifically the issue of whether Inv. Benjamin was required to inform Defendant Michael Albert of his *Miranda* Rights when he was questioned on May 9, 2013 at Greene Correctional Facility.

An inmate in a correctional facility is not *per se* "in custody" for *Miranda* purposes, but may be "in custody" if there is an "added constraint that would lead a prison inmate reasonably to believe that there has been a restriction on that person's freedom over and above that of ordinary confinement in a correctional facility." *People v. Alls*, 83 NY2d 94, 100 (1993) (this is often referred to as the "added restraints" or "additional restraints" test). It is clear from a review of the Hearing Transcript that Mr. Albert was "in custody" when interrogated by Inv. Benjamin and he should have been notified of his *Miranda* Rights.

It is undisputed, however, that Inv. Benjamin did not read Mr. Albert his *Miranda* Warnings when he was interrogated at Greene Correctional Facility. November 26, 2013 Transcript, p. 38. As he was not advised of his *Miranda* Rights, the statements made on May 9, 2013 must be suppressed.

Mr. Albert was "in custody" because he was he was isolated from anyone other than 215

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enforcement officials. The Court of Appeals has said:

The taking of a suspect under apparent compulsion by a law enforcement official to a place of isolation has repeatedly been held to constitute custodial restraint, even when such asportation is to a place less coercive than a police headquarters (*see, Florida v Royer*, 460 US 491 [isolation of a suspected drug courier in a small room at an airline terminal]; *United States v Baron*, 860 F2d 911 [9th Cir], *cert denied* 490 US 1040 [suspect taken from a parking lot and isolated in another suspect's apartment]). Indeed, the court in *United States v Baron* identified as "the crucial factor" in the case "the coerciveness created by isolating a suspect in a private space controlled by the police" (*id.*, at 916).

*People v. Alls*, 83 NY2d at 102-103.

Inv. Benjamin made advanced arrangements to interrogate Mr. Albert on this date.

November 26, 2013 Transcript, p. 34-35. Inv. Benjamin and Inv. Mazzola were already waiting in the interrogation room when "one of the jail guards" brought Mr. Albert to see them. *Id.* at 23, 36. In *Alls*, the Court of Appeals noted that under New York Regulations, 7 NYCRR 270.2(B)(10)(iii), an inmate is required to comply with directions of a corrections officer relating to movement within the facility. 83 NY2d at 103. Thus, Mr. Albert was required to comply with the directions of the prison staff to go to the room for interrogation.

Mr. Albert was interrogated in a room off of a visiting area. November 26, 2013 Transcript, p. 36. During the entire two hour interrogation, there was no one in the visiting area except prison staff, and no one in the interrogation room other than Inv. Benjamin and Inv. Mazzola. *Id.*, p. 37. During the interrogation, no one entered or left the room. *Id.* at 40, 46. Further, the door to the interrogation room remained closed during the entire period. *Id.* At 46. Thus, Mr. Albert was isolated from anyone other than law enforcement officials.

The Fourth Department has found isolation from other inmates significant in determining

that an individual was "in custody" for *Miranda* purposes. In *People v. Brown*, the Fourth Department stated, "Defendant was then taken to a lobby area outside the presence of other inmates, where . . . the correction sergeant "questioned [defendant]. . . . We conclude that, under those circumstances, 'defendant could have reasonably believed that his freedom was restricted over and above that of ordinary confinement.' *Miranda* warnings were thus required." 49 AD3d 1345, 1346 (4<sup>TH</sup> Dept. 2008) (internal citations omitted).

Also, significant is how and when the interrogation of Mr. Albert ended, namely when Inv. Benjamin wanted it to end. The interrogation ended only when Inv. Benjamin told Mr. Albert that he was going to be charged with murder (despite not having admitted to the homicide), Inv. Benjamin then opened the door to the room and told the prison staff that he was "all set;" Mr. Albert was taken away by the prison guard who waited outside. *Id.* at 39, 40, 41, 45. In *People v. VanPatten*, the court found that "the interrogation of defendant at the detention facility--which took place in a classroom with correction officers standing outside the door while defendant was not permitted to leave on his own--was custodial in nature. 48 AD3d 30, 33 (3<sup>RD</sup> Dept. 2007). Thus, due to the isolation of Mr. Albert from other inmates he was "in custody" for *Miranda* purposes.

Moreover, Mr. Albert was "in custody" because he was not told that he could leave the interrogation room at any time or that he could refuse to speak to investigators. Inv. Benjamin acknowledged that he did not tell Mr. Albert that he had the right to refuse to speak to investigators. November 26, 2013 Transcript, p. 38. Nor did he inform him that he could leave at any time. *Id.*

It is submitted that the cases seem to suggest that the single most significant factor in determining if there are "additional restraints" on an inmate is whether the police have notified

him that he is free to leave at any time and not speak to the interrogators. See Brunetti, *New York Confessions*, LexisNexis 2012 Edition, § 2.05[6][c], page 2-54. The Court of Appeals in *Alls* stated that the "truly relevant factor" was whether the interrogator "(backed by the full authority of prison regulations) may have directed defendant to go with him to an isolated location 'without indicating in any way he was free to depart' (*Florida v. Royer, supra*, [460 US 491] at 501)." 83 NY2d at 103 (footnote).

The importance of the investigator telling the suspect that he is free to leave at any time and that he does not need to answer any questions can be seen by looking at two Third Department cases that turned on this issue. In *People v. Hope*, defendant's isolation from other inmates coupled with the fact that there was "no indication that defendant was told that the interview was voluntary or that he could leave the room at any time" led the Third Department to conclude that *Miranda* Warnings were required. 284 AD2d 560, 562 (3<sup>RD</sup> Dept. 2001).

The Third Department, on the other hand, found that *Miranda* Warnings were not required when "at the outset of [the] interview with defendant, [the interrogator] advised defendant of the purpose of the inquiry, told him that he did not have to answer any questions and was free to leave the visitors' room at any time." *People v. Passino*, 53 AD3d 204, 205 (3<sup>RD</sup> Dept. 2008). The Second Department has also found this to be a significant factor, in that it observed, "the defendant [was informed] at the outset of the questioning that he was not in custody and was free to leave the interview room and go back to his cell at any time. Under these circumstances, the defendant could not have reasonably believed that "that there has been a restriction on that person's freedom over and above that of ordinary confinement in a correctional facility." *People v. Vila*, 208 AD2d 781, 782 (2<sup>ND</sup> Dept. 1994) (citations omitted).

The United States Supreme Court has also found this to be a significant factor. In *Howe*

*v. Fields*, the Supreme Court found that the defendant was not in custody for *Miranda* purposes because he was told that he was free to leave at any time and the door to the interview room was open at times during the questioning. 132 S.Ct. 1181, 1193 (2012). As Inv. Benjamin acknowledged that he did not inform Mr. Albert that he was free to leave at any time or that he did not have to speak to investigators, he was "in custody" for *Miranda* purposes.


Finally, a number of other facts established at the Hearing support the conclusion that Mr. Albert was "in custody" for *Miranda* purposes in that the police planned to make the interrogation room a coercive environment with which to conduct the interrogation. It should initially be noted that the police already made the decision to charge Mr. Albert with the murder, no matter what occurred during the interrogation. November 26, 2013 Transcript, p. 39.

And, although Inv. Benjamin made advanced arrangements to interrogate Mr. Albert on this date, he did not give Mr. Albert advanced notice that he was coming. *Id.* p. 35-36. Clearly, this was done to catch Mr. Albert by surprise and contributes to the conclusion that the police were intending to create a coercive environment with which to conduct the interrogation. Further, Mr. Albert was never asked if he needed to use the bathroom or wanted something to drink. *Id.* at 40. Nor was he asked if he needed or wanted to eat despite the interrogation beginning at the lunch hour, 11:30 a.m. *Id.* at 36, 40.

In conclusion, Mr. Albert was "in custody" for *Miranda* purposes. He was brought to the interrogation room by prison staff. Mr. Albert was required, by New York State regulations, to go to the interrogation room as directed by staff. When he got to the room, he was isolated away from anyone other than law enforcement officers, two Rochester Police investigators inside the interrogation room and prison staff outside the interrogation room. Mr. Albert was never informed that he could leave the room at any time or that he could refuse to talk to investigators.

The door to the room was left closed for the entire two hours interrogation, and no one entered or left the room. Mr. Albert was not offered food despite the interrogation being during the lunch hour, nor was he offered a drink or to use the bathroom facilities. The interrogation lasted until Investigator Benjamin decided he was "all set." As Mr. Albert was "in custody" Inv. Benjamin was required to notify him of his *Miranda* Rights. He did not do so. The statements made by Mr. Albert to Inv. Benjamin and Inv. Mazzola on May 9, 2013 at Greene Correctional Facility must, therefore, be suppressed.

Dated: December 17, 2013

  
MARK D. FUNK, ESQ.  
Attorney for Defendant Michael A. Albert

TO: Hon. Vincent Dinolfo  
Judge, Monroe County Court

Patrick B. Farrell, Esq.  
Monroe County District Attorney's Office

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STATE OF NEW YORK  
COUNTY COURT

COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

SUPERCEDING DECISION  
AND ORDER /  
DECISION AND ORDER

v.

Indict. No. 2013/0539

MICHAEL A. ALBERT,

Defendant.

13/7117

**APPEARANCES:**

For the People:

SANDRA DOORLEY, ESQ.  
Monroe County District Attorney  
PATRICK FARRELL Esq., of Counsel  
47 S. Fitzhugh Street, Suite 832  
Rochester, New York 14614

For the Defendant:

MARK D. FUNK, ESQ.  
144 Exchange Boulevard  
Rochester, New York 14614

**DECISION AND ORDER**

VINCENT M. DINOLFO, J.

Defendant is charged with Murder in the Second Degree in violation of PL §125.25(1) and  
Criminal Possession of a Weapon in the Second Degree in violation of PL §265.03(2) and  
Criminal Possession of a Weapon in the Third Degree in violation of PL §265.02(4). This

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Decision and Order supercedes those portions of the prior Decision and Order issued from the bench in December 2013 to the extent it is delineated herein. This ruling also addresses the original issue as to whether a *Singer* Hearing is needed as so moved by Defendant.

In addressing the *Singer* issue first, Defendant asserts that the delay between the date of this crime and the date which the charges were brought violates his due process rights under the US Constitution (Amendments VI and XIV) and the New York Constitution (Art. 1 §6). He contends that the seven year delay in bringing these charges is violative of his rights to be afforded due process, citing and quoting, People v. Bryant, 65 AD2d 333(2nd Dept. 1978), and the reference to the necessity of conducting a *Singer* Hearing to determine the issue. His primary argument is that since corroboration is not needed to obtain an indictment, any argument which the People raise on that subject in order to justify this delay is unpersuasive. Defendant also argues that a seven year delay is "substantial" in and of itself. He further submits that his case has been prejudiced because the passage of time has seriously eroded his ability to defend himself, citing the difficulty of an alibi defense after so long a time, and that he has been prejudiced because as a sentenced prisoner, he has now lost the right to negotiate a sentence agreement which would include concurrent incarceration.

The factors which the Court should consider in making a due process determination are: 1) the length of the delay, 2) the reason for the delay, 3) the degree of actual prejudice to the defendant, 4) the seriousness of the underlying offense, and 5) the extent of pretrial incarceration (People v. Singer, 44 NY2d 241 [1978]; *see also* People v. Vernace, 96 NY2d 886 [2001]).

Here, there was a seven year delay in the timely prosecution of this homicide. The underlying charge is murder, inarguably a serious if not the most serious offense, that can be

charged in the criminal justice system. Fifteen year preindictment, (People v. Decker, 13 NY 3d 12 [2009]), fourteen year preindictment, (People v. Vernace, supra), and nineteen year preindictment delays (People v. Rogers, 103 AD3d 1150 [4<sup>th</sup> Dept. 2013]), have not been held to be per se violations of due process in homicide cases. Here, the period of delay is significantly less. Also, in the present case, the issue of extensive pretrial incarceration is not applicable because Defendant was sentenced and incarcerated on a totally separate crime/event.

Further, the People did not pursue this sooner because of a perceived lack of corroborative evidence. In that vein, "a determination made in good faith to defer commencement of the prosecution for further investigation\*\*\* will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense" (People v. Singer, supra, at 254, 405 N.Y.S.2d, 17", (People v. Denis, 276 AD2d 237, 248, [3<sup>rd</sup> Dept. 2000]). The People have stated their reasons for delay in their papers and the Court finds those reasons have merit and are not the manifestation of bad faith. Here, this was not the abuse of the significant amount of discretion that the People must of necessity have, and there is no indication that the decision was made in anything but good faith (People v. Rogers, supra at 1151, *citing and quoting*, People v. Decker, supra at 15).

Additionally, there is no indication that the defense has been seriously impaired by the delay (People v. Hayes, 39 AD3d 1173 [4<sup>th</sup> Dept. 2007]). With a seven year delay, "it is likely that some degree of prejudice will result-given that memories will fade, potentially making it difficult for a defendant to establish an alibi or other defenses" (People v. Decker, supra at 15-16). But a delay may likewise work against the prosecution as the passage of time can make it more difficult for the prosecution to meet their burden of proof (*see*, People v. Vernace, supra

at 288). Accordingly, Defendant's motion to dismiss the Indictment on the ground that he was denied due process or because of the preindictment delay is denied for the reasons stated above and the Court need not conduct a *Rogers* Hearing in order to reach that conclusion (*see, People v. Decker*, 13 NY3d 12 [2009]; *People v. Rogers*, 103 AD3d 1150 [4<sup>th</sup> Dept. 2013]; *People v. Hayes*, 39 AD3d 1173 [4<sup>th</sup> Dept. 2007]).

The Court has reconsidered Defendant's motion and arguments with respect to that portion which seeks dismissal of the second and third counts of the Indictment as being beyond the statute of limitations. There is a clear distinction between speedy trial provisions and statute of limitations provisions within CPL §30, *et al.* In reviewing the issue the Court concludes that controlling authority can be found in both *People v. Wildrick*, 83 AD3d 1455 (4<sup>th</sup> Dept. 2011), and *People v. Heil*, 70AD3d 1490 (4<sup>th</sup> Dept. 2010). In both cases, where the statute of limitations did not require dismissal of the major crime alleged in the respective Indictments, the presence of those charges did not toll the statute of limitations to separate counts. The argument that the separate charges were transactional, and thus afforded the statute of limitations for the major charge, was not supported in these cases. Therefore, the Court now grants Defendant's motion to dismiss counts two and three of this Indictment as time-barred by application of the appropriate statute of limitations for those counts.

With respect to Defendant's motion to reconsider the Court's ruling with respect to the necessity of the service of a CPL §710.30 Notice, the Court declines to grant the motion based upon the content of the original Decision and Order (*see also; People v. Boone*, 98 AD3d 629 [2d Dept. 2012]; *People v. Rockefeller*, 89 AD2d 1151[3rd Dept. 2011; *People v. Carter*, 31 AD. 3d 1056 [3<sup>rd</sup> Dept. 2006]).

Wade/Huntley Hearing

A combined *Wade/Huntley* Hearing was conducted in this matter on November 26, 2013. The only witness who testified during the Hearing was Rochester Police Department ("RPD") Investigator Randy Benjamin ("Benjamin"). The Court makes the following findings of fact based upon the testimony which the Court has determined to be credible:

Benjamin was working in September 2006 and was investigating a homicide which had occurred near Lexington Avenue in the City of Rochester, Monroe County, New York, during that month. On September 13, 2006 at approximately 2:30, he conducted a photo array with a person who has been delineated as Witness 1. The procedure took place in the Public Safety Building and was conducted by Benjamin and his partner, Inv. Neal O'Brien. The array consisted of photographs of six African-American males. The photos were in color and showed the men's faces. The array was computer generated by "putting in" to a databank, similar characteristics such as height, age, color, weight, and race. The intention was to create an array with persons who would appear similar in appearance to Defendant. The witness was advised that he was going to be shown a photo array and asked if he recognized anyone shown in the display. The witness pointed out picture number 3 and stated "that's him right there." The person in photo number 3 was Defendant.

Benjamin performed a similar photo array procedure on April 26, 2013 at approximately 1:55 p.m., with a second person known as Witness 2. The array had been generated in a manner similar to the first array and contained photographs of six persons, including Defendant. Prior to the array being shown to Witness 2, the witness was given instructions by use of a RPD Photo Array Form, and was subsequently received into evidence. The instructions were read verbatim

to Witness2, who indicated that he or she understood the instructions. The witness was then shown the array. The witness pointed out photo number 2 and stated "that's Gotti right there." Ex.# 3 was placed into evidence. Neither Witness 1 nor Witness 2 were shown any other photos of Defendant prior to the subject photo arrays.

Benjamin also testified with respect to a conversation which he had with Defendant on May 9, 2013. The conversation took place at Greene Correctional Facility ("Facility"). Defendant was incarcerated at the Facility on an unrelated matter. Benjamin had traveled to the Facility with another investigator, Nick Mazzola, who was present during the entire conversation, but took no active part.

Benjamin stated that Defendant was brought into a room which had described as an office with three chairs, "probably the size of the men's room" on the 2<sup>nd</sup> Floor of the Hall of Justice. Defendant was escorted into the room by Corrections personnel, but was neither handcuffed nor shackled. The Corrections personnel person did not remain in the room and was not positioned at the door. Defendant had freedom of movement within the room. He was not read his *Miranda* warnings. The contents of the conversation that ensued is contained in the record of the Hearing and for the sake of brevity, will not be repeated herein. Defendant never asked that the questioning cease nor did he ask for the services of an attorney. The "interview process" lasted for approximately two hours.

#### Conclusions of Law - Wade/Huntley

With respect to the photo array identification procedure conducted with the identifying witnesses, the People have the burden of going forward to establish both the reasonableness of the police conduct and the lack of suggestiveness in the identification procedure used. (People

v. Ortiz, 90 NY2d 533 [1997]). The Defendant has the ultimate burden of proving that the identification procedure was unduly suggestive. ((People v. Ortiz, at 537; People v. Chipp, 75 NY2d 327 [1990]; People v. Berrios, 28 NY2d 541 [1971])).

In the present case, the subjects depicted in the photo array were sufficiently similar in appearance so that the viewers' attention was not drawn to any one photo in such a way as to indicate that the police were urging a particular selection. (People v. Dean, 28 AD3d 1118 [4<sup>th</sup> Dept 2006]). Additionally, there was nothing in the instructions given by the law enforcement officer, or in the manner in which either array was conducted, which was suggestive in nature. Accordingly, the photo arrays and the procedures implemented in their presentations to the witnesses were not unduly suggestive and Defendant's motion to suppress the in-court identification by the witnesses is denied. (People v. Gonzalez, 89 AD3d 1443 [4<sup>th</sup> Dept. 2011]; People v. Weston, 83 AD3d 1511 [4<sup>th</sup> Dept. 2011]; People v. Dean, 28 AD3d 1118 [4<sup>th</sup> Dept. 2006]).

In addressing the statements purportedly made by Defendant, generally, a confession or admission is admissible at trial only where its voluntariness is established by the People beyond a reasonable doubt (People v. Huntley, 15 N.Y.2d 72 [1965]). Statements resulting from custodial interrogation are admissible only upon a showing that the procedural safeguards provided in Miranda v. Arizona, 384 US 436 (1966) were complied with. *Miranda* warnings are required whenever a defendant is taken into custody or otherwise deprived of his or her freedom of action in any significant way and is subjected to interrogation. *Id* at 444.

Generally speaking, the questioning of an inmate in a correctional facility is not, in and of itself, a custodial interrogation under the *Miranda* rule (People v. Alls, 83 NY2d 94 [1993]).

Essentially, for the purposes of determining whether an inmate is being held in a "custodial" circumstance during a conversation with law enforcement personnel, there must be an added constraint upon the inmate which would lead that prison inmate to reasonably believe that there has been a restriction on his or her freedom over and above that of the ordinary confinement in the facility (People v. Machicote, 23 AD3d 264 [1<sup>st</sup> Dept. 2005], *leave to appeal denied* 6 NY3d 777[2006]). If there is not added constraints as detailed above, the inmate is not in custody for *Miranda* purposes and the *Miranda* warnings are not necessary (People v. Ayala, 27 AD3d 1087 [4<sup>th</sup> Dept. 2006], *leave to appeal denied* 6 NY3d 892 [2006]. Moreover, in a circumstance where an inmate is not handcuffed or further restrained, placed in an office, had not been frisked or placed under direct guard and was, in a short period of time, informed why the investigators were there, there is no need for *Miranda* warnings to be given (*see generally*, People v. Alls, *supra*; People v. Busanet, 79 AD3d 600 [1<sup>st</sup> Dept. 2010]; People v. Passino, 53 AD3d 204 [3<sup>rd</sup> Dept. 2008]).

Further, the test for determining whether a person is in custody for *Miranda* purposes is not what the Defendant thought, but rather what a reasonable person, innocent of any crimes, would have thought had he been in Defendant's position (People v. Brown, 111 AD3d 1385 [4<sup>th</sup> Dept. 2013]; People v. Jones, 110 AD3d 1484 [4<sup>th</sup> Dept. 2013]). In determining whether a defendant was in custody for *Miranda* purposes the court should consider: 1) the amount of time the defendant spent with police, 2) whether his freedom of action was restricted in any significant manner, 3) the location and atmosphere in which the defendant was questioned, 4) the degree of cooperation exhibited by the defendant, 5), whether he was apprised of his constitutional rights, and 6) whether the questioning was investigatory or accusatory in nature



(People v. Kelly, 91 AD3d 1318,1318 [4<sup>th</sup> Dept. 2012], *citing and quoting*, People v. Lunderman, 19 AD3d 1067, 1067-1069, *lv denied*, 5 NY 3d 830 [2005]).


The testimony reveals that no force, coercion, or threats thereof, or evidence of other improper conduct or undue pressure was exercised upon Defendant in order to induce him to speak. No promises were made to Defendant which created a risk that he might falsely incriminate himself. He was never denied anything which he requested. His answers to inquiries were reasonable and responsive and there were no indicia that he was ill or suffering from a medical condition which would render his cooperation involuntary. The conversation lasted only two hours. Defendant was not harangued when he denied culpability. He was cooperative. He was not restricted in any out of the ordinary manner. The conversation took place in an office with a window rather than a more confining space. No prison officials participated in the conversation or acted menacingly towards Defendant during the process. Under the circumstances and the nature of the contents of the conversation, the interaction was congenial.

Defendant did not appear to be suffering from the effects of either drugs or alcohol. Defendant never asked for the services of an attorney, nor did he ask for the questioning to cease. He was cooperative with the police and seemed insistent on speaking with them.

When the facts are viewed in their totality, it is clear beyond a reasonable doubt that Defendant's statements were both voluntary and not the result of custodial interrogation. Accordingly, Defendant's motion to suppress his statements is denied and the People may use them in either their direct examination or in cross examination should Defendant choose to testify in his own behalf.

The above constitutes the Decision and Order of this Court.

Dated this 26<sup>th</sup> day March, 2014 at Rochester, New York.

  
**HONORABLE VINCENT M. DINOLFO**  
**MONROE COUNTY COURT JUDGE**

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MONROE COUNTY COURT  
COUNTY OF MONROE, STATE OF NEW YORK

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The PEOPLE of the State of NEW YORK,

Indictment No.: 2013-0539

vs.

**NOTICE OF MOTION**

**MICHAEL A. ALBERT,**

Hon. Vincent M. Dinolfo

Defendant.

---

PLEASE TAKE NOTICE, that upon the annexed affirmation of MARK D. FUNK, ESQ., dated July 22, 2014, the undersigned attorney for the defendant, MICHAEL ALBERT, will move this court before the Hon. Vincent M. Dionolfo, Monroe County Court Judge, at the Hall of Justice, Rochester, New York on the 30<sup>TH</sup> day of July, 2014 at 10:00 a.m. or as soon thereafter as counsel can be heard for the following relief:

A. To Set Aside the Verdict pursuant to Criminal Procedure Law § 330.30(1).

B. Such other and further relief as this Court deems just and proper.

DATED: July 22, 2014  
Rochester, New York

Yours etc.,

MARK D. FUNK, ESQ.  
Suite 400  
144 Exchange Blvd.  
Rochester, New York 14614  
(585) 325-4080

TO: Hon. Vincent M. Dinolfo  
Judge, Monroe County Court

Patrick Farrell, Esq.  
Assistant District Attorney, Monroe Count

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MONROE COUNTY COURT  
COUNTY OF MONROE, STATE OF NEW YORK

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The PEOPLE of the State of NEW YORK,

vs.

ATTORNEY AFFIRMATION

MICHAEL A. ALBERT,

Defendant.

---

MARK D. FUNK, ESQ., affirms under penalty of perjury pursuant to Civil Procedure Law and Rules § 2106, the following:

1. That he is an attorney duly licensed to practice law in the State of New York, and maintains offices at Suite 400, 144 Exchange Blvd., Rochester, County of Monroe, New York.
2. That he is the attorney for the Defendant, MICHAEL A. ALBERT, having been appointed to represent him by the Hon. Vincent Dinolfo, Monroe County Court Judge, on August 1, 2013.
3. The Defendant was charged, by way of a Sealed Indictment, Number 2013-0539, filed June 25, 2013, with Murder in the Second Degree, in violation of Section 125.25(1) of the Penal Law of the State of New York; Criminal Possession of a Weapon in the Second Degree, in violation of Section 265.03(2) of the Penal Law of the State of New York and Criminal Possession of a Weapon in the Third Degree, in violation of Section 265.02(4) of the Penal Law of the State of New York.
4. The Defendant was arraigned and entered a plea of "not guilty" to all charges lodged in Indictment No.: 2013-0539. The Court, prior to trial, granted the defense motion to dismiss Count Two and Count Three of the Indictment. A jury trial was commenced on June 2, 2014.

By verdict rendered on June 9, 2014, Defendant was found "guilty" of Count One, Murder in the Second Degree. Defendant has not been sentenced; sentencing is scheduled for July 30, 2014 at 10:00 a.m.

5. The undersigned makes this affirmation in support of the relief requested in the annexed Notice of Motion. The sources of the information and grounds for my belief reflected in this affirmation are examination of the various papers filed in connection with this proceeding, examination of the discovery previously provided by the prosecution, and my independent investigation of this matter.

#### **A. MOTION TO SET ASIDE VERDICT**

1. Defendant MICHAEL ALBERT moves that the verdict of guilty rendered on June 9, 2014 be set aside pursuant to Criminal Procedure Law § 330.30(1), as there are grounds appearing in the record that would require reversal of the judgment as a matter of law by an appellate court.

2. From June 2-9, 2014, Defendant was on trial for a charge of Murder in the Second Degree. On June 9, 2014, the jury returned a verdict of "guilty."

3. This verdict must be set aside as it was error for the jury to hear the testimony of Sherrita Jefferson and the recording she made while acting as an agent of the police. Furthermore, during Defendant's trial, prosecutorial misconduct and a Due Process violation occurred requiring a new trial.

1. DUE PROCESS VIOLATION.

4. The People engaged in prosecutorial misconduct and violated Defendant's Due Process rights under the New York and Federal Constitutions by making inconsistent arguments pre-trial and during trial regarding the significance of the recording made by Sherrita Jefferson. Prior to trial, the People asserted to the Court that the recording made by Sherrita Jefferson was not even sufficient to obtain an Indictment. During trial, the People contradicted this position. The People argued to the jury, during their Summation, that this recording, standing alone, was sufficient to find Defendant guilty beyond a reasonable doubt.

5. The People argued, during their Summation, that the recording made by Sherrita Jefferson alone was proof beyond a reasonable doubt. Specifically, the People argued:

And I submit to you that you don't have to take Martin Wall's word to find the defendant guilty here. You don't have to take Sherrita Jefferson's word to find the defendant guilty. Based on what the defendant told Sherrita Jefferson on that recording about this murder, about why he did the murder, how he did the murder and what he did with the murder weapon after the murder, you have everything you need to find the defendant guilty beyond a reasonable doubt of Murder in the Second Degree. This case isn't about Martin Wall and Sherrita Jefferson.

People's Closing Statement, attached as Exhibit A, p. 30. After the People's Summation, defense counsel moved for a mistrial based upon a violation of Defendant's constitutional right to Due Process. Transcript of Oral Motion for Mistrial, attached as Exhibit B, p. 2.

6. The People's argument to the jury was in complete contradiction to the their arguments to the Court prior to trial. When it served the People's purposes prior to trial, the People repeatedly argued that the statements made to Sherrita Jefferson did not constitute proof beyond a reasonable doubt, or even sufficient proof to bring an Indictment.

7. In his omnibus motion, Defendant, noting the People's seven (7) year delay in obtaining an Indictment in this matter, moved for dismissal of the charges based upon a Due Process violation, or in the alternative, a *Singer* Hearing. See Defendant's Motions, dated September 27, 2013, Part E., pages 33-36. In opposing this request, the People first claimed that they did not have sufficient evidence to corroborate the Defendant's admissions to Sherrita Jefferson and therefore could not secure an Indictment. See People's Motion Response, dated October 11, 2013, pp. 10-11.

8. At oral argument of the motions, the People changed their position by conceded that they would have been able to obtain an Indictment. October 24, 2013 Transcript, p. 5, attached as Exhibit C. Instead, at oral argument, the People claimed that the statements made to Ms. Jefferson were not proof beyond a reasonable doubt. The People stated, "[T]he People may have been able to present the case to a grand jury, but getting beyond grand jury certainly would have been an issue. It was certainly not proof at trial which would be satisfactory." October 24, 2013 Transcript, p. 5.

9. After oral argument, written submissions were filed regarding some issues. In these submissions, the People again argued that they could not have secured an Indictment based upon this recording. In the People's Response to Defendant's Memorandum of Law, dated December 13, 2013, the People argued that they did not have "a viable prosecution" based upon this recording alone. People's Response to Defendant's Memorandum of Law, pp. 5, 10. The People also portrayed these statements as "somewhat vague" (Page 12) and "some general incriminating statements" that "do[] not specify the victim's name, the date the offense occurred or the location where the offense occurred." People's Response to Defendant's Memorandum of Law, p. 4.

10. The People also argued that they made a "good faith determination" that these statements were "insufficient" proof of Defendant's guilt. People's Response to Defendant's Memorandum of Law, p. 13.

11. The People make similar arguments in their People's Response to Defendant's Motion to Reconsider, dated January 6, 2014, Section I, ¶¶ 10-11. The People even argued that this crime could not be "solve[d]" based upon these statements alone. People's Response to Defendant's Motion to Reconsider, Section I, ¶ 12.

12. Clearly, all of these pre-trial statements contradict the position of the People taken during Summation, that these statements alone constitute proof beyond a reasonable doubt. The Court of Appeals has said:

Prosecutor's occupy a dual role as advocates and as public officers and, as such, they are charged with the duty not only to seek convictions but also to see that justice is done. In their role as public officers, they must deal fairly with the accused and be candid with the courts (*see, People v. Pelchat*, 62 NY2d 97, 105; *see also, People v. Vilardi*, 76 NY 2d 67, 76; *People v. Simmons*, 36 NY2d 126, 131-132). This rule of fairness [is] rooted in the concept of constitutional due process.

*People v. Steadman*, 82 NY2d 1 (1993).

13. The People's obligation to be candid with the Court and of fair dealing with the accused "also rests upon the prosecutor during pretrial proceedings." *People v. Pelchat*, 62 NY2d 97, 105 (1984).

14. The People's lack of fair dealing has been found to be a violation of Due Process in a number of contexts. One such context is the People remaining silent upon hearing false testimony. *People v. Savvides*, 1 NY2d 554 (1956). In *Savvides*, The Court of Appeals stated, "The administration of justice must not only be above reproach, it must also be beyond the



suspicion of reproach. The prosecutor should have corrected the trial testimony given by [the witness] and the impression it created." 1 NY2d at 556.

15. Another context establishing a violation of Due Process is the prosecution making arguments known to be untrue. For example, in *People v. Whalen*, 59 NY2d 273 (1983), a conviction for rape was reversed by the Court of Appeals when the prosecutor made arguments to the jury that he knew were inaccurate. During his Summation, the prosecutor argued that defendant's alibi was a recent fabrication when he knew that defense counsel had filed a Notice of Alibi eight (8) months before trial. The Court noted that defendant's motion for a mistrial should have been granted.

16. This is what has happened here; the People have made knowingly false statements. The position that the People took prior to trial (that the recording was not sufficient to secure an Indictment) is diametrically opposed to their position at trial (this recording alone was proof beyond a reasonable doubt). Both of these statements cannot be true. Thus, the People have made knowingly false statements either pre-trial (to avoid dismissal due to a delay in Indictment) or before the jury (to gain a conviction). The People have therefore violated Defendant's Due Process rights by making knowingly false statements.

17. Further, the People have violated Defendant's Due Process rights by making contradictory statements pre-trial and during trial. The Court of Appeals found a violation of Defendant's constitutional rights by arguing a position different at trial than at the Grand Jury. *People v. Grega (Roberts)*, 72 NY2d 489 (1988).

18. More relevant to the case at bar is *People v. Lane*, 10 NY2d 347 (1961). In *Lane*, the Court of Appeals reversed a conviction when the People made an argument during Summation contrary to their position prior to trial. Prior to trial, the People argued that the jury should not

hear any testimony regarding defendant McNair being beaten by police. The trial court precluded any such testimony. At trial, the prosecutor committed error when he emphasized to the jury that they did not hear any testimony that McNair was beaten.

19. Likewise, in *Thompson v. Calderon*, 120 F.3d 1045 (9<sup>TH</sup> Cir. 1997), the court reversed defendant's conviction after finding prosecutorial misconduct and a violation of Due Process when the prosecutor argued a theory at trial inconsistent with his position pre-trial.

20. In short, in opposition to Defendant's motions, the People took one position with regard to the significance of the recording made by Sherrita Jefferson, and a contrary position during trial before the jury. This constitutes prosecutorial misconduct and a violation of Defendant's Due Process rights.

21. The jury's verdict must be set aside. Further, if the Court grants this relief, a *Singer* Hearing must be held.

## 2. CPL § 710.30 ISSUE.

1. This verdict must also be set aside as it was error for the jury to hear the testimony of Sherrita Jefferson and the recording she made while acting as an agent of the police. The People should have been precluded from presenting this testimony and recording as the People failed to give Defendant notice pursuant to Criminal Procedure Law § 710.30.

2. The People conceded pre-trial that Ms. Jefferson was acting as an agent of the police<sup>1</sup> when she procured statements from Defendant regarding the death of Jeremy Trim. See People's Response to Defendant's Motion to Reconsider, dated January 6, 2014, Section II, ¶ 4 (Jefferson

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<sup>1</sup> Sherrita Jefferson's trial testimony also established that she was acting as an agent of the police when the recording was made. She testified that Inv. Benjamin gave her the recording device with instructions how to work the device and instructions as to what to talk to "Gotti" about. Jefferson Trial Transcript, p. 14, attached as Exhibit D. *People v. Stroman*, 286 AD2d 974 (4TH Dept. 2001). This was also done after she signed a contract to cooperate with the police and District Attorney's Office. Jefferson Trial Transcript, pp 10, 26.

was wearing "a covert recording device which was provided by Rochester Police Investigators."). The People maintained however that she was not a "public servant" when the recording was made. The Court adopted this rational in an oral decision rendered on December 19, 2013.

3. Under the relevant statutes and case law there is no distinction between someone acting as an agent of the police and a public servant. CPL § 710.30 requires notice of statements made to a public servant. The term "public servant" is defined in Penal Law § 10.00(15) as "(a) any public officer or employee of the state or any political subdivision thereof or any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee." It is clear that someone recording a conversation with a device provided by the police with the express purpose of questioning a suspect in a murder is "exercising the functions of any such public officer." *People v. Wilhelm*, 34 AD3d 40 (3<sup>RD</sup> Dept. 2006) (Department of Social Services caseworkers engaged in functions of the police when they interrogated the defendant; a CPL § 710.30 Notice was required).

4. We should also look at CPL § 710.30 in conjunction with CPL § 60.45 (as the People have previously conceded). CPL § 710.30(1)(a) discusses notice if statements "if involuntarily made would render the evidence thereof suppressible". CPL § 60.45(2)(b) defines "involuntarily made" statements as statements made to "a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him." Again, it cannot be disputed that Sherrita Jefferson was acting at the direction of a public servant engaged in law enforcement activities when she interrogated Defendant about the death of Jeremy Trim.

5. In *People v. Mirenda*, 23 NY2d 439 (1969), the Court of Appeals discussed the notice requirement with respect to three groups: police officers, police informants and private parties. The Court found that notice was required for the first two groups, but not the third. The Court

stated, "The language of the statute does not distinguish, for the purpose of notice, between confessions and admissions made to the police or private individuals. We do not, however, interpret the legislative intent as requiring the District Attorney to notify defendants of admissions made to private parties who were not police agents." 23 NY2d at 448.

6. In *Mirenda*, the Court of Appeals clearly held that notice was required for those acting as agents of the police, 23 NY2d at 448-449, as Sherrita Jefferson was.

7. A number of Fourth Department cases also stand for the proposition that notice must be given for statements made to "police agents". These cases include *People v. Stroman*, 286 AD2d 974 (4<sup>TH</sup> Dept. 2001), *People v. Eberle*, 265 AD2d 881 (4<sup>TH</sup> Dept. 1999), and *People v. Williams*, 21 AD3d 1401, 1403 (4<sup>TH</sup> Dept. 2005), all Fourth Department cases which taken together hold that statements made to an agent of the police are suppressible and must, therefore, be noticed.

8. The First Department has made a similar holding. The First Department stated, "A CPL § 710.30 statement notice is required when a statement to be introduced is made to a public servant, or to a police agent, but not when a statement is made to a private party." *People v. Rivera*, 173 AD2d 360 (1<sup>ST</sup> Dept. 1991).

9. The Third Department has also found that notice was required for statements made to confidential informants, *People v. Costello*, 101 AD2d 244 (3<sup>RD</sup> Dept. 1984), and agents of the police. *People v. Miller*, 142 AD2d 760 (3<sup>RD</sup> Dept. 1988) (an off-duty police officer was acting in concert with the police).

10. Thus, the Defendant's verdict must be set aside as it was error for the recording made by Sherrita Jefferson to be entered into evidence at trial as the People failed to give Defendant notice pursuant to CPL § 710.30.

**B. SUCH OTHER AND FURTHER RELIEF**

1. WHEREFORE, the undersigned requests that the Court grant the relief requested herein along with such other and further relief as to the Court may deem just and proper.

**AFFIRMED UNDER PENALTY OF PERJURY PURSUANT TO CPLR § 2106.**

Dated: July 22, 2014

  
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**MARK D. FUNK, ESQ.**  
*Attorney for Defendant Michael Albert*

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**EXHIBIT A**

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1 STATE OF NEW YORK : COUNTY OF MONROE  
2 COUNTY COURT

3 -----x  
4 THE PEOPLE OF THE STATE OF NEW YORK, : Indictment No.  
5 -versus- : 2013-0539  
6 MICHAEL A. ALBERT, : NYSID No.  
7 Defendant. : 00562522Q  
8 -----x

9 \*\*\*Closing Statement of Mr. Farrell\*\*\*

10 Hall of Justice  
11 Civic Center Plaza  
12 Rochester, New York 14614  
13 June 6, 2014

14 P r e s i d i n g :

15 THE HONORABLE VINCENT M. DINOLFO  
16 County Court Judge

17 A p p e a r a n c e s :

18 SANDRA DOORLEY, ESQ.  
19 District Attorney, County of Monroe  
20 BY: PATRICK FARRELL, ESQ.  
21 Assistant District Attorney

22 MARK FUNK, ESQ.  
23 Attorney for Defendant

24 Defendant Present

25 R e p o r t e d B y :

KATHLEEN K. ARNAULT, CSR, RPR  
Official Court Reporter

000200

(EXCERPT OF CLOSING STATEMENTS)

THE COURT: Ladies and Gentlemen, thank you.

The record should reflect the presence of Mr. Albert, Mr. Funk, Mr. Farrell and all 14 members of the jury panel.

Mr. Farrell, you may deliver your summation.

MR. FARRELL: Thank you, your Honor.

Good morning, Ladies and Gentlemen.

THE JURY: Good morning.

MR. FARRELL: Ladies and Gentlemen, over the past week a number of issues have come up in this trial, but the issue for you as jurors to decide in this case is actually very, very narrow; on April 29th, 2006, did the defendant Michael Albert, also known as Gotti, intentionally cause the death of Jeremy Trim by shooting him. Well, the defendant told Martin Wall that he did. The defendant told Sherrita Jefferson that he did. So we have to ask ourselves, how do we know that we can rely on what the defendant told Martin Wall about what he did and what the defendant told Sherrita Jefferson about what he did on that recording.

During his opening statement, Mr. Funk told you that I would be asking you to guess or speculate about what happened to Jeremy Trim on April 29th, 2006. Ladies and Gentlemen, you don't have to take my word for what happened on that date. You don't need to take Martin



1 Wall's word for what happened on that date. And you  
2 don't even need to take Sherrita Jefferson's word for  
3 what happened on that date. On that recording that is  
4 People's Exhibit 27, the defendant Michael Albert told us  
5 all what he did to Jeremy Trim. What led up to him  
6 shooting Jeremy Trim. Why he shot Jeremy Trim. And what  
7 he did with the murder weapon after he shot Jeremy Trim.  
8 And contrary to what Mr. Funk suggested to you that the  
9 pieces don't add up, I would submit to you that if you  
10 look at Martin Wall's testimony, and you look at Sherrita  
11 Jefferson's testimony, and you listen to that recording,  
12 and when you, Ladies and Gentlemen, go back into that  
13 deliberation room and you have all the evidence before  
14 you, including the law as Judge Dinolfo instructs you,  
15 you will have no problem coming to the conclusion that  
16 Michael Albert is guilty beyond a reasonable doubt of  
17 Murder in the Second Degree, and this is my opportunity  
18 to tell you why.

19 Now, Mr. Funk just said to you that I was going  
20 to get up and yell, and I was going to tell you what a  
21 bad guy and what a murderer Michael Albert is. But  
22 again, Ladies and Gentlemen, you don't need to take my  
23 word for it. You listen to that recording that is  
24 People's Exhibit No. 27 and you see exactly what Gotti is  
25 all about. You see how Gotti carries guns with him. How

1 he uses guns when he feels even the slightest disrespect  
2 of either him or someone in his clique or crew, be it Ack  
3 or his buddy Jeremy. You hear on that recording exactly  
4 what Michael Albert is about or at least exactly what he  
5 was about back in September of 2006.

6 Now, Mr. Funk suggested to you that that  
7 recording isn't proof beyond a reasonable doubt because  
8 it's too vague. He talked about an incident and Sherrita  
9 asks him so what happened that day, the date that all  
10 that shit happen, and that's too vague, that's not proof  
11 beyond a reasonable doubt. Well, Ladies and Gentlemen,  
12 when you go back into that deliberation room you will  
13 have all the evidence before you, whether it's a  
14 photograph, or the shell casing, or the .40-caliber  
15 bullet, or the recording itself, you will be able to  
16 review those exhibits as closely as you like. The  
17 recording actually we will have to bring you back into  
18 the courtroom to listen to that, but you can listen to it  
19 as many times as you like. And I submit to you that at  
20 the very beginning of that when the defendant starts to  
21 tell Sherrita his narrative as to what happened, he says  
22 to her, I'll tell you exactly what happened. And then he  
23 proceeds to tell her what he did, why he did it and what  
24 he did with the murder weapon after he shot and killed  
25 Jeremy Trim.

000203

1 Now, we have all done things in our lives that  
2 we shouldn't have done, or maybe came to regret it at a  
3 later time. And whereas you, or I, or Mr. Funk, you  
4 know, might go to church and confess to a priest or a  
5 minister --

6 MR. FUNK: Objection.

7 THE COURT: Overruled. Again, Ladies and  
8 Gentlemen, I'll tell you that Mr. Farrell's  
9 interpretation of the evidence doesn't necessarily have  
10 to be the same as yours or Mr. Funk's. It's your  
11 interpretation of the evidence that counts.

12 You may continue.

13 MR. FARRELL: Thank you, your Honor.

14 We might go to a priest or a minister and  
15 confess about something that we did that we regretted or  
16 if we did a bad thing, someone, a priest or minister,  
17 someone we can trust. I told you at the beginning of  
18 this case, Ladies and Gentlemen, we weren't going to hear  
19 from two nuns as the main witnesses in this case because  
20 back in April 29th of 2006 and September 17th of 2006  
21 when the recording was made, Gotti wasn't hanging out  
22 with nuns. He was hanging out with people like Martin  
23 Wall who was the stepfather, or surrogate father, or  
24 whatever you want to call it to the defendant's good  
25 friend Rhian Smith or Spaz. And he was hanging out with

1 people like Sherrita Jefferson, the sister of his good  
2 friend Ack. And to Michael Albert back in 2006 those  
3 were people that he believed he could trust.

4 We heard from Martin Wall that just a day or  
5 two after the murder on April 29th, 2006, Martin still  
6 didn't really have a full indication as to what happened  
7 that night. You know, you will recall he hosted the  
8 barbecue. He saw people including himself with guns at  
9 the barbecue. He met up with the defendant and Ack who  
10 basically met him when he returned from the smoke shop  
11 and drove them across town to St. Paul and dropped them  
12 off. He then came back to his home where he talked to  
13 his daughter and his daughter's boyfriend, and then he  
14 tried to drive up to the scene to see if it was anyone he  
15 knew that had been shot. And at that point Jeremy got in  
16 his car, the defendant's friend Jeremy. He then drove  
17 Jeremy to the area of Avenue D because Jeremy told him he  
18 had to get rid of something. Again, at that point Martin  
19 doesn't know exactly what happened, but Martin told us  
20 that just a couple days after the murder when Martin was  
21 with his adopted son Spaz or Rhian Smith at his weed  
22 house on Emerson Street, the defendant came over and when  
23 they asked him what happened that day, the defendant  
24 started to tell them about what happened, about what he  
25 did and why he did it.

000205

1 And again, Mr. Funk said in his summation that,  
2 you know, Jeremy Trim didn't have any drugs on his person  
3 at the time the Medical Examiners recovered his body. So  
4 how do we know that he was selling crack like Martin Wall  
5 said? Or how do we know that he was selling crack like  
6 the defendant said on the recording? Well, Ladies and  
7 Gentlemen, Martin Wall. The information that he got  
8 about the murder came directly from the defendant's mouth  
9 two days later when the defendant came by the weed house  
10 and he told Martin Wall and his stepson Rhian Smith or  
11 Spaz that the person was selling at the corner and that  
12 the person -- they told the person he had to bounce out  
13 of there or leave, that the person got mouthy with him,  
14 that he thought that the person was reaching for  
15 something and then he shot the boy. And he told Martin  
16 at that point two days later that he gave the gun to  
17 Jeremy. So again, until Martin Wall hears the  
18 defendant's account as to what happened, he doesn't know  
19 exactly what happened.

20 What about Sherrita Jefferson? September 17th,  
21 2006, the defendant comes over to her apartment and makes  
22 the statements that are contained on the recording that  
23 is People's Exhibit 27. People's Exhibit No. 27, which  
24 I'm going to play portions for you in just a few moments.  
25 And again, it's in evidence, too, if you need to listen

1 to it again you're certainly encouraged to do that.

2 I'm somewhat hesitant, Ladies and Gentlemen, to  
3 characterize what Mr. Albert told Sherrita Jefferson as a  
4 confession. You know, when you hear that word  
5 confession, it's usually associated with some level of  
6 remorse or regret.

7 MR. FUNK: Objection.

8 THE COURT: Sustained.

9 MR. FARRELL: Ladies and Gentlemen, that  
10 recording is in evidence, and I want you to ask  
11 yourselves when you listen to that recording and you  
12 recall that recording in your deliberations, you ask  
13 yourselves at any time during that 30-minute recording  
14 did the defendant express any level of regret?

15 MR. FUNK: Objection.

16 THE COURT: Overruled; fair comment on the  
17 evidence.

18 MR. FARRELL: Did he express any level of  
19 regret whatsoever for what he did to Jeremy Trim? If  
20 anything, we see the polar opposite of remorse and regret  
21 contained on that video. We see the defendant's cocky  
22 arrogance on that video when he is talking about --

23 THE COURT: Excuse me, you mean audio; is that  
24 correct?

25 MR. FARRELL: I'm sorry, Judge, I misspoke.

000207

1           On that recording we hear that cocky arrogance  
2           in his voice when he tells Sherrita that gun is long  
3           gone, it's out of state. No weapon, no charge. If  
4           somebody else gets bagged with it out of state, they are  
5           going down for this murder. I'm not going down for this  
6           murder. Absolutely no regret or remorse whatsoever  
7           contained on that recording.

8           Now, I want to talk first about Martin Wall's  
9           testimony and where we see his testimony independently  
10          corroborated with the other evidence in the case. Ladies  
11          and Gentlemen, this case isn't about whether you can or  
12          should identify with Martin Wall. Martin Wall didn't  
13          come forward to the police with the information he had  
14          until he was facing a significant state prison sentence,  
15          a range of 7 to 15 years if convicted of Burglary in the  
16          Second Degree. And he didn't come forward with that  
17          information until he was facing that significant state  
18          prison sentence. And I'll certainly acknowledge that. I  
19          believe Martin acknowledged it.

20          Martin Wall didn't know the victim in this case  
21          Jeremy Trim. And I submit to you that he didn't care  
22          about the victim Jeremy Trim. He didn't come forward  
23          with the information he had on this homicide until  
24          December of 2012 when he had some incentive to gain for  
25          sharing the information that he had.

1 And again, like we talked about during jury  
2 selection, I'm not asking you to like Martin Wall.  
3 Ladies and Gentlemen, this isn't about whether you like  
4 Martin Wall. It's about whether based on the evidence in  
5 this case you can believe what Martin Wall told you about  
6 the events at his house at the barbecue, and after the  
7 barbecue, and whether you believe Martin Wall about what  
8 the defendant told him a couple of days after the murder  
9 at his weed house on Emerson Street.

10 Martin told us he hosted a barbecue at his  
11 house at 164 Lexington Avenue on April 29th, 2006. He  
12 told us that most of the guests at his barbecue that  
13 night were friends of his adopted son Rhian Smith or  
14 Spaz. He mentioned these guests at the barbecue as his  
15 son's friend Jeremy, his son's friend Ack, his son's  
16 friend Gotti, someone named TY. He told us that at one  
17 point during the barbecue, the young man himself  
18 included, started showing off their guns, placing them on  
19 a table at the barbecue. And he acknowledged he showed  
20 off his .357-Magnum. His adopted son Rhian Smith who is  
21 no longer with us put on the table his .38 Smith &  
22 Wesson. His son's friend Ack displayed his little .22 or  
23 .25, whatever it was it's not important.

24 MR. FUNK: Objection.

25 THE COURT: Overruled.



1 MR. FUNK: Judge, if I could, it's up to the  
2 jury to decide what is important. I would submit that is  
3 not accurate.

4 THE COURT: You're correct. This is Mr.  
5 Farrell's interpretation of the evidence and what he  
6 suggests the evidence infers. It's up to you to make  
7 your decision. I said that before. It's not a  
8 mischaracterization, consequently your objection is  
9 overruled.

10 MR. FARRELL: Most importantly, Ladies and  
11 Gentlemen, while these young men, the guests at the  
12 barbecue, are showing off their guns, the defendant  
13 Michael Albert shows off his .40-caliber black that he  
14 places on the table. Now, we saw -- we heard Martin  
15 Wall's testimony that the defendant had a .40-caliber  
16 handgun at the barbecue that he showed off that gun  
17 shortly before whatever took place on that 301 Lexington.  
18 And where do we see that corroborated later on in the  
19 case? Well, we heard testimony from the police officers,  
20 Officer Hinman and Finnerty, who responded to the scene,  
21 and about the ballistic evidence they observed, a fired  
22 .40-caliber shell casing and a fired .40-caliber bullet.

23 Where else do we see Martin Wall's testimony  
24 that the defendant had a .40-caliber handgun at the  
25 barbecue corroborating and confirmed independently? We

1 heard testimony from the firearms examiner John Clark  
2 that based on his training and experience he analyzed and  
3 examined that spent .40-caliber casing and that spent  
4 bullet and determined that the .40-caliber shell casing  
5 was fired from a .40-caliber semi-automatic handgun, and  
6 that the fired bullet was consistent with it being fired  
7 from a .40-caliber semi-automatic handgun manufactured by  
8 the High Point Corporation.

9 Now, Martin told us that after everybody showed  
10 off their guns and as the barbecue wound down, the  
11 defendant, Ack, and Jeremy went to go check on a drug  
12 house or a crack house that the defendant and the others  
13 sold drugs out of right nearby on Maryland Street.  
14 Martin indicated that he was familiar with this drug  
15 house as he had been there many times prior to  
16 April 29th, 2006. Martin testified that when the  
17 defendant and the others began to leave the barbecue  
18 that's where they said they were going to check on their  
19 drug house.

20 Ladies and Gentlemen, in the photograph, and  
21 I'll put it on the visualizer.

22 THE COURT: Referring to an exhibit number,  
23 please.

24 MR. FARRELL: Yes, your Honor, People's Exhibit  
25 No. 2.

000211

1 In the exhibit, Ladies and Gentlemen, we can  
2 see the close proximity between Maryland Street where the  
3 defendant's drug house was and 301 Lexington Avenue where  
4 Jeremy Trim was murdered. We see it's actually on the  
5 exact same block as where the defendant was murdered --

6 MR. FUNK: Objection, Judge.

7 MR. FARRELL: Strike that as to where Mr. Trim  
8 was murdered.

9 MR. FUNK: Objection. There is no testimony  
10 that the alleged drug house is in that photograph or on  
11 the same block.

12 THE COURT: I'll sustain the objection.

13 MR. FARRELL: It becomes very important, Ladies  
14 and Gentlemen, the location as to where Jeremy Trim was  
15 shot and its relation to Maryland Street where the  
16 defendant had his drug house and admitted to Investigator  
17 Mazzola to having a drug house back during that time  
18 period. It becomes very important later on when you  
19 listen to the recording.

20 Now, we will get to that recording in just a  
21 few moments, Ladies and Gentlemen, but we heard the  
22 defendant's account as to what happened. On the  
23 recording the defendant tells Sherrita that the victim  
24 says something to the effect of, This ain't your block.  
25 I can hustle wherever I want to hustle.

1 And how does the defendant respond to that?

2 No, this is our block. And with gun fire.

3 Now, Martin told us that after the defendant  
4 and the other young men left to go check on their drug  
5 house, he went to a smoke shop on Dewey Avenue to get  
6 some baggies for some weed. And he testified that when  
7 he returned to his house at 164 Lexington and pulled up  
8 in the driveway, the defendant and his son's friend Ack  
9 were coming up the driveway as well and asked for a ride  
10 to the area of St. Paul, where he took them.

11 Martin testified that at that point Ack was  
12 holding the little .22 or the .25, whatever it was, and  
13 significantly at that point Martin no longer saw the  
14 defendant in possession of that .40-caliber handgun that  
15 he had at the barbecue minutes earlier.

16 We know from the other pieces in the case what  
17 had happened while Martin was at the smoke shop and what  
18 the defendant Michael Albert did with his .40-caliber  
19 handgun after the shooting at 301 Lexington. Martin told  
20 us that he dropped the defendant and his son's friend Ack  
21 off on St. Paul. And he indicated that he then returned  
22 to his residence at 164 Lexington. And when he got back  
23 to 164 Lexington, he talked briefly with his daughter and  
24 his daughter's boyfriend. They then tried to take a ride  
25 up to the scene to see what had happened and the police

1 had the area blocked off. But it's significant to note,  
2 Ladies and Gentlemen, also because the way it fits and  
3 interlocks with the other piece in the case, that when  
4 the defendant tried to drive up to the scene, he saw  
5 someone -- he saw the defendant and his son's friend  
6 Jeremy who had been at the barbecue earlier and Jeremy  
7 asked him for a ride and told him he had to get rid of  
8 something. Martin told us that after he dropped his  
9 daughter and his daughter's boyfriend off, he then took  
10 the friend across the way to the area of Avenue D and  
11 Joseph Avenue where the defendant -- where Jeremy got out  
12 of the car, he spoke briefly with a couple of guys, a  
13 couple of dudes I think he called them, and then took a  
14 walk down the driveway where he disappeared, returned to  
15 the car and had money in his hands.

16 Where do we see that corroborated by  
17 independent pieces in the case? Again in just a moment,  
18 Ladies and Gentlemen, I'm going to play you a couple  
19 portions of the recording, the defendant's statements to  
20 Sherrita Jefferson, but he describes to Sherrita, When I  
21 bounced I handed it off to somebody else, we went  
22 opposite ways, I hopped in a van, I went to the east,  
23 went to my little brother and his baby mom's house,  
24 chilled out for a couple days and then came back to the  
25 block. The defendant tells Sherrita Jefferson exactly

1 what he did after the murder of Jeremy Trim.

2 Now, finally, what we have already talked about  
3 a little bit that is significant from Martin's testimony  
4 is that just a day or two after the defendant came over  
5 to Martin's weed spot on Emerson Street where he told  
6 Martin and Spaz about what had happened.

7 Now, where else do we see significant pieces to  
8 Martin Wall's testimony and the defendant's account as to  
9 what happened on the recording corroborated  
10 independently? If you recall, Ladies and Gentlemen,  
11 Wednesday we heard from Investigator Nick Mazzola, a  
12 Major Crimes Investigator with the Rochester Police  
13 Department. And Investigator Mazzola indicated that on  
14 May 9th, 2013, he and his partner Investigator Randy  
15 Benjamin conducted an interview of the defendant. And  
16 during this interview they asked him, you know, where do  
17 you live? Pedigree questions. Where do you live? What  
18 is your date of birth? Did you ever spend any time in  
19 the Lexington Avenue area? And the defendant denies it.

20 MR. FUNK: Objection, mischaracterization.

21 THE COURT: Overruled. It's Mr. Farrell's  
22 interpretation of the evidence.

23 MR. FARRELL: The investigators then ask the  
24 defendant who he associated with back in 2006. And we  
25 know from the independent pieces in the case who the

1 defendant associated with back in 2006. But the  
2 defendant tells Investigator Mazzola and Investigator  
3 Benjamin, I didn't really hang out with anybody, I was  
4 pretty much a loaner.

5 They then ask the defendant if he had a  
6 nickname or a street name he went by, and he denied it.  
7 They asked him if he went by the name Gotti. And he told  
8 them I never went by that nickname, and people never  
9 called him that name. As soon as the investigators  
10 brought up the homicide they were investigating and the  
11 location of the homicide they were investigating, the  
12 defendant's demeanor changed. You recall Investigator  
13 Mazzola's testimony as to how he described the  
14 defendant's demeanor when they told him they wanted to  
15 talk about a homicide that happened in the area of  
16 Lexington Avenue and Maryland Street. He said the  
17 defendant began sweating, breathing heavily, the exact  
18 type of reaction you would expect to get knowing the  
19 evidence in this case.

20 MR. FUNK: Objection.

21 THE COURT: Overruled.

22 MR. FARRELL: They asked the defendant have you  
23 ever heard anything about a homicide in that area of  
24 Lexington Avenue and Maryland Street? And the defendant  
25 denied having heard anything about a homicide in that

1 area. The defendant went so far in that interview to say  
2 I wouldn't be involved in a homicide because I had a good  
3 friend named Rhian Smith or Spaz who was murdered, so I  
4 wouldn't be involved in a homicide. Again, this  
5 corroborates that portion of Martin's testimony about how  
6 he knew the defendant, the fact that the defendant was a  
7 good friend of his son Rhian Smith or Spaz. Then the  
8 defendant claims to have just heard about the homicide on  
9 the news.

10 And as Mr. Funk pointed out to you, while the  
11 defendant didn't confess to the murder to Investigators  
12 Benjamin and Mazzola in May of 2013 as he did to Martin  
13 Wall and Sherrita Jefferson on the recording, he does  
14 make some admissions. He eventually admits to going by  
15 the street name or nickname of Gotti. And most  
16 significantly, Ladies and Gentlemen, you see a key piece  
17 of the motive or the reason behind the shooting in the  
18 defendant's interview with Investigator Mazzola. He  
19 eventually comes around and admits that he did spend time  
20 in the Lexington Avenue area back in 2006 because he  
21 operated a drug house on Maryland Street. Again, we see  
22 how it fits with the other pieces in the case, Martin  
23 Wall's testimony and the defendant's statements to  
24 Sherrita Jefferson on the recording.

25 Now, I want to talk before I get to the



1 recording just a couple things about Dr. Dignan's  
2 testimony. You recall we heard from the Medical Examiner  
3 on Wednesday afternoon, the last witness that we heard  
4 from. She talked about the cause of death. And that's  
5 significant because obviously one of the elements I have  
6 to prove is that Michael Albert caused the death of  
7 Jeremy Trim by shooting him with a gun. She talked about  
8 the cause of death, the location of the gunshot wound and  
9 the property that Jeremy Trim had on him at the time of  
10 his death.

11 Now, Dr. Dignan told us that based on her  
12 review of the case folder in this case and the autopsy  
13 that Dr. LaPoint, her predecessor, conducted in this  
14 case, that Jeremy Trim died as a result of that single  
15 gunshot wound that entered his upper back tore through  
16 his trachea, esophagus and carotid artery and exited out  
17 of the front of his neck. She testified that that  
18 injury, the most significant injury out of those would  
19 have been the injury of the carotid artery which would  
20 have caused Jeremy to bleed to death essentially within a  
21 very short period of time.

22 Again, one of the things I have to prove is not  
23 just that Michael Albert caused the death of Jeremy Trim,  
24 but he did so with the intent to cause the death. And  
25 I'll ask you, Ladies and Gentlemen, what does the

1 location of that gunshot wound say about the defendant's  
2 intent?

3 Now, I submit to you, Ladies and Gentlemen,  
4 this is basically the defendant shooting Jeremy Trim at  
5 point blank range over either disrespect, a beef over  
6 drug territory. And what does the location of that  
7 gunshot wound say about the defendant's intent? Ladies  
8 and Gentlemen, this isn't a warning shot to an arm or a  
9 leg or something like that. This was a shot with a  
10 .40-caliber handgun to Jeremy's upper back and neck area.  
11 This was a shot to the upper back with a .40-caliber  
12 handgun that was meant to kill, and in this case kill it  
13 did.

14 Now, one thing we talked about that Mr. Funk  
15 talked about in his closing remarks to you was the  
16 evidence doesn't add up; Mr. Farrell is telling you that  
17 you should listen to that recording from Sherrita  
18 Jefferson and that this was a beef over a drug territory,  
19 drug blocks, but Jeremy Trim didn't have any narcotics on  
20 him. Well, one thing that is very significant that Dr.  
21 Dignan testified to, Ladies and Gentlemen, was what  
22 Jeremy Trim did have on him. We talked about the  
23 clothing. Dr. Dignan indicated that one of the items  
24 that Jeremy had in his coat pocket was a number of clear  
25 plastic baggies that are in evidence as People's Exhibit

1 No. 26, the personal belongings of Jeremy Trim. And,  
2 Ladies and Gentlemen, within People's Exhibit No. 26 we  
3 see what was in Jeremy Trim's coat pocket; a number of  
4 clear plastic tiny Ziplock baggies. And again, Ladies  
5 and Gentlemen, I don't know if Jeremy Trim was actually  
6 selling drugs at 301 Lexington Avenue at that time.  
7 Where we get this information from is entirely from the  
8 defendant. It's from what the defendant told Martin Wall  
9 and Martin Wall relayed to us when he testified. And  
10 it's from what the defendant told Sherrita Jefferson on  
11 the recording that we heard through Sherrita's testimony.  
12 You know, for all we know Jeremy Trim could have been  
13 selling on that block at that time.

14 MR. FUNK: Objection.

15 THE COURT: Overruled.

16 MR. FARRELL: Or he could have simply been  
17 standing on that block at the wrong time and got into a  
18 verbal dispute with the defendant. Now, the defendant  
19 doesn't say anywhere on the recording that he actually  
20 saw Jeremy Trim sell the drugs. He says something to the  
21 effect of he was hustling, he was a hustler, and then he  
22 describes the argument that led up to it: This ain't  
23 your block. I can hustle where I want to hustle.

24 And we will get to that in just a moment. Now  
25 there is an tendency to look at that, Ladies and

1       Gentlemen, that motive or reason for the murder in this  
2       case and think to yourself, you know, really the  
3       defendant Michael Albert killed Jeremy Trim over where he  
4       was standing on a particular block. Really? Jeremy Trim  
5       for all we know wasn't even actually selling drugs at  
6       that time. He could have been just standing on the  
7       block. There is that tendency to say "really" over this,  
8       and you hear that phrase a senseless act of violence.

9               MR. FUNK: Objection.

10              THE COURT: Overruled.

11              MR. FARRELL: But then you listen to that  
12       recording, Ladies and Gentlemen, and on that recording  
13       you get some real raw insight as to the type of person  
14       that Michael Albert is. You listen to that recording and  
15       you get some real raw uncut insight into what the  
16       defendant Michael Albert is about. Drug blocks, drug  
17       territory, toting guns, nobody is going to disrespect my  
18       man. If somebody disrespects Ack, it's like they are  
19       disrespecting me. You get some real insight, Ladies and  
20       Gentlemen, on that recording that even the slightest sign  
21       of disrespect towards Michael Albert or anyone in Michael  
22       Albert's clique and he does exactly what he did to Jeremy  
23       Trim in this case.

24              Now, Sherrita Jefferson's testimony. Sherrita  
25       told us again similarly to Martin Wall and she didn't

1 know Jeremy Trim the victim in this case. She didn't  
2 have any ties or association to Jeremy Trim, the victim  
3 in this case. Sadly I submit to you that based on the  
4 evidence, I don't think she really cared about Jeremy  
5 Trim in this case. She didn't come forward with the  
6 information she had until some four months after the  
7 homicide.

8 On July 23rd, 2006, Sherrita told us that she  
9 was at the Kohl's Department Store in Henrietta and she  
10 got arrested for forgery, identity theft, possession of a  
11 forged instrument and brought to the Monroe County Jail.  
12 Sherrita told us that two days after that on July 25th,  
13 2006, she reached out to homicide investigators with some  
14 information she knew about her brother Ack's friend  
15 Gotti.

16 And then finally that leads us up to the night  
17 of September 17th, 2006, when Sherrita Jefferson,  
18 equipped with that covert recording device that was  
19 supplied to her by the homicide investigators concealed  
20 in her coat pocket has a half-hour long conversation with  
21 the defendant on her back porch. They talked for about a  
22 half hour that night and on that recording the defendant  
23 tells her what he did to Jeremy Trim, why he did it and  
24 what he did with the murder weapon after.

25 Ladies and Gentlemen, in just a few moments I'm

1 going to play a couple portions of the recording for you  
2 and I submit to you in contrast to what Mr. Funk  
3 submitted that this isn't vague. When you listen to that  
4 recording you know exactly what incident Michael Albert  
5 is talking about. He talks about it being on Lexington  
6 Avenue. We know that it was some time shortly prior to  
7 September 17th, 2006, when the recording was made. There  
8 is some significant details on that recording, Ladies and  
9 Gentlemen, that only someone who was present at the time  
10 and location of the murder would know, and these are  
11 evident in the recorded conversation between the  
12 defendant and Sherrita Jefferson.

13 Now, very early on in the recording, Ladies and  
14 Gentlemen, and again it's approximately 30-minutes long  
15 but I wanted to start with a clip around the two-minute  
16 mark. We hear very early on in that recording the  
17 defendant tell Sherrita that at the time they are  
18 actually having that conversation on her back porch  
19 September 17, 2006, he is armed with a handgun. Not the  
20 handgun that he used to murder Jeremy Trim, but a .380.  
21 And he tells Sherrita that he keeps his gun with him.

22 (People's Exhibit 27 was played.)

23 MR. FARRELL: Just to give you some context,  
24 folks, the night of the conversation, September 17, 2006,  
25 the defendant is armed with a .380 handgun. Telling

1 Sherrita there is too many people getting robbed out  
2 here.

3 I want to move onto about the seven-minute  
4 marker on the recording. And what we see there, Ladies  
5 and Gentlemen, or what we hear there is again keep in  
6 mind Sherrita has got this recording device concealed in  
7 her coat pocket. I submit to you that Sherrita knows  
8 that if the defendant knows what she is up to, it's not  
9 going to be pretty. And we see the defendant sensing  
10 Sherrita's nervousness about this.

11 (People's Exhibit 27 was played.)

12 MR. FARRELL: Now much more significant, Ladies  
13 and Gentlemen? It brings us around to the halfway part  
14 of the recording, around the 14-minute 30-second mark  
15 where Sherrita asked the defendant directly what happened  
16 that day. And at that point the defendant proceeds to  
17 tell her in detail what happened that day.

18 First of all, he starts off with who he was  
19 with at the time. It becomes very clear on the recording  
20 that the defendant wasn't alone when he confronted Jeremy  
21 Trim at 301 Lexington. He was accompanied by his friend  
22 Ack and his friend Jeremy. Again, corroborated by Martin  
23 Wall's testimony as to who was at the barbeque and who  
24 left the barbecue to check on the drug house on Maryland  
25 Street. The defendant tells Sherrita if someone

1       disrespects Ack, it's like they are disrespecting him.  
2       He tells her his belief or his opinion based on what he  
3       saw that the victim was hustling or selling drugs at the  
4       time. And again, we don't know that for sure. That's  
5       coming all from the defendant.

6               The defendant tells Sherrita that the victim  
7       told him that this wasn't his block and he could hustle  
8       wherever he wanted to hustle. The defendant tells  
9       Sherrita that he says that this is our block. The  
10      defendant tells Sherrita that the victim looks in  
11      Jeremy's -- his friend Jeremy's face and is like, yo, I  
12      know you. And at that point the victim says, okay, you  
13      got it, I'm going to leave. But he threatens to come  
14      back. The defendant then explains his belief that if he  
15      didn't dust or shoot Jeremy Trim, Jeremy Trim, the victim  
16      in this case, would come back at a later date and dust  
17      either the defendant, or Ack, or his friend Jeremy.

18             The defendant further explains his reason for  
19      dusting Jeremy Trim by saying he'd be damned if the  
20      victim was going to come back and get him and ain't  
21      nobody going to disrespect Ack. Sherrita then tells the  
22      defendant essentially you know you didn't have to kill  
23      the guy, though. And the defendant further explains his  
24      reasoning that if he hadn't killed the victim right then  
25      and there on Lexington Avenue, the victim may have come



1 back at him or his friends, Ack or Jeremy, at a later  
2 time.

3 The defendant then finishes up by telling  
4 Sherrita that the gun he used in the murder is out of  
5 state, and if someone got caught with it out of state,  
6 that person out of state would go down for the murder and  
7 not him. And then right before I'll break, Ladies and  
8 Gentlemen, Sherrita says essentially to the defendant,  
9 you sure sound like you're okay with what you did. And  
10 the defendant tells her it's part of being a G, or a  
11 gangster, and if you can't get away with it what is the  
12 point.

13 Now, Ladies and Gentlemen, I'll ask you to  
14 listen very carefully because at this time I'll play  
15 approximately a seven-minute clip of the recording where  
16 all that is actually laid out.

17 (People's Exhibit 27 was played.)

18 MR. FARRELL: It's part of being a G if you  
19 can't get away with it, then what is the point. The  
20 words of the defendant Michael Albert.

21 Just a couple more clips I need to play for  
22 you, Ladies and Gentlemen. We then move to the 26th  
23 minute mark. Sherrita Jefferson tells the defendant, if  
24 I were you, I would have thrown the gun in the river.  
25 And the defendant proceeds to tell her exactly what he

1 did with the gun after the shooting. He tells her that,  
2 hey, they call me Gotti for a reason, I don't do things,  
3 I have people do things for me.

4 He tells her that he passed the gun off to  
5 someone else. They went their opposite ways. The gun  
6 got wiped down with alcohol a couple of times and then it  
7 got sold out of state.

8 Why is this so significant, Ladies and  
9 Gentlemen? He passed the gun off to someone else. They  
10 went their opposite ways. It completely corroborates and  
11 confirms exactly what Martin Wall told us about the  
12 aftermath of the shooting when he picked Ack and the  
13 defendant up, drove them to the St. Paul area. And then  
14 later he picked Jeremy up, because Jeremy had to get rid  
15 of something. He took Jeremy to the Avenue D area.

16 In this clip I'm about to play, it's about  
17 two-and-a-half minutes long. Ladies and Gentlemen, we  
18 really see the peek of the defendant's cocky arrogance  
19 about this whole case here. He says that he will never  
20 get caught for the murder, and he will beat any murder  
21 charge because no weapon, no charge. He then tells  
22 Sherrita what he did after the murder, handing off the  
23 gun, hopping in a van, getting a ride to the east side  
24 and he chilled out for a few days before he came back to  
25 the block.

000227

1 (People's Exhibit 27 was played.)

2 MR. FARRELL: There is something on that clip,  
3 Ladies and Gentlemen, that I think is also significant.  
4 We didn't hear from any eyewitnesses in this case. We  
5 didn't hear from any eyewitnesses who were actually out  
6 there at 301 Lexington Avenue at the time Jeremy Trim was  
7 murdered. And on that recording you see the defendant  
8 talking about who he was with at the time. It was just  
9 our whole clique, there was nobody else out there. It  
10 was late night. Exactly what you would expect given the  
11 evidence in this case the way the independent pieces fit  
12 together. The defendant says to Sherrita there was  
13 nobody else out there. I'm not getting caught for this.  
14 It was just the guys in our clique, Ack and his friend  
15 Jeremy.

16 There is one more clip I want to play for you  
17 folks because it's significant because in that clip,  
18 which is only about 45 seconds long, Sherrita asks the  
19 defendant about the gun that he has with him at the time  
20 of the conversation, the .380. And he describes the .380  
21 saying it's little in size, but it's big in caliber. She  
22 then asked him the other one was big, referring to  
23 obviously the murder weapon. And he says that was big as  
24 a bitch. And she says what was it? And he says  
25 .40-caliber. Again, Martin Wall's testimony

1 corroborated, Firearms Examiner John Clark's testimony  
2 corroborated.

3 Do you remember with John Clark I said what  
4 does a High Point semi-automatic handgun look like  
5 typically? Black, bulkier than a typical handgun. And  
6 I'll play that clip.

7 (People's Exhibit 27 was played.)

8 MR. FARRELL: Ladies and Gentlemen, you've  
9 heard all the evidence in this case. And in just a few  
10 moments Judge Dinolfo will read you the law in this case.  
11 And I submit to you that you don't have to take Martin  
12 Wall's word to find the defendant guilty here. You don't  
13 have to take Sherrita Jefferson's word to find the  
14 defendant guilty. Based on what the defendant told  
15 Sherrita Jefferson on that recording about this murder,  
16 about why he did the murder, how he did the murder and  
17 what he did with the murder weapon after the murder, you  
18 have everything you need to find the defendant guilty  
19 beyond a reasonable doubt of Murder in the Second Degree.  
20 This case isn't about Martin Wall and Sherrita Jefferson.  
21 It's about an accountability.

22 MR. FUNK: Objection.

23 THE COURT: Overruled.

24 MR. FARRELL: No weapon, no charge. If  
25 somebody else gets bagged with the weapon out of state,

1 they are going down for it, not me.

2 Ladies and Gentlemen, based on the evidence in  
3 this case, I'm asking you to find the defendant guilty of  
4 Murder in the Second Degree and hold him accountable for  
5 what he did to Jeremy Trim.

6 MR. FUNK: Objection; holding him accountable.

7 THE COURT: Overruled. It's comment on the  
8 evidence.

9 MR. FARRELL: Based on the evidence in this  
10 case, Ladies and Gentlemen, not speculation, not  
11 guessing, I'm asking you to hold the defendant  
12 accountable for what he did to Jeremy Trim and find him  
13 guilty of Murder in the Second Degree. Thank you very  
14 much folks.

15 THE COURT: Thank you, Mr. Farrell.

16 MR. FARRELL: Thank you, your Honor.

17 (END OF EXCERPT OF CLOSING STATEMENTS)

18 (Certified to be a true and accurate transcript.)

19 Kathleen K. Arnault  
20 Kathleen K. Arnault, CSR, RPR  
21 Official Court Reporter  
22  
23  
24  
25

000230

**EXHIBIT B**

000231

1 STATE OF NEW YORK : COUNTY OF MONROE

2 COUNTY COURT

3 -----x  
4 THE PEOPLE OF THE STATE OF NEW YORK, : Indictment No.  
5 : 2013-0539  
6 -versus- : NYSID No.  
7 : 00562522Q  
8 MICHAEL A. ALBERT, :  
9 Defendant. :  
10 -----x

11 \*\*\*Excerpt of Motion\*\*\*

12 Hall of Justice  
13 Civic Center Plaza  
14 Rochester, New York 14614  
15 June 6, 2014

16 P r e s i d i n g :

17 THE HONORABLE VINCENT M. DINOLFO

18 County Court Judge

19 A p p e a r a n c e s :

20 SANDRA DOORLEY, ESQ.  
21 District Attorney, County of Monroe  
22 BY: PATRICK FARRELL, ESQ.  
23 Assistant District Attorney

24 MARK FUNK, ESQ.  
25 Attorney for Defendant

Defendant Present

R e p o r t e d B y :

KATHLEEN K. ARNAULT, CSR, RPR  
Official Court Reporter

005232

1 (EXCERPT OF TRANSCRIPT)

2 MR. FUNK: Can we approach?

3 THE COURT: Yes, you may.

4 (The following sidebar discussion took place between the Court  
5 and counsel on the record.)

6 MR. FUNK: Before the jury starts deliberating,  
7 I would just again object and move for a mistrial. At  
8 the end of the People's summation, they argued to the  
9 jury that Ms. Jefferson's testimony and the recording was  
10 by itself proof beyond a reasonable doubt. And I remind  
11 the Court that during pre-trial motions the People took  
12 the exact opposite position, that that item did not  
13 constitute proof beyond a reasonable doubt and that  
14 explained their seven-year delay in bringing this  
15 indictment. I would submit that these inconsistencies  
16 are a violation of due process, and I move for a  
17 mistrial.

18 THE COURT: Your motion is denied. You can  
19 have an exception to my ruling.

20 MR. FUNK: Thank you.

21 (The sidebar discussion ended.)

22 (END OF EXCERPT OF TRANSCRIPT)

23 (Certified to be a true and accurate transcript.)

24 Kathleen K. Arnault  
25 Kathleen K. Arnault, CSR, RPR  
Official Court Reporter

000233



## EXHIBIT C

005234

STATE OF NEW YORK

COUNTY OF MONROE

COUNTY COURT

-----X

THE PEOPLE OF THE STATE OF NEW YORK : INDMT#  
2013-0539

-vs- :

MICHAEL A. ALBERT, :

Defendant. : MOTIONS

-----X

Hall of Justice  
Rochester, New York  
October 24, 2013

B e f o r e :

HON. VINCENT M. DINOLFO

County Court Judge

A p p e a r a n c e s :

MONROE COUNTY DISTRICT ATTORNEY

47 South Fitzhugh Street

Rochester, New York 14614

By: PATRICK B. FARRELL, ESQ.

Assistant District Attorney

MARK D. FUNK, ESQ.

144 Exchange Boulevard, Suite 400

Rochester, New York 14614

Attorney for Defendant

Reported By:

ELLEN K. DeVITO, CSR, RPR

Senior Court Reporter

006235

1 MR. FARRELL: Sir, are you Michael Albert?

2 THE DEFENDANT: Yes.

3 MR. FARRELL: And are you here with your  
4 attorney, Mr. Funk?

10:16:48 5 THE DEFENDANT: Yes.

6 MR. FARRELL: Thank you, sir.

7 Good morning, your Honor.

8 THE COURT: Good morning, Mr. Farrell.

9 This matter was scheduled last week, and I was  
10:16:53 10 notified that you didn't want to come to court,  
11 Mr. Albert.

12 MR. FUNK: Judge, if I could address that. I  
13 talked to Michael about that last week. He was -- when  
14 transport came to get him, he was in the shower. And  
10:17:08 15 because he was not ready to come to court, they  
16 essentially deemed him as a refusal. It was not intended  
17 to disrespect the Court at all.

18 And I advised him the Court adjourned the case  
19 until today, directed him not to take a shower this  
10:17:26 20 morning so he'd be ready to go, and transport showed up  
21 and he's here today.

22 THE COURT: Very well.

23 All right, I have reviewed the copious motions  
24 that you have filed on behalf of Mr. Albert and the  
10:17:49 25 People's response.

People vs. Michael Albert

3

1 Obviously I need grand jury minutes.

2 MR. FARRELL: Those have been ordered, Judge.  
3 They were ordered as soon as Mr. Funk filed his motions,  
4 so I anticipate getting those to the Court within the  
10:18:01 5 next week or so.

6 THE COURT: Let's talk about Sing (sic) right  
7 off the bat.

8 MR. FUNK: Talk about what, Judge?

9 THE COURT: Your request for a Sing hearing.

10:18:14 10 MR. FUNK: Yes.

11 THE COURT: A Singer hearing.

12 MR. FUNK: Yes.

13 THE COURT: People's response, they've  
14 indicated that they had no corroborative evidence until  
10:18:25 15 April 20th of 2013. The indictment was less than two  
16 months later. That appears to me to satisfy the Singer  
17 issue.

18 Do you wish to be heard further on that?

19 MR. FUNK: I would, Judge.

10:18:42 20 I somewhat disagree with that as I think the  
21 cases are clear, and the People often cite the cases for  
22 the proposition that, particularly at the grand jury  
23 stage, you don't need a great deal of corroboration to  
24 support, for example in this case, alleged admissions by  
10:19:03 25 the defendant.

006237

1 And we'll talk about that in a minute because I  
2 haven't had access to what these admissions are. But  
3 let's assume, for example, that Mr. Albert said, "I  
4 killed this guy on Lexington Avenue in April."

10:19:19 5 THE COURT: Okay.

6 MR. FUNK: I would submit to the Court that the  
7 fact that someone got killed on Lexington Avenue in April  
8 would be sufficient corroborative evidence of that  
9 statement to secure an indictment.

10:19:35 10 I would submit that essentially the issue is  
11 that they have -- they had a confidential informant and  
12 that was their whole case and they didn't want to indict  
13 on just one witness.

14 So I would submit that this -- and this second  
10:19:54 15 witness coming forward -- and, you know, we know, Judge,  
16 that this witness in the past has denied knowing anything  
17 about this offense, and then he gets arrested earlier  
18 this year and comes forward and says, Oh, by the way, I'm  
19 an eyewitness to this thing."

10:20:09 20 So I would submit that the Court should not  
21 take that at face value and that we should have this  
22 Singer hearing to flesh out what information the  
23 government had for the last six years before this  
24 indictment and whether there was sufficient  
10:20:27 25 corroboration.

1 THE COURT: Mr. Farrell.

2 MR. FARRELL: Yes, your Honor.

3 The Court is accurate. As outlined in our  
4 motion response papers, essentially this case from 2006  
10:20:36 5 up until April of 2013 stood solely on the statements  
6 that Mr. Albert has allegedly made to a confidential  
7 informant. Without any corroboration to go forward, Mr.  
8 Funk is accurate, the People may have been able to  
9 present the case to a grand jury, but getting beyond  
10:20:53 10 grand jury certainly would have been an issue. It was  
11 certainly not proof at trial which would be satisfactory.

12 It was in April of 2013 when an additional  
13 witness came forward and we were able to provide that  
14 additional corroboration where we felt the case was ready  
10:21:09 15 to proceed to the grand jury and a trial, and that is the  
16 sole reason for the delay, your Honor.

17 THE COURT: I'll reserve on your request for a  
18 *Singer* hearing.

19 I'm prepared to order a *Huntley* and a *Wade*  
10:21:42 20 hearing.

21 I'll reserve on your request to dismiss  
22 counts --

23 MR. FUNK: I believe it's two and three, Judge.

24 THE COURT: -- two and three. And I'll give  
10:21:57 25 you an opportunity to supplement your papers by providing

1 me with some authority on point.

2 If you wish to respond, you may respond as  
3 well.

4 MR. FARRELL: Yes, your Honor.

10:22:08 5 THE COURT: And maybe that can be done by the  
6 hearing.

7 Let's look at our calendars right now.

8 MR. FUNK: Judge, regarding supplementing on  
9 the *Singer* issue or on a different issue?

10:22:20 10 THE COURT: On the dismissal issue.

11 MR. FARRELL: And, Judge, essentially that  
12 issue is that Mr. Funk had moved to dismiss counts two  
13 and three because no statute of limitations applies to  
14 the murder count.

10:22:32 15 THE COURT: Right.

16 MR. FARRELL: However, it does apply to -- Mr.  
17 Funk's argument was it would apply to the two weapons  
18 counts.

19 THE COURT: Right.

10:22:38 20 MR. FARRELL: And that's what the Court would  
21 be looking for additional law on?

22 THE COURT: Yes.

23 MR. FARRELL: Okay, thank you.

24 THE COURT: Does November 6th work for you,  
10:23:21 25 gentlemen?

1 MR. FARRELL: It does, your Honor.

2 MR. FUNK: Not for me, Judge. I have a hearing  
3 in federal court.

4 THE COURT: I have a -- November 26th?

10:24:07 5 MR. FARRELL: That works, your Honor.

6 MR. FUNK: That's fine, Judge.

7 THE COURT: I have a *Singer* hearing scheduled  
8 for the 25th that may spill into the 26th. So we'll put  
9 it down for 10:00 in the morning, but I need you both to  
10:24:34 10 be flexible and save the afternoon as well because we may  
11 have to move it to the afternoon.

12 MR. FARRELL: Yes, your Honor.

13 THE COURT: November 26th, 10 a.m.

14 MR. FARRELL: Judge, just one other matter.

10:25:10 15 As part of Mr. Funk's discovery motion he  
16 requested 911 materials. The Court signed a subpoena for  
17 the People last week for those materials. I will provide  
18 those materials to Mr. Funk.

19 As I indicated to Mr. Funk off the record, the  
10:25:22 20 911 center no longer keeps recordings after a certain  
21 period of time. We do have all the documentation from  
22 the 911 center. However, I do think that the lead  
23 investigator on this case has a copy of the recording  
24 from back in 2006. I'll certainly make a copy of that  
10:25:37 25 for Mr. Funk as well.



People vs. Michael Albert

1 THE COURT: Very well.

2 MR. FARRELL: Thank you, your Honor. People  
3 remain ready for trial.

4 MR. FUNK: Judge, there was one other issue  
10:25:42 5 that was raised in my motion papers --

6 THE COURT: You may be heard.

7 MR. FUNK: -- with regard to preclusion of  
8 statements made -- well, allegedly made to the  
9 confidential informant. I am prepared to argue that  
10:25:56 10 today if the Court wants. I think the argument will be  
11 fairly extensive, if the Court wants me to do written  
12 submissions.

13 THE COURT: Would you please do a written  
14 submission.

10:26:05 15 MR. FUNK: Sure.

16 THE COURT: I'll give you an opportunity to  
17 respond. How long do you need to put that in writing?

18 MR. FUNK: Probably a week-and-a-half.

19 THE COURT: Take two weeks.

10:26:19 20 Respond within two weeks as well.

21 MR. FARRELL: Okay.

22 THE COURT: And I'll have a decision for you,  
23 hopefully by the hearing.

24 MR. FARRELL: Thank you, your Honor.

10:26:28 25 MR. FUNK: Thank you, your Honor.

THE COURT: Thank you.

(Certified to be a true and accurate transcript.)

Ellen K. DeVito

Ellen K. DeVito, CSR, RPR

Senior Court Reporter

10:26:29

## EXHIBIT D

000244

STATE OF NEW YORK : COUNTY OF MONROE

COUNTY COURT

-----X  
: THE PEOPLE OF THE STATE OF NEW YORK, : Indictment No.  
: 2013-0539  
-versus- : NYSID No.  
: 00562522Q

MICHAEL A. ALBERT,  
Defendant.

-----X  
\*\*\*Testimony of Sherrita Jefferson\*\*\*

Hall of Justice  
Civic Center Plaza  
Rochester, New York 14614  
June 4, 2014

P r e s i d i n g :

THE HONORABLE VINCENT M. DINOLFO

County Court Judge

A p p e a r a n c e s :

SANDRA DOORLEY, ESQ.  
District Attorney, County of Monroe  
BY: PATRICK FARRELL, ESQ.  
Assistant District Attorney

MARK FUNK, ESQ.  
Attorney for Defendant

Defendant Present

R e p o r t e d B y :

KATHLEEN K. ARNAULT, CSR, RPR  
Official Court Reporter

000245

I N D E X   T O   W I T N E S S E S

For the People:      Examination By:      Page:

Sherrita Jefferson    DX - Mr. Farrell      3

"                      "                      CX - Mr. Funk      22

\*                      \*                      \*

I N D E X   T O   E X H I B I T S

For the People:                      ID      EVD

27    CD    18

For the Defendant:

E    Agreement of Sherrita Jefferson      33

\*                      \*                      \*

(EXCERPT OF TESTIMONY)

MR. FARRELL: Thank you, your Honor. The People call Sherrita Jefferson.

THE COURT DEPUTY: Raise your right hand to be sworn and face the clerk.

S H E R R I T A J E F F E R S O N ,

called herein as a witness, first being duly sworn, testified as follows:

THE COURT DEPUTY: State and spell your name for the record.

THE WITNESS: Sherrita Jefferson,  
S-h-e-r-r-i-t-a, J-e-f-f-e-r-s-o-n.

THE COURT: Ms. Jefferson, if you hear either lawyer make an objection, I ask you to become silent right away and I'll instruct you as to whether or not you need to answer the question. Okay?

THE WITNESS: Yes.

THE COURT: Keep your voice up, let it fill the whole courtroom, please.

You may ask.

MR. FARRELL: Thank you, your Honor.

DIRECT EXAMINATION BY MR. FARRELL:

Q. Good morning, Ms. Jefferson.

A. Good morning.

Q. How old are you?

1 A. 36.

2 Q. What is your date of birth?

3 A. 4/13/78.

4 Q. Ma'am, are you the same Sherrita Jefferson that has  
5 a misdemeanor conviction for Petit Larceny from 2011?

6 A. Yes.

7 Q. And are you the same Sherrita Jefferson that has a  
8 felony conviction for Criminal Possession of a Forged  
9 Instrument in the Second Degree from 2002?

10 A. Yes.

11 Q. Are you the same Sherrita Jefferson that has pending  
12 charges of Forgery in the Second Degree, Criminal Possession  
13 of a Forged Instrument in the Second Degree, Identity Theft in  
14 the First Degree and Attempted Petit Larceny from back in  
15 2006?

16 A. Yes.

17 Q. Do you anticipate receiving some benefit for  
18 providing testimony in this case, the People of the State of  
19 New York versus Michael Albert?

20 A. Yes.

21 Q. And does that anticipated benefit consist of the  
22 District Attorney's Office permitting you to plead guilty to  
23 the reduced charge of Criminal Possession of a Forged  
24 Instrument in the Third Degree with a sentence of three years  
25 probation?

000248

1 A. Yes.

2 Q. Was that agreement worked out between your attorney  
3 and the Monroe County District Attorney's Office?

4 A. Yes.

5 Q. Ms. Jefferson, do you have a brother?

6 A. Yes.

7 Q. And what is your brother's name?

8 A. Clyde Gladney.

9 Q. And does Clyde Gladney, your brother, have a  
10 nickname or a street name that he goes by?

11 A. Ack.

12 Q. And do people commonly call him Ack and refer to him  
13 as Ack?

14 A. Yes.

15 Q. I'm going to direct your attention back to the later  
16 part of April of 2006. Did you know a male who went by the  
17 nickname or street name of Gotti?

18 A. Yes.

19 Q. And how was it that you knew Gotti?

20 A. He was just a close friend to my brother.

21 Q. A close friend of your brother Ack?

22 A. Correct.

23 Q. And prior to April of 2006 about how long had you  
24 known Gotti for?

25 A. Maybe about five or six months.



1 Q. Do you see that person in the courtroom today?

2 A. Yes.

3 Q. And can you please point him out for the Court and  
4 identify some article of clothing that he is wearing?

5 A. Right there in the yellow shirt.

6 MR. FARRELL: Your Honor, I ask the record  
7 reflect Ms. Jefferson has identified the defendant  
8 Michael Albert.

9 THE COURT: Describe something else he is  
10 wearing, please.

11 THE WITNESS: Glasses.

12 THE COURT: Okay, it may.

13 Q. Now, did you know the defendant or Gotti's real name  
14 back in April of 2006?

15 A. No.

16 Q. I'm going to direct your attention to the late part  
17 of April of 2006. Did there come a time when you learned  
18 about a murder that occurred in the area of Lexington Avenue?

19 A. Yes.

20 Q. Did you know the alleged victim of that murder,  
21 Jeremy Trim?

22 A. No.

23 Q. I'm going to direct your attention, Ms. Jefferson,  
24 to several months after that incident in the area of Lexington  
25 Avenue. Now, July 23rd of 2006, can you tell the jury what

1 happened that day?

2 A. I think I was in a department store, Kohl's, and --

3 THE COURT: Keep your voice up for me, please.

4 A. I was in a department store called Kohl's, and I got  
5 charged with something, and then I was arrested.

6 Q. You were arrested on that date July 23rd, 2006?

7 A. Yes, that is correct.

8 Q. Do you recall what crimes you were charged with on  
9 July 23rd, 2006?

10 A. Forged instrument, attempted petit larceny.

11 Q. And were you brought to the Monroe County Jail as a  
12 result of those charges on July 23rd, 2006?

13 A. I was.

14 Q. Ms. Jefferson, I'm going to direct your attention to  
15 two days later, July 25th of 2006. Can you tell the jury what  
16 happened on that date?

17 A. I was incarcerated and I talked to two detectives,  
18 Randy Benjamin and I can't remember the other guy's name.

19 Q. You met with those two detectives on that date?

20 A. Correct.

21 Q. Where did you meet with the detectives on that day?

22 A. Inside the Monroe County Jail.

23 Q. And on that date did you tell the detectives what  
24 you had heard about the murder on Lexington Avenue?

25 A. Correct.

1 Q. Now, Ms. Jefferson, I'm going to direct your  
2 attention to a few months after that, now talking about  
3 September the 17th of 2006 at about 10:00 p.m. that night.  
4 Can you tell the jury where you were that night at about  
5 10:00 p.m.?

6 A. At my home on Spencer Street.

7 Q. And what was your address on Spencer Street back on  
8 September 17th, 2006?

9 A. 268.

10 Q. Did anyone come over to your apartment that night  
11 around 10:00 p.m.?

12 A. Yes.

13 Q. Who came over, Ms. Jefferson?

14 A. Gotti.

15 Q. And how did the defendant or Gotti come to be at  
16 your apartment that evening around 10:00 p.m.?

17 A. I think we called each other or something.

18 Q. And you talked on the telephone?

19 A. Yes.

20 Q. After you talked on the telephone he came over to  
21 your apartment?

22 A. Yes.

23 Q. Now, prior to when the defendant arrived at your  
24 apartment that evening, September 17th, 2006, did you conceal  
25 a recording device anywhere on your person?

1 A. Yes.

2 Q. And can you describe that recording device for the  
3 jury?

4 A. It was like a little like tape recorder.

5 Q. Where did you conceal that recording device prior to  
6 when the defendant came over?

7 A. In my coat pocket.

8 Q. And who provided you with that recording device?

9 A. The detectives.

10 Q. And were those the same detectives that you met with  
11 two days after you got arrested at the Monroe County Jail?

12 A. Yes, that's correct.

13 Q. When did the detectives provide you with that  
14 recording device?

15 A. Maybe around July 20th -- I don't know. I can't  
16 remember the exact date.

17 Q. I'll back you up a little bit. The defendant came  
18 over to your apartment on September 17th, 2006, correct?

19 A. Yes.

20 Q. When in relation to that did they actually give you  
21 the recording device?

22 A. Like a day before. Probably about September 15th.

23 Q. When they gave the recording device to you on  
24 September 15th, did they show you how to operate it?

25 A. They did.

1 Q. Now, when the defendant came over to your apartment  
2 on Spencer Street that night, did you speak with him?

3 A. Yes.

4 Q. Just prior to when the defendant arrived at your  
5 apartment, did you activate that recording device that you had  
6 in your coat pocket?

7 A. Yes.

8 Q. Where did you speak with the defendant that evening,  
9 September 17th, 2006?

10 A. In the back of my porch.

11 Q. Were you inside or outside your actual apartment at  
12 that time?

13 A. Outside.

14 Q. And can you just describe generally your back porch  
15 area back on that date?

16 A. Yes. It was like you went up some stairs and there  
17 was a little like deck-looking type of porch.

18 Q. Now, about how long did you speak with the defendant  
19 for that evening at that time?

20 A. Probably about an hour or so.

21 Q. Now, what did you do after speaking with the  
22 defendant on your back porch earlier that evening?

23 A. I went back in the house.

24 Q. What did the defendant do at that point?

25 A. He left.

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1 Q. Did there come a time later on that night when the  
2 defendant returned to your apartment on Spencer Street?

3 A. Yes.

4 Q. And what happened at that time?

5 A. We went in and talked.

6 Q. I'll show you what has been marked for  
7 identification as People's Exhibit 27. Can you take a look at  
8 that and first of all tell us if you recognize it?

9 A. I do.

10 Q. What do you recognize it to be, Ms. Jefferson?

11 A. It's the recording of the tape.

12 Q. And is that the recording that you made essentially  
13 on September 17th, 2006, at approximately 10:00 p.m. of that  
14 conversation that you had with the defendant?

15 A. Yes.

16 Q. How do you recognize that exhibit, Ms. Jefferson?

17 A. Because I've seen it before and I heard it.

18 Q. Did you make any markings on that exhibit after  
19 listening to it?

20 A. Yes.

21 Q. What markings did you make?

22 A. My initials and the date that I listened to it.

23 Q. Is that recording, People's Exhibit No. 27, a fair  
24 and accurate account of the entirety of the conversation that  
25 you had with the defendant back on September 17th, 2006, on

1 your back porch?

2 A. Yes.

3 Q. And you indicated you had listened to that recording  
4 prior to court today?

5 A. Yes.

6 Q. When did you most recently listen to that recording?

7 A. On May 30th.

8 Q. Would that be May 30th of 2014?

9 A. Correct.

10 Q. And when was the first time that you had a chance to  
11 listen to that recording after you had that conversation with  
12 the defendant on September 17th, 2006?

13 A. In June of 2013.

14 Q. And after listening to it on each of those two  
15 occasions, did you make those markings that you testified to,  
16 your initials and the date?

17 A. Yes.

18 Q. Do you recognize the voices on the recording, Ms.  
19 Jefferson?

20 A. Yes.

21 Q. Whose voice do you recognize?

22 A. Mine and Gotti's.

23 Q. Does that recording, People's Exhibit No. 27,  
24 contain a fair and accurate account of the entirety of the  
25 conversation that you and the defendant had on your back porch

1 on September 17th, 2006?

2 A. Yes.

3 Q. Approximately how long is that recording, Ms.  
4 Jefferson?

5 A. Probably about 30 minutes, 30.

6 Q. Has anything been added to that recording that  
7 didn't actually occur during that 30-minute conversation?

8 A. No.

9 Q. Was anything deleted from that recording that was  
10 said during that 30-minute conversation?

11 A. No.

12 Q. Have there been any additions, deletions, changes  
13 whatsoever to that recording from the actual conversation that  
14 you had with the defendant on September 17th, 2006?

15 A. No.

16 MR. FARRELL: Your Honor, at this time I would  
17 move to enter People's Exhibit No. 27 into evidence.

18 THE COURT: Mr. Funk?

19 MR. FUNK: May I voir dire the witness, Judge?

20 THE COURT: You may.

21 VOIR DIRE EXAMINATION BY MR. FUNK:

22 Q. Ms. Jefferson, I'm a little confused. You said that  
23 the recording that you listened to was about 30-minutes long,  
24 correct?

25 A. Correct.



1 Q. A couple minutes ago you said that the conversation  
2 you had was for about an hour.

3 A. Correct.

4 Q. But then you told us that nothing has been changed  
5 or deleted from that recording?

6 A. It hasn't.

7 Q. When you received the recording device from the  
8 detectives, that was Investigator Benjamin gave that to you?

9 A. Correct.

10 Q. And he gave you instructions on how to work it?

11 A. Correct.

12 Q. And did he give you instructions as to what you  
13 should talk to Gotti about?

14 A. Yes.

15 MR. FUNK: Can we approach, Judge?

16 THE COURT: Yes.

17 (The following sidebar discussion took place between the Court  
18 and counsel on the record.)

19 MR. FUNK: I would again object to the entry of  
20 this item into evidence now for two reasons. One is  
21 there seems to be a discrepancy between the testimony  
22 regarding the length of the conversation and the length  
23 of the recording. And second, the voir dire is again I  
24 would submit that she is acting as an agent of the police  
25 and we did not receive proper 710.30 notice regarding

1 this, and I move to preclude this evidence.

2 MR. FARRELL: Judge, the tape that we are about  
3 to hear you can clearly hear from the point in time when  
4 they first say hello to each other to the point in time  
5 when they part ways. I think she simply, you know,  
6 misspoke as to her exact account of time when she said, I  
7 don't know maybe an hour or so. She did testify several  
8 times that that contains an entirety of the conversation  
9 that was had on the back porch.

10 THE COURT: With respect to the second issue?

11 MR. FARRELL: With respect to the second issue,  
12 Judge, the People argued this on motion practice. The  
13 People's position was essentially that when there is no  
14 issue as to the voluntariness of the statement, the law  
15 does not require the People to file a 710.30 notice.  
16 This was clearly entirely out of custody, noncustodial,  
17 no police presence type of conversation that she had.  
18 And the law that I submitted as part of my motion papers  
19 was very clear that in the instance where there is no  
20 question as to voluntariness, there is no requirement  
21 that the People notice that in a 710.30.

22 MR. FUNK: Judge, I would disagree with that  
23 assessment of the law. In all the cases the People cited  
24 when we litigated this issue all dealt with drug  
25 transactions and recordings of the drug transactions

1 themselves where it was either an undercover cop or a  
2 confidential informant working with the police to record  
3 the drug transaction, not a situation like this where  
4 it's months after the alleged incident. And those cases  
5 I would submit were decided on the facts that those  
6 statements were made during the criminal transaction.  
7 That's not the situation we have here. It's months after  
8 the alleged incident, and she was wearing a wire. And  
9 instructions of the police told her what information to  
10 gather. So I would submit that issue is really a  
11 non-issue, it's distinguishable from what we have here.

12 THE COURT: I understand your arguments. Thank  
13 you.

14 (The sidebar discussion ended.)

15 THE COURT: The Court is going to deal with a  
16 brief issue of law that should not and must not concern  
17 you. Keep an open mind until you've heard all the  
18 evidence and have been instructed on the law. Don't form  
19 any opinions about the case or express any opinions about  
20 the case to each other or anyone else. Don't discuss the  
21 case among yourselves or anyone else. Don't read,  
22 research, view or listen to any media or internet  
23 accounts of the case. We will have you back out here  
24 probably within ten minutes.

25 The Court is in recess for ten minutes.

1 (The jury left the courtroom at 11:59 a.m.)

2 (The Court recessed at 11:59 a.m.)

3 (The Court reconvened at 12:16 p.m.; appearances as  
4 before noted.)

5 THE COURT: Mr. Funk, I've reconsidered your  
6 application here. The Court has already made a  
7 determination. I've given it to you in writing. It is  
8 the law of the case. I'm not going to upset that ruling  
9 at this point. Consequentially your motion is denied  
10 relying on the original written decision of the Court, or  
11 the original written decision of the Court, the  
12 supplemented decision of the Court citing People versus  
13 Boom, 98 A.D.3d 629, it's a 2nd Department case from  
14 2012; Rockefeller at 89 A.D.2d 1151, 3rd Department case  
15 from 2011; and People versus Carter at 31 A.D.3d, a 3rd  
16 Department case from 2006. You have an exception to my  
17 ruling.

18 MR. FUNK: Thank you, your Honor. I also note,  
19 Judge, I did essentially object to the foundation given  
20 the discrepancies in the testimony.

21 THE COURT: Your argument therein will go to  
22 weight and not admissibility.

23 Bring the witness back in, please.

24 (The witness entered the courtroom at 12:18 p.m.)

25 THE COURT: Ms. Jefferson, you may take your

1 place on the stand.

2 You can bring the jury out, please.

3 (The jury entered the courtroom at 12:18 p.m.)

4 THE COURT: Thank you, Ladies and Gentlemen.

5 The record should reflect the presence of Mr. Albert, Mr.  
6 Funk and Mr. Farrell and all 14 members of the jury  
7 panel.

8 Ma'am, I remind you, you are still under oath.

9 THE WITNESS: Yes.

10 THE COURT: You may continue.

11 MR. FARRELL: Your Honor, at this time I simply  
12 renew my motion to move People's Exhibit No. 27 into  
13 evidence.

14 THE COURT: Mark it received with the  
15 defendant's exceptions as noted for the record.

16 (PEOPLE'S EXHIBIT 27 WAS RECEIVED IN EVIDENCE)

17 MR. FARRELL: Your Honor, at this time I would  
18 request the Court's permission to play People's Exhibit  
19 No. 27 for the jury. We do have transcripts prepared  
20 that I'll distribute to the Court, counsel and the  
21 members of the jury.

22 THE COURT: You may do that.

23 Counsel approach, please.

24 (The following sidebar discussion took place between the Court  
25 and counsel on the record.)

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1 THE COURT: I'll give the curative now and  
2 indicate to the jury that there are partials of that tape  
3 that have been redacted, they must not speculate as to  
4 why.

5 MR. FARRELL: And it's just being submitted to  
6 the jury as an aid.

7 THE COURT: Yes.

8 MR. FUNK: I would also ask the Court to  
9 instruct the jury that if their review of the tape is  
10 different than the transcript, they go with the  
11 recording.

12 THE COURT: Yes.

13 (The sidebar discussion ended.)

14 THE COURT: Ladies and Gentlemen, with respect  
15 to the tape that you're about to hear, and the transcript  
16 that you're about to receive, the transcript hasn't been  
17 marked and that you are receiving it is not evidence. It  
18 is merely intended as a guide to assist you in following  
19 the tape. The evidence is the tape itself, and it's up  
20 to you to determine exactly what is being said by whom on  
21 the tape. That's your province and your province alone.  
22 Consequently, after you hear the tape this transcript  
23 will be recollected and this transcript will not go with  
24 you into the jury deliberation room. It's not evidence.  
25 It's merely a guide.

1 But you will also notice that there are  
2 portions of the tape that have been redacted. The  
3 redactions in the tape have been made because of legal  
4 arguments or for other reasons that should not and must  
5 not concern you. You're not to speculate as to what may  
6 or may not have occurred, what may or may not have been  
7 said in the portions of the tape that have been redacted.

8 Any other curatives requested?

9 MR. FARRELL: No, your Honor.

10 MR. FUNK: No, your Honor.

11 THE COURT: Very well.

12 (People's Exhibit 27 was played.)

13 MR. FARRELL: May I re-collect the transcripts,  
14 your Honor?

15 THE COURT: Please.

16 THE COURT DEPUTY: Pass them forward, please.

17 MR. FARRELL: Judge, I don't have any  
18 additional questions for Ms. Jefferson at this time.

19 THE COURT: Alright. Ladies and Gentlemen,  
20 what we will do then is we will break for lunch. Keep an  
21 open mind until you've heard all the evidence and been  
22 instructed on the law. Do not form any opinions about  
23 the case or express any opinions about the case to each  
24 other or anyone else. Do not discuss the case among  
25 yourselves or with anyone else. Do not read, view or

1 listen to any media or internet accounts of the case.  
2 Don't research any issues that you learned about during  
3 the course of hearing the testimony at this trial. Do  
4 not visit 301 Lexington Avenue or any other locations  
5 that you've learned about during the testimony of this  
6 trial.

7 I would like you back at the Central Jury  
8 services room at five minutes to 2. We will be down to  
9 get you right promptly at 2 o'clock to continue with the  
10 cross-examination of this witness.

11 The Court is in recess until 2 o'clock.

12 (The jury left the courtroom at 2:54 p.m.)

13 (The Court recessed at 12:54 p.m.)

14 (The Court reconvened at 2:05 p.m.; appearances as before  
15 noted.)

16 THE COURT: We are back in the matter of the  
17 People of the State of New York versus Michael Albert.  
18 Mr. Albert is back in the courtroom with Mr. Funk, Mr.  
19 Farrell is here as well. Bring Ms. Jefferson back to the  
20 witness stand, please, and then we will bring the jury  
21 in. Call Ms. Jefferson, please.

22 (The witness entered the courtroom at 2:05 p.m.)

23 THE COURT: Bring the jury out, please.

24 (The jury entered the courtroom at 2:06 p.m.)

25 THE COURT: The record should reflect that we



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1 have been joined by all 14 members of the jury panel and  
2 Ms. Jefferson is back on the stand.

3 Ms. Jefferson, I remind you, you are still  
4 under oath.

5 Mr. Funk, your witness.

6 MR. FUNK: Thank you, your Honor.

7 CROSS-EXAMINATION BY MR. FUNK:

8 Q. Ms. Jefferson, I'm going to start by taking you back  
9 to 2001. Okay?

10 A. Yes.

11 Q. Now, you told Mr. Farrell and the jury earlier that  
12 in 2002 you pled guilty to a felony of Criminal Possession of  
13 a Forged Instrument in the Second Degree, right?

14 A. Yes.

15 Q. But that was actually from incidents that happened  
16 in 2001?

17 A. Correct.

18 Q. At that time you were a student at MCC?

19 A. Correct.

20 Q. And you went to the student bookstore and you cashed  
21 forged checks; isn't that right?

22 A. Correct.

23 Q. And you did that at both the downtown Damon Campus,  
24 right?

25 A. Yes.

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1 Q. And at the Brighton campus?

2 A. Yes.

3 Q. So you actually got charged in the City and in  
4 Brighton for these different checks?

5 A. That is correct.

6 Q. And you also forged some checks at a place called  
7 Aaron's Rental Company, correct?

8 A. Yes.

9 Q. And that was from Irondequoit?

10 A. Yes.

11 Q. So you had charges pending in Brighton, the City and  
12 Irondequoit?

13 A. Yes.

14 Q. And you talked to the police and you told them that  
15 you got the checks from a guy named Vincent or V; is that  
16 right?

17 A. Correct.

18 Q. And because of that information you ended up getting  
19 probation as a sentence?

20 A. Yes.

21 Q. Now, one of the rules you had on probation was to  
22 not get arrested again, right?

23 A. Correct.

24 Q. Now, you got probation even though on a Criminal  
25 Possession of a Forged Instrument in the Second Degree you

1 could have gotten up to seven years in prison, right?

2 A. Correct.

3 Q. And you were put on probation for five years?

4 A. Yes.

5 Q. And you were told one of the rules you have to  
6 follow for the next five years is you can't get arrested  
7 again?

8 A. Yes.

9 Q. Now let's fast forward to 2006. You did get  
10 arrested again, right?

11 A. Yes.

12 Q. And you were still on probation from the 2002 plea?

13 A. Yes.

14 Q. And you got arrested for the exact same stuff that  
15 you pled guilty to in 2002?

16 A. Correct.

17 Q. And this time it was Criminal Possession of a Forged  
18 Instrument in the Second Degree, right?

19 A. Yes.

20 Q. And Forgery in the Second Degree?

21 A. Yes.

22 Q. And Identity Theft in the First Degree?

23 A. Yes.

24 Q. Because this time you had a fake ID?

25 A. Correct.

1 Q. And the forgery is that you signed a fake name to  
2 something, correct?

3 A. Correct.

4 Q. Now, the 2001 incident with MCC and Aaron's and all  
5 that, you cashed checks in the amount of about \$4,000, right?

6 A. No.

7 Q. Well, you were ordered to pay restitution in the  
8 amount of \$4,000, right?

9 A. Correct.

10 Q. So did you not take \$4,000?

11 A. I don't recall -- no. The checks were like \$200 a  
12 piece and there were four of them.

13 Q. So you cashed \$800 worth of checks about but the  
14 Judge ordered you to pay back 4,000?

15 A. Yes. He said it was restitution, I guess, or court  
16 fees. I don't know. But I didn't cash 4,000 out of the  
17 checks from what I recall. It was a very long time ago.

18 Q. So when you got arrested in 2006 for the same  
19 conduct that you were on probation for, you knew you were in a  
20 lot of trouble, right?

21 A. Yeah.

22 Q. And, in fact, because you had the same charge  
23 Criminal Possession of a Forged Instrument in the Second  
24 Degree, you were looking at again seven years in state prison  
25 for that?

1 A. Correct.

2 Q. And because you were on probation when you committed  
3 the second crime, you could actually get consecutive sentences  
4 meaning one on top of the other, right?

5 A. Yes.

6 Q. So you could have gotten a violation of probation  
7 and on the new charge up to 14 years in prison, seven plus  
8 seven, right?

9 A. I would suppose. I was never told that, but yeah.

10 Q. And right after you got arrested on the new charge  
11 and the violation of probation in July of 2006, you said you  
12 contacted the police?

13 A. Correct.

14 Q. For help?

15 A. Yes.

16 Q. And within a week of getting arrested you signed a  
17 contract with the police and the District Attorney's Office?

18 A. Yes.

19 Q. And because you signed that contract, you have never  
20 been charged, you've never pled guilty for this 2006 incident?

21 MR. FARRELL: Objection to having never been  
22 charged or pled guilty.

23 THE COURT: Sustained. You can rephrase.

24 Q. You have never been indicted by a Grand Jury for  
25 those charges, correct?

1 A. No.

2 Q. You've never pled guilty to those charges?

3 THE COURT: No, he is incorrect? Or no, you  
4 haven't been indicted by a Grand Jury? Which one was it?

5 THE WITNESS: I haven't been indicted by a  
6 Grand Jury.

7 THE COURT: Thank you.

8 MR. FUNK: Thanks for clarifying, Judge.

9 Q. And you have not pled guilty to any charges  
10 regarding the 2006 incident, right?

11 A. No.

12 THE COURT: Same clarification, no he is  
13 incorrect? Or no you haven't entered any pleas?

14 THE WITNESS: I haven't entered any pleas.

15 THE COURT: Thank you.

16 Q. After you signed this contract, and you signed the  
17 contract on July 31st, 2006, right?

18 A. Yes.

19 Q. And as soon as you signed that contract, you were  
20 let out of jail?

21 A. Yes.

22 Q. And one of the conditions of this contract, just  
23 like a condition of your probation, is that you're not to get  
24 arrested again and not to commit any new criminal acts,  
25 correct?

1 A. Correct.

2 Q. And what the contract says is that if you do get  
3 arrested again, that's breaking the contract and you can be  
4 prosecuted, right?

5 A. Right.

6 Q. To the fullest extent of the law?

7 A. Correct.

8 Q. Within a month of signing this contract you had a  
9 warrant out for you, right?

10 A. I don't think so.

11 Q. You entered the contract on July 31st, 2006, did you  
12 have a warrant out for you by the end of August, 2006, for  
13 aggravated harassment for threatening to kill your baby's  
14 father?

15 A. It wasn't -- I didn't threat to kill him. We had an  
16 argument over the phone. We both were making threats. We are  
17 married and he was making threats as much as me. I don't  
18 recall threatening to kill him. But yes, when I arrived at  
19 probation they said that he called and said that I was  
20 harassing him in a phone conversation.

21 Q. Well, did you say to him on the phone -- actually,  
22 did you leave a message for him saying, I'm going to kill you,  
23 I'm going to get my people to come over and kill you?

24 A. No, I don't recall that.

25 Q. But you had a warrant for you because of this

1 incident?

2 A. Yes. I could have filled a warrant out on him as  
3 well, but I didn't. It was an argument that we have  
4 occasionally.

5 Q. When you reported to probation, they arrested you on  
6 that warrant?

7 A. Yes.

8 Q. And that was in the middle of September of 2006?

9 A. Correct.

10 Q. And instead of taking you to the jail, they called  
11 Investigator Randy Benjamin?

12 A. Mm-hmm.

13 Q. Right?

14 A. Yes.

15 Q. And they handed you over to Investigator Benjamin?

16 A. Yes.

17 Q. The lead investigator in this case?

18 A. Yes.

19 Q. Now, no one from the DA's office said you violated  
20 the conditions of this agreement, did they?

21 A. No.

22 Q. And in 2011 you plead guilty to petit larceny,  
23 right?

24 A. Correct.

25 Q. That was for an incident at Wal-Mart?



1 A. Correct.

2 Q. You were working at Wal-Mart at the time?

3 A. Correct.

4 Q. And you stole a \$300 gift card?

5 A. I didn't.

6 Q. Well, you pled guilty to it, right?

7 A. Yes.

8 Q. But you didn't do anything wrong?

9 A. It was a card, and I didn't -- I don't know what  
10 happened to the card. At that point I was a cashier.

11 Q. Well, did you put \$300 on the card and then walk out  
12 of the store with it?

13 A. Yes.

14 Q. But you didn't steal it?

15 A. I didn't know that I had it at that time when I  
16 left, and then the circumstances I was having, yeah, I took it  
17 home. And when I realized I had it at home, yeah, it was in  
18 my possession and I used it.

19 Q. So you stole it but didn't mean to steal it?

20 A. No. I took it. I'm not saying I didn't mean to. I  
21 knew what I was doing when it was done.

22 Q. And you ended up pleading guilty to that charge?

23 A. Correct.

24 Q. And no one from the District Attorney's Office said  
25 you violated the paragraphs in here that says you can't get

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1 arrested and can't commit any new criminal conduct, right?

2 A. No. It's been eight years ago since I was dealing  
3 with the detective and everyone else. I wasn't like in touch  
4 with them on a day-to-day basis, but no I wasn't in contact  
5 with him.

6 Q. So you've had a get-out-of-jail free card for eight  
7 years?

8 MR. FARRELL: Objection, your Honor.

9 A. No.

10 THE COURT: Overruled. The answer of no will  
11 stand.

12 Q. Didn't you also get arrested in 2010 for a crime  
13 called theft of services for stealing cable service?

14 A. No.

15 Q. Now, when -- in 2001, 2006 when you cashed these  
16 forged checks, you did it to get money, right?

17 A. Correct.

18 Q. Were you using drugs?

19 A. No.

20 Q. Why did you need the money?

21 A. Because I was a single mom and my babies were 1 and  
22 2, they were 11 months apart. I was married. I had an  
23 estranged husband. He was doing what he wanted to do in  
24 different states. I wasn't seeing him. I wasn't getting  
25 help. It's no excuse for what I did back then, but I was very

1 young. So these people came to me and told me, you know, this  
2 is how you can make some money. So I was naive about it and I  
3 did it.

4 Q. Well, were you naive about it the second time?

5 A. Pretty much, yeah, because at that time like I  
6 needed help that I didn't know that I needed help with. I was  
7 going through depression and a whole bunch of other stuff.  
8 And then actually the day that it happened when I was in  
9 Kohl's it was the day before my anniversary and I found out  
10 that my husband was sleeping with someone else and he was  
11 taunting me on the phone. So I went out and was not conscious  
12 enough to make smart decisions.

13 Q. So you committed a felony because you were upset  
14 your husband was cheating on you?

15 A. In 2001 it doesn't -- it plays a part of it. It  
16 plays a big part. But I still don't use that as an excuse. I  
17 did have a mind, but I was only like 20 or 21-years old back  
18 then.

19 Q. And we get into again so you didn't learn your  
20 lesson the first time and you committed the exact same crime 6  
21 years, 5 years later?

22 A. Well, I learned my lesson. It's just that like I  
23 said my mind wasn't in the right mind frame at that time.

24 Q. What you learned was that if you give information  
25 about other people, you can get away with stuff, right?

1 MR. FARRELL: Objection, your Honor.

2 THE COURT: Overruled. It's a fair question  
3 for cross-examination.

4 A. No.

5 Q. Now, let me ask you in this contract you signed with  
6 the government, you also told them and agreed that you would  
7 give information about a Vincent Howard aka Fabulous; is that  
8 right?

9 A. I don't know about the aka, but yeah.

10 Q. Well, you don't know if he goes by that name?

11 A. No, I don't.

12 Q. But you agreed to give information about Vincent  
13 Howard?

14 A. I didn't necessarily agree. When they asked me who  
15 gave them to me, I told them who gave them to me.

16 MR. FUNK: Will you mark this.

17 (DEFENDANT'S EXHIBIT E WAS MARKED FOR IDENTIFICATION)

18 Q. Ms. Jefferson, let me show you what has been marked  
19 as Defendant's Exhibit E for identification. Take a look at  
20 that. You can hold it. Flip through it. See if you  
21 recognize that document.

22 A. I do.

23 Q. Now, is that the agreement that you entered into  
24 with the District Attorney's Office and the Rochester Police  
25 Department?

1 A. Yes.

2 Q. Now I misspoke earlier, the front of it is dated  
3 July 31st, 2006, correct?

4 A. Correct.

5 Q. When I said I misspoke earlier, you didn't actually  
6 sign it until the next day, August 1st, 2006, correct?

7 A. Correct.

8 Q. And that's your signature on the last page?

9 A. Yes.

10 Q. Now, let's get back to the first page. Isn't the  
11 heading of it, doesn't it say Agreement?

12 A. Yes. And that's for what -- you are talking about  
13 this one, right?

14 THE COURT: Keep your voice up.

15 Q. We will get to that. I'm asking you doesn't the  
16 caption say Agreement?

17 A. It says Agreement.

18 Q. Now, let me direct your attention to the second  
19 page, paragraph 2B. Do you want to read that to yourself?

20 A. Yes.

21 Q. Isn't part of that agreement that you would give the  
22 police information about the person by the name of Vincent  
23 Howard?

24 A. It says that in that paragraph, yes.

25 Q. And that paragraph is part of this agreement that

1 you signed, right?

2 A. Correct.

3 Q. Now, on the recording that we just heard, you, I  
4 think, testified that prior to today you heard it at least  
5 twice; is that right?

6 A. Yes.

7 Q. Once in June of 2013?

8 A. Yes.

9 Q. And that was in preparation for your testifying  
10 before the Monroe County Grand Jury?

11 A. Yes.

12 Q. And then you heard it last week in preparation for  
13 trial this week?

14 A. Yes.

15 Q. Now, after you entered this contract in 2006, you  
16 gave the police information about Mr. Howard, right?

17 A. In 2006?

18 Q. Yes.

19 A. I don't remember that. I remember like maybe when  
20 that happened with him like in 2001 or 2, but I don't recall  
21 it with this case.

22 Q. When you were talking during this recording, didn't  
23 you say that the thing that happened at Kohl's was because you  
24 were a guinea pig and this person gave you some checks?

25 A. Correct.

1 Q. And that that was a female?

2 A. Correct.

3 Q. It wasn't Mr. Howard?

4 A. No.

5 Q. So you agreed to give the government information  
6 about Mr. Howard even though it was a female that gave you the  
7 checks?

8 A. She was right there. She was in the store with  
9 them. They were able to dispose of them because the attention  
10 was on me. I was the guinea pig. I went first.

11 Q. During this conversation in September of 2006 and  
12 the recording we just heard, there is a lot of would you  
13 describe it as flirting?

14 A. Yes.

15 Q. And when Mr. Albert said stuff like, I want to be  
16 with you, and things like that, and you told him you had a  
17 crush on him; is that right?

18 A. Yes.

19 Q. Now, in your direct testimony you said that after  
20 that conversation he left and then came back and you talked  
21 some more; is that right?

22 A. Correct.

23 Q. When he came back did you two have sexual  
24 intercourse?

25 A. We did.

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1 Q. And did you tell him during this recorded  
2 conversation that if you want to be with me you have to talk  
3 to me, right?

4 A. I thought I told him to be honest and that you  
5 shouldn't do the things that they were doing.

6 Q. You had sex with Mr. Albert prior to the making of  
7 this recording?

8 A. No.

9 Q. Did you have sex with him after the making of this  
10 recording?

11 A. Yes.

12 Q. Was this the only time that you recorded the  
13 conversation?

14 A. Correct.

15 Q. Now, during this conversation he was talking to you  
16 about protecting you, right?

17 A. Correct.

18 Q. He talked about that he had to talk to some guys  
19 because they were making comments about how you looked in your  
20 shorts one day?

21 A. I suppose that's what -- yes.

22 Q. And he said that he would, if you were having  
23 problems with your baby's father, he would beat him up for  
24 you, right?

25 A. Yes.



1 Q. And you joked about that you wanted your baby's  
2 father killed?

3 A. Yeah. It wasn't -- I wasn't serious about it. And  
4 on the recording it says that as well. I never want anything  
5 to happen to my kids' father, but he was abusive at that time  
6 and they knew about it so.

7 Q. And you were joking about it?

8 A. Correct.

9 Q. And he told you that you were the only person that  
10 he would get off the block for, meaning not hang out with his  
11 friends, that he wanted to hang out with you?

12 A. Correct.

13 Q. Now, you were not at 301 Lexington Avenue on  
14 April 29th, 2006, correct?

15 A. Correct.

16 Q. And you have no firsthand knowledge of what happened  
17 at that location that night?

18 A. What do you mean when you say firsthand knowledge?

19 Q. You didn't see what happened that night?

20 A. No.

21 Q. Now, how long had you known Mr. Albert prior to  
22 September of 2006?

23 A. Probably about six months.

24 Q. During that time he was friends with your brother,  
25 right?

000282

1 A. Correct.

2 Q. And the two of you would see each other and you  
3 would flirt and hang out, right?

4 A. Not necessarily hang out, no.

5 Q. You would flirt with each other or at least he would  
6 flirt with you?

7 A. Yeah, once in a while.

8 Q. He made it known to you prior to September of 2006  
9 that he was interested in you romantically, correct?

10 A. Yes.

11 Q. And Mr. Albert was talking during this conversation,  
12 he was talking about a lot of things. At one point he  
13 mentioned that his friend named Free got shot and didn't even  
14 know it. Do you remember that?

15 A. In the tape a little bit, yeah.

16 Q. And he was laughing about that, wasn't he?

17 A. I can't recall.

18 MR. FUNK: If I could have a minute, Judge.

19 THE COURT: You may.

20 MR. FUNK: I have no more questions, Judge.

21 THE COURT: Do you have any redirect?

22 MR. FARRELL: No, your Honor. Thank you.

23 THE COURT: Ms. Jefferson, you may step down.

24 Thank you very much.

25 (END OF EXCERPT OF TESTIMONY)

(Certified to be a true and accurate transcript.)

Kathleen K. Arnault  
Kathleen K. Arnault, CSR, RPR  
Official Court Reporter

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000284

MONROE COUNTY COURT  
COUNTY OF MONROE, STATE OF NEW YORK

The PEOPLE of the State of NEW YORK,

vs.

**MICHAEL ALBERT,**

Defendant.

Hon. Vincent M. Dinolfo

**MEMORANDUM OF LAW**  
-Supplemental

Indictment No.: 2013-053

RECEIVED

2014 MAR 26 PM 12:33

MONROE SUPREME COURT  
STATE OF NEW YORK

The undersigned has previously filed a Motion to Reconsider on December 19, 2013 and a Memorandum of Law regarding whether an individual, Sherrita Jefferson, who was wearing a wire was acting as an agent of the police and whether the People were required to provide notice, pursuant to CPL § 710.30 of the statements made to Ms. Jefferson. This memorandum is a supplement to those previously filed documents as new information has come to the undersigned's attention.

The undersigned has recently received some un-redacted reports regarding the police investigators' interactions with Ms. Jefferson. The investigators documented in their report that after wearing the wire, Ms. Jefferson contacted the investigators. The report states, "On 9/18/06 RI (Benjamin) talked to Sherrita Jefferson and she told him that she thinks she got what we were looking for (recorded conversation)." Page 7 of the Report attached as Exhibit A.

This clearly shows that Ms. Jefferson was acting as an agent of the Rochester Police when she spoke to Defendant. This passage of the investigators' report shows that the investigators told her what information they were looking for and asked her to steer the conversation to get this information. She was therefore an agent of the police. *People v. Stroman*, 286 AD2d 974 (4<sup>TH</sup> Dept. 2001). The undersigned requests that the Court consider this additional information in

FILED

2014 AUG -1 PM 3:38

MONROE COUNTY COURT

deciding the Motion to Reconsider.

Additionally, the People have argued that they did not provide a 710.30 Notice regarding this statement because they would have had to reveal the name of the witness. As has previously been noted, this argument is laughable as they gave a 710.30 Notice regarding an identification procedure conducted with Ms. Jefferson without revealing her identity as the identifying witness.

Moreover, in two unrelated cases within the last week, the undersigned received protective orders in cases with the Monroe County District Attorney's Office. One of the protective orders states, "ORDERED, that the identities of these witnesses be kept secret from any 710.30 notice." Exhibit B.

The other protective order states:

ORDERED, that the names and addresses of the witness listed in the ex parte application not be disclosed in a CPL § 710.30 Notice. This Court specifically finds pursuant to CPL § 710.30 that good cause exists not to include the names or addresses of the identifying witnesses listed in the People's ex parte application in any CPL § 710.30 Notice. This Court permits the People to give the defense the name of the witnesses and file an amended CPL § 710.30 Notice on the day of trial or upon further order of this Court.

Exhibit C.

These Orders are significant for a few reasons. First, they show that the People have the ability to provide the required notice while still protecting the identity of the witness. Second, they show that the People have the ability to make this request of the Court and the Court is likely to grant this request. Third, these orders are significant in that they show that the courts that issued these orders did not relieve the People of their responsibility to provide notice, only that the notice did not have to specify the identifying information of the witnesses.

In this case, contrary to these two example, the People just simply failed to provide a 710.30 Notice regarding these statements. They did not request a protective order until well after the fifteen day deadline in CPL § 710.30 (Defendant was arraigned on July 18, 2013, the Fifteen (15) day deadline expired on August 2, 2013. The Protective Order was not requested until October, and not authorized until October 9, 2013—68 days after the People's notice was due). And, the People have never filed a proper, albeit late, 710.30 Notice regarding statements made to Witness 1 (who we now know is Sherrita Jefferson) in this matter.

In conclusion, the People's failure to comply with CPL § 710.30 requires preclusion in this matter. *People v. O'Doherty*, 70 NY2d 479.

Dated: March 26, 2014

  
MARK D. FUNK, ESQ.

Attorney for Defendant Michael A. Albert

TO: Hon. Vincent Dinolfo  
Judge, Monroe County Court

Patrick B. Farrell, Esq.  
Monroe County District Attorney's Office

2014 AUG -4 PM 3:34  
MONROE COUNTY CLERK

FILED

1. CERTIFICATION OF AGS INVESTIGATIVE ACTION		2. CR # 06-125287	
3. VICTIM'S NAME (LAST, FIRST, MIDDLE, FIRM NAME IF BUSINESS)	4. OFFENSE/INCIDENT ADDRESS	5. SEC	6. DCV. DATE OF INCIDENT LOW M D Y
TRIM, JEREMY	301 LEXINGTON AVE	W-46	SAT 04/29/06

PAGE  
7  
OF  
9

BLOCK NO. 7. INDICATE BLOCK LETTER OR NUMBER IN LEFT MARGIN:

"THAT'S HIM RIGHT THERE". SHE STATED THAT THIS WAS A PHOTO OF THE PERSON SHE KNOWS AS "GOTTI". RI'S LET HER KNOW THAT THE PERSON IN THAT PHOTO IS NAMED MICHAEL ALBERT.

DURING THE SEVERAL MEETINGS WITH SHERRITA JEFFERSON, SHE LET RI'S KNOW THAT "GOTTI" HAS A ROMANTIC INTEREST IN HER. SHE TOLD US THAT SHE MIGHT BE ABLE TO GET HIM TO TALK ABOUT IT. ON 9/15/06 RI'S MET WITH JEFFERSON AT THE PSB AND GAVE HER A RECORDING DEVICE WITH THE INSTRUCTIONS ON HOW TO USE IT.

ON 9/18/06 RI (BENJAMIN) TALKED TO SHERRITA JEFFERSON AND SHE TOLD HIM THAT SHE THINKS SHE GOT WHAT WE WERE LOOKING FOR (RECORDED CONVERSATION.)

ON 9/19/06 RI'S MET WITH SHERITTA JEFFERSON AT THE PSB. SHE TOLD US THAT SHE MET WITH "GOTTI" AND HE TALKED ABOUT THE MURDER. HE TOLD HER IT WAS A .40 CAL AND HE WASHED IT WITH ALCOHOL. SHE SAID THAT HE TOOK THE GUN AND SOLD IT OUT OF STATE. WHEN SHE ASKED WHY HE DID IT, HE TOLD IT WAS A DISPUTE BETWEEN THE VICTIM AND JEREMY (POSSIBLY JEREMY DUKES?) REFER TO THE TRANSCRIPT AND RECORDED CONVERSATION FOR DETAILS.

ON 10/02/06 RI'S MET WITH SHERITTA JEFFERSON AGAIN AND SHE COMPLETED A SUPPORTING DEPOSITION (W/RY. BENJAMIN.) SEE HER DEPOSITION FOR DETAILS.

ON 9/25/07 RI'S WENT TO THE MONROE COUNTY JAIL AND MET WITH ALBERT DONALD (IN FEDERAL CUSTODY AND CLAIMED TO HAVE INFORMATION ABOUT A MURDER.) DONALD GAVE HIS DOB 6/30/79, ADDRESS OF 109 NORTH LINCOLN RD. IN SUM AND SUBSTANCE DONALD TOLD US THAT "GOTTI" SHOT THE DUDE IN THE NECK ON LEXINGTON AVE. HE THINKS IT WAS AROUND 8:00 OR 9:00PM WHEN IS COUSIN CLYDE GLADNEY AND "GOTTI" TOLD HIM ABOUT THE SHOOTING. HE STATED THAT "GOTTI" USED A HIGH POINT .40 CAL PISTOL AND HE TOOK THE GUN TO "SHORTY" AFTER IT HAPPENED. DONALD TOLD US THAT "SHORTY" USED TO LIVE IN THE APARTMENT BUILDING ON LEXINGTON AVE NEAR LAKE AVE. SOME ADDITIONAL INFORMATION FROM DONALD WAS THE POLICE WERE JUST CLEARING FROM THE SCENE WHEN HE WENT TO 120 MARYLAND ST AND WAS TOLD ABOUT THE SHOOTING. HIS COUSIN CLYDE GLADNEY OFTEN RIDES AROUND ON A MO-PEL AND HE WAS RIDING IT IN THE AREA WHEN THE SHOOTING OCCURRED. RI'S ASKED DONALD WHICH "GOTTI" HE WAS TALKING ABOUT AND HE IMMEDIATELY SAID IT WAS THE DARK SKIN ONE. HE SAID THAT "GOTTI" IS MEMBER OF THE MARVELOUS GANG AND HIS GIRLFRIEND IS TANGELLA THAT LIVES ON RAVINE. HE DESCRIBED "SHORTY" AS A SHORT BLACK DUDE, ABOUT THIRTY FIVE YEARS OLD AND HE USED TO SELL WEED ON EMERSON ST. DONALD HAD NO ADDITIONAL INFORMATION AND THE INTERVIEW WAS TERMINATED. RI'S LET HIM KNOW THAT WE MAY BE BACK TO THE JAIL TO MEET WITH HIM AGAIN.

ON 1/26/08 RI'S MET WITH SONJA WALL AT THE PSB 4TH FLOOR. THIS WAS IN RESPONSE TO AN FIF THAT OFF. B. GARCIA SUBMITTED, CR #08-234077 (SEE THE FIF FOR DETAILS.) DURING A DOMESTIC DISPUTE WALL'S BOYFRIEND KERBY WILSON TOLD THE OFFICER THAT WALL KNOWS ABOUT A HOMICIDE THAT OCCURRED ABOUT A YEAR AND HALF AGO ON LEXINGTON AVE. WILSON TOLD THE OFFICER THAT HER EX-HUSBAND MARTIN WALL HAD SOMETHING TO DO WITH IT. WALL GAVE HER DOB 8/26/70, ADDRESS 33 HILLCREST ST, PHONE #944-0100. IN SUM AND SUBSTANCE SHE DENIED HAVING ANY KNOWLEDGE AS TO WHO WAS INVOLVED IN THE MURDER OF JEREMY TRIM. SHE SAID THAT TWO YEARS AGO SHE WAS LIVING AT 164 LEXINGTON AVE WITH MARTIN WALL, BUT THEY WEREN'T TOGETHER. WALL HAD NOTHING MORE TO ADD AND THE INTERVIEW WAS TERMINATED.

8. REPORTING OFFICER  
N. O'BRIEN/R. BENJAMIN

ID #  
9357030

9. SUPERVISOR APPROVING  
MLJ788

ID #

10. XC TO

G.O. 475

ROCHESTER POLICE DEPARTMENT ADDENDUM REPORT

EXHIBIT A

000-37

AT A TERM OF THE SUPREME COURT OF NEW YORK  
held in and for the County of Monroe,  
at the Hall of Justice, on the 6<sup>th</sup> day  
of MARCH, 2014 *jm*

PRESENT: HON. JOANNE M. WINSLOW  
SUPREME COURT JUSTICE

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF MONROE

2014 MAR 19 AM 9:04  
MONROE COUNTY CLERK

FILED

THE PEOPLE OF THE STATE OF NEW YORK

-VS-

ORDER  
Indict. 1238-2013

ESTEBEN MALDONADO,

Defendant.

IT APPEARING that the People, having moved for an *ex parte* Protective Order of Discovery to protect the names, addresses and identifying information of certain victims and witnesses referenced in the People's application for said order in the above case from being discoverable, and

IT FURTHER APPEARING that the People having demonstrated good cause shown in their moving papers, and,

NOW, upon the *ex parte* application of Matthew T. McGrath, Esq., Assistant District

000298

EXHIBIT B



Attorney, it is hereby:

ORDERED, that any and all identifying information

victims referenced in the Affidavit of Assistant District Attorney Matthew T. McGinnis, Esq.

may be redacted from the discoverable material by the People, and further

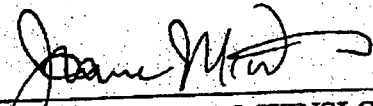
ORDERED, that the identities of these witnesses be kept secret from any 710.30 notice, and further,

ORDERED, that questions relating to the identity of the witnesses be prohibited from both parties in any pretrial hearings or proceedings,

Until such time immediately before trial as the Court determines the above items must be made available to the Defense.

Dated: March 6, 2014

ENTER

  
HON. JOANNE M. WINSLOW  
SUPREME COURT JUSTICE

2014 MAR 19 AM 9:04  
MONROE COUNTY CLERK

FILED

000299

STATE OF NEW YORK  
COUNTY COURT

COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

WILLIE MCCULLOUGH  
DONKAVIUS HOWARD

Defendants.

IND # 0295/2014

PROTECTIVE ORDER  
PURSUANT TO CPL 240.50  
and 240.90

NOTED FOR FILING  
STATE OF NEW YORK

2014 MAR 12 PM 12:08

RECEIVED

Upon reviewing an ex parte motion by the District Attorneys Office, Perry Duckles, Esq. of Counsel, representing the People in the above captioned matter, and after a review of said application this Court finds good cause exists pursuant to CPL §240.50 to issue a protective order and that not issuing the order will have an adverse effect on the legitimate needs of law enforcement and that these factors outweigh the usefulness that the discovery would be to the defendant it is thereby,

ORDERED, that the names and addresses of the witnesses who are the subject of the ex parte application before this Court be sealed until the day of trial or upon further order of this Court; and it is further;

ORDERED, that the names and addresses of the witnesses who are the subject of the ex parte application and any terms or phrases which may indicate the identity or addresses of said witnesses be redacted from discovery until the day of trial or upon further order of this Court, and it is further ;


ORDERED, that the names and addresses of the witness listed in the ex parte application

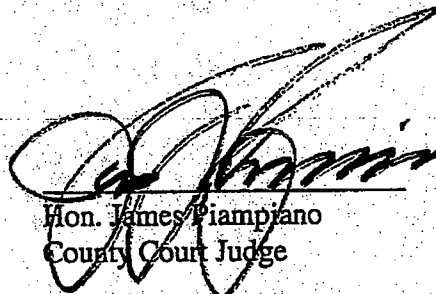
000300

EXHIBIT C

not be disclosed in a CPL §710.30 Notice. This Court specifically finds pursuant to CPL §710.30 that good cause exists not to include the name or addresses of the identifying witnesses listed in the People's ex parte application in any CPL §710.30 Notice. This Court permits the People to give the defense the name of the witnesses and file an amended CPL §710.30 Notice on the day of trial or upon further order of this Court, and it is further;

ORDERED, that the District Attorneys ex parte application in support of this order be sealed until further order of this Court.

 Dated at Rochester, New York  
March 17, 2014.

  
Hon. James Piamprano  
County Court Judge

**Additional material  
from this filing is  
available in the  
Clerk's Office.**