

23-5052

No. _____

FILED

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SUPREME COURT, U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Washington D.C.

Richard A. Stokes Jr., — PETITIONER
(Your Name)

vs.

The People of The State of New York RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of The State of New York Appellate Division Fourth Judicial Department.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard A. Stokes Jr.
(Your Name)

Madison County Public Safety Bldg. North Court Street,
(Address)

Wampsville, New York 13163
(City, State, Zip Code)

315-830-6320 cell
(Phone Number)

"Questions Presented"

- 1.) Did the County Court err in denying Petitioner Pretrial Motion to Dismiss indictment; dated April 21, 2017?
- 2.) Did the joinable offenses satisfy the statutory criteria of CPL. 200.20.
- 3.) Does the Tampering of Physical Evidence and Prosecutorial Misconduct concerning the Grand Jury proceeding render the indictment defective?
- 4.) Did Deputy Robert Marshall Material Hearsay Testimony of the (3) three empty beer cans under the passenger seat taint and poison the minds of the jurors?
- 5.) Did Deputy Robert Marshall Material Testimony of dumping the beer cans out of the box and then took a picture constitute Tampering of Physical Evidence?
- 6.) Did the District Attorney prejudice the petitioner by showing the photo of the scattered beer cans to the Grand Jury?
- 7.) Does the Motive and actions of the District Attorney establish Prosecutorial Misconduct?
- 8.) Did the County Court err in denying Petitioner 440.10 motion regards to the newly discoverable evidence?
- 9.) Did the County Court err in denying Petitioner 440.10 motion without a hearing?
- 10.) Does David Fulvio document filed in the County Clerk Office with his letterhead, email and address constitute a sworn affidavit?

11.) Did the District Attorney violate Petitioner Fourth and Fourteenth Amendment Rights?

12.) Did the County Court err in dismissing Count (7) one of the indictment rather than dismissing the indictment entirely?

13.) Was Attorney James Riotta ineffective when he did not object to the Motely Hearing and refile the Pretrial Motion to Dismiss Indictment?

14.) Did District Attorney Christopher Bohelman motive to obtain a P.O. Box in Alacodon N.Y. 14502, constitute Election Law Fraud and violation of Public Office Law(3) in order to receive a pay from \$67,756.00 to \$183,350.00?

All parties appear in the Caption of the Case on the Cover page.

"Related Cases"

People v. Pelchat, 62 N.Y.2d 97, Appellate Division of the Supreme Court, Second Judicial Department entered May 31, 1983;

People v. Gordon, 277 A.D.2d 1053, Supreme Court of New York, Appellate Division, Fourth Department;

Costello v. United States, 350 U.S. 359; Supreme Court of the United States Argued January 16-17, 1956; March 5, 1956;

People v. Glen, 173, N.Y. 395, Court of Appeals of New York January 12, 1903, Argued; February 10, 1903, Decided;

People v. Bergerson, 17 N.Y.2d 398, Court of Appeals of New York May 4, 1966 Argued; June 9, 1966, Decided;

People v. Howell, 3 N.Y.2d 672, Court of Appeals of New York October 17, 1957, Argued; February 20, 1958, Decided;

People v. Sexton, 187 N.Y. 495, Court of Appeals of New York January 29, 1907, Argued; February 26 1907, Decided.

United States v. Basulto, 497 F.2d 781, United States Court of Appeals for the Ninth Circuit; May 10, 1974.

United States v. Flaherty, 668 F.2d 566, United States Court of Appeals for the First Circuit; September 10, 1981, Argued; November 12, 1981, Decided.

United States v. Kennedy, 564 F.2d 1329, United States Court of Appeals for the Ninth Circuit; November 28, 1977.

Myers v. United States, 1978 U.S. Lexis 1290, March 27, 1978.

United States v. Estepa, 471 F.2d 1132, United States Court of Appeal For the Second Circuit December 1, 1972, Argued; December 29, 1972 Decided;

People v. Leary, 305 N.Y. 793; Court of Appeals of New York Argued April 15, 1953; May 29, 1953 decided.

People v. Evans, 58 N.Y. 2d 14, Court of Appeals of New York November 9, 1982 Argued; December 14, 1982 Decided.

People v. Di Raffaele, 55 N.Y. 2d 234, Court of Appeals of New York January 15, 1982 Argued; February 23, 1982 Decided.

People v. Thomas, 53 N.Y. 2d 338, Court of Appeals of New York May 7, 1981 Argued; July 6, 1981, decided.

People v. Lynn, 28 N.Y. 2d 196, Court of Appeals of New York January 19, 1971, Argued, April 8, 1971, Decided.

People v. Kazmarick, 52 N.Y. 2d 322, Court of Appeals of New York January 9, 1981 Argued; February 26, 1981 decided.

New York v. Clairborne, 29 N.Y. 2d 950; Court of Appeals of New York January 6, 1972, Argued; January 17, 1972 Decided;

People v. Dunbar, 53 N.Y. 2d 868; Court of Appeals of New York March 30, 1981, Argued; May 7, 1981, Decided.

People v. Foster, 19 N.Y. 2d 150, Court of Appeals of New York January 19, 1967 submitted, February 23, 1967 Decided.

Holt v. United States 218 U.S. 18, 245;

People v. Griffin, 7 N.Y. 2d 511, Court of Appeals of New York
February 24, 1960 Argued; April 1, 1960 Decided.

People v. Harper, 37 N.Y. 2d 96, Court of Appeals of New York
May 7, 1975; Argued; June 12, 1975 Decided.

People v. Koffroth, 2 N.Y. 2d 807, Court of Appeals of New York
Argued November 29, 1956; January 10, 1957 Decided.

People v. Miles, 289 N.Y. 360, Court of Appeals of New York
October 22, 1942; Argued; December 11, 1942 Decided.

People v. Lee, 58 N.Y. 2d 491, Court of Appeals of New York
February 10, 1983 Argued; March 31, 1983 Decided.

People v. Blakley, 34 N.Y. 2d 311, Court of Appeals of New York
February 20, 1974, Argued; June 12, 1974 Decided

People v. Francabandera, 33 N.Y. 2d 429, Court of Appeals of New York
February 14, 1974, Argued; March 28, 1974, Decided

Boykin v. Ala. 395 U.S. 238, Supreme Court of the United States
March 4, 1969, Argued; June 2, 1969, Decided

* People v. Peetz, 7 N.Y. 2d 147, Court of Appeals of New York
October 21, 1959, Argued; December 30, 1959 Decided.

People v. Nitzberg, 289 N.Y. 523, Court of Appeals of New York
October 16, 1942, Argued; January 21, 1943 Decided.

People v. Bryant 200 A.d. 3d 1483.

United States v. Demarco, 401 F. Supp. 505 aff. 550 F.2d 1224;

People v. Tyler 46, N.Y.2d 251;

Matter of Cunningham v. Nadjari; 39 N.Y.2d 314, 318;

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TABLE OF AUTHORITIES CITED

CASES

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(The People v. Gordon 277 A.D. 2d 1653); (People v. Pelchat 62, N.Y. 2d 97)	(2)
(People v. Bergeron 17 NY2d 398, 402); People v. Howell, 3 N.Y. 2d 672; People v. Sexton Costello v. United States, Holt v. United States, 218 U.S. 18; People vs Glen 173, N.Y. 395 United States v. Kennedy; Myers v. United States, United States v. Estepa, United States v. Basurto, People v. Leavy.);	(4)
(United States v. Demarco; People v. Tyler; Matter of Cunningham v. Nadjari People v. Evans, People v. Di Ruffaese, People v. Thomas, People v. Lynn People v. Kazmarick, People v. Claiborne, People v. Dunbar, People v. Foster People v. Griffin, People v. Harper, People v. Koffroth, People v. Miles, People v. Lee People v. Blakley, People v. Francabandera, People v. Lynn People v. Peetz, People v. Koffroth, People v. Sexton,)-	(5)
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STATUTES AND RULES (People v. Eckert, -

1) CPL. 210.30	(3)
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3) Traffic Law 1192(3)	(7)
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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the State of New York Court of Appeals court appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 6/21/23.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1.) N.Y. Crim Pro. Law 210.35(5)
- 2.) CPL Article 210,
- 3.) CPL 210.30.
- 4.) Article 190.50.
- 5.) Vehicle and Traffic Law 1192(3); (1), (f)(i)
- 6.) Traffic Law 1227(1)

The defendant retained Attorney James Riello in the amount of \$ 10,000.00 dollars in hopes that he protects defendants fourth and fourteenth amendments rights; (In the People v. Gordon, 277 A.D. 2d 1053; the alleged incident of misconduct concerning the grand jury proceedings was not preserved for appellate review because defendant failed to move to dismiss the indictment Under N.Y. Crim Proc. Law 210.35(5).)

Iderein, the People vs. Stokes the defendant Attorney filed a Motion to dismiss on April 21, 2017 pursuant to CPL Article 210 based on the grounds that the evidence before the Grand Jury was not legally sufficient to establish the offense(s) charged, or any lesser included offense and the grand Jury proceeding itself was defective" (emphasis added.) (see Appendix (B))

Therefore, the alleged incident of "Prosecutorial" "Misconduct" and "Tampering" of "physical" "evidence", concerning the Grand Jury proceeding was preserved and mandates a review by this Court in regards to the defective Indictment.

" People v. Pelchat, 62 N.Y. 2d 97 (1984)."

Appeal by permission of an Associate Judge of the Court of Appeals from an Order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 31, 1983 which affirmed a judgment of the Supreme Court (Joseph Jaspan, J.) rendered in Suffolk County, convicting defendant, upon his plea of guilty, of Criminal possession of Marijuana in the First degree.

the Court of Appeals reversed and dismissed the indictment with leave to move for permission to resubmit the case to the Grand Jury, holding in an Opinion by Judge Simons, that because the only information before the Grand Jury connecting defendant with the crime was the testimony of the Police officer and the Prosecutor knew of the officer's mistake in so testifying before defendant's plea he was obliged to resubmit the matter and correct the proceedings and his failure to do so mandates that the conviction be reversed and the indictment dismissed.

Indictments are presumed to be valid (*People v. Bergerson*, 17 NY2d 398, 402; *People v. Howell*, 3 N.Y.2d 672, 675; (*People v. Sexton*) and they are rarely open to attack on grounds of inadequacy after a conviction because such attacks lend themselves to abuses; (see *Costello v. United States*, *Holt v. United States*, 218 U.S. 18, 245, and see CPL 210.30); However, courts have exercised their inherent powers to dismiss an indictment even then, when there was a total lack of Evidence before the Grand Jury; (see *People vs. Glen*, 173 N.Y. 395, 400) When the quality of the evidence is challenged because the witness testimony was perjured; (*United States vs. Basurto* 497 F.2d 781; *United States v. Flaherty* 668 F2d 566; *United States v. Kennedy*, 564 F2d 1329 *Myers v. United States* 435 U.S. 944; or

When the indictment is founded on hearsay testimony which the Grand Jury may not have understood as such, (*United States v. Estepa*, 471 F2d 1132.); Courts have dismissed in these circumstances even though there was sufficient other reliable evidence presented, or the prosecutor acquired the knowledge of the false evidence after the indictment was handed-up, or the prosecutor made a full disclosure of the falsity after discovering it; (*United States v. Basurto*, *People v. Leary*, 305 N.Y. 793.)

Indeed, Courts have stated that Indictments may be dismissed solely because they were obtained by prosecutor for improper motives; (see e.g. *United States v. Demarco* (#19), 401 F.Supp 505 aff. 550 F.2d 1224; *People v. Tyler* 46 N.Y.2d 251; *Matter of Cunningham v. Nadjari*, 39 N.Y.2d 314, 318.) (emphasis added)...

The People contend and the Court below held that defendant waived his right to challenge the proceedings preliminary to conviction when he pleaded guilty (see *People v. Evans*, 58 N.Y.2d 14; *People v. Di Raffaele*, 55 N.Y.2d 234; *People v. Thomas*, 53 N.Y.2d 338, *People v. Lynn*, 28 N.Y.2d 196). We have held that a defendant who accepts a bargained plea to a lesser included offense may not challenge the sufficiency of the Grand Jury evidence supporting the charge in the indictment (*People v. Kazmarick*, 52 N.Y.2d 322, 326; *People v. Clairborne* ^{no} 22, 29 N.Y.2d 950.) and that is so even if there are technical defects in the proceeding, if the defects do not impair the integrity of the Grand Jury process (see *People v. Dunbar*, 53 N.Y.2d 868).

By pleading, defendant has elected a trial strategy. He has determined, for whatever reason, that he will not litigate the question of guilt. Having made that bargain he necessarily surrenders certain rights including the right to challenge the factual basis for the plea (see *People v. Foster*, 19 N.Y.2d 150, 151; *People v. Griffin*, 7 N.Y.2d 511, 515). He does not, however, forfeit all right to challenge the court's jurisdiction (*People v. Harper*, 37 N.Y.2d 96; *People v. Koffroth*, 2 N.Y.2d 807; *People v. Whites*, 289 N.Y. 360) or raise arguments of a constitutional dimension (see *People v. Lee*, 58 N.Y.2d 491 [constitutionality of statute]; *People v. Blakely*, 34 N.Y.2d 311; [speedy trial rulings]; *People v. Francabandera* 33 N.Y.2d 429 [defendants competence to stand trial]; *People v. Lynn*, 28 N.Y.2d 196, [right to be informed of right to appeal]; see, also, *Pitler*, N.Y. Crim Proc Under the CPL 9.11, pp 453-454; cf. *Boyle v. Alabama*, 395 U.S. 238).

"Falling into the same category is a challenge based upon a guilty plea to an accusatory instrument which is void because of the prosecutor's knowledge that the only evidence to support it is false (see *People v. Peetz*, 7 N.Y.2d 147; *People v. Koffroth*, *People v. Sexton*, 187 N.Y. 495, 511)" emphasis added.

The People refer to the limiting provisions of CPL 210.30. That section provides that the validity of an order denying a motion to dismiss an indictment for insufficiency is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence. It was enacted in response to (*People v. Nitzberg*, 289 N.Y. 323) and similar cases (see Bellacosa, Practice Commentary, *Mickinney's Cons Laws of NY*, Book 11A, CPL 210.30 p 93; see, also 34 NY Jur 2d, Criminal Law 2283). "In *Nitzberg*, defendant was convicted of murder [§ 454] [§ 86] after a jury trial. The judgment was reversed on appeal because of an error in the charge, not because of the insufficiency of the evidence. After the reversal defendant moved, for the first time, to inspect the Grand Jury minutes and dismiss the indictment for insufficiency because it was based solely on accomplice testimony. The trial court denied the motion but on appeal to this court, after the second trial, the judgment was reversed and the motion to dismiss granted. (emphasis added)

CPL. 210.30 changed the *Nitzberg* rule but it did not similarly restrict the authority of the court to review the validity of the evidence supporting an indictment after a plea of guilty. The statutory differentiation between the two situations is logical because the sufficiency of the evidence to convict following a trial is manifest from the record.

I bring your attention to the matter at hand; (People vs. Stokes); its well settled that on or about December 13, 2016 the defendant was arrested and charged with Felony Driving While Intoxicated in violation of New York State Vehicle and Traffic Law 1192(3); and on or about February 2, 2017 the defendant was arrested and charged inter alia, with Felony Driving While Intoxicated in violation of New York State Vehicle and Traffic Law 1192(3).

On or about February 9, 2017, the defendant received two (2) letters informing him his cases were being presented to the Wayne County Grand Jury. Subsequently, your affiant notified the District Attorney, Christopher Bokelman, that the Defendant wanted to testify before the Grand Jury regarding his case in Lyons only and that there was a video that he want to show to grand jury of the arrest that should exonerate him of the alleged charge. District Attorney Christopher Bokelman agreed to the request.

On or about February 27, 2017, both of Defendants matters were presented to the same Grand Jury at the same time, despite your affiant's request that the cases be presented one at a time. However, on this day the defendant with attorney present signed a Waiver of Immunity, and prepared to testify before the grand jury. Before entering the grand jury room District Attorney Christopher Bokelman notified the defendant that he already instruct the grand jurors of the two(2) alleged Felony Driving While Intoxicated.

Being that count (2) one of the indictment was dismissed for lack of probable Cause the District Attorney knew, had the defendant was offered the opportunity to testify just to Count (2), and was able to present the video evidence; that charge would never been on indictment # 17-21.

District Attorney Christopher Bohelman motive was to have the same jurors hear similar charges alleged against the defendant so that the indictment was almost guaranteed; hearing both cases at once created an improper influence and exposure to bias which undermined the integrity of the Grand Jury.

On February 27, 2017 a three (3) Count indictment was filed with the Court charging Mr. Stokes with two (2) Counts of felony Driving while intoxicated, in violation of New York State Vehicle and Traffic Law 1192(3) and 1193(2)(C)(i); and the Traffic violation of Consumption or Possession of Alcohol in a Motor Vehicle, in violation of New York State Vehicle and Traffic Law 1227(1).

"Grand Jury Testimony." (See Appendix C)

Monday, February 27, 2017. (Proceedings in the above-titled matter commencing at 9:13 a.m.).

(The following exhibits were marked for identification: Grand Jury Exh 2 through 4.);

Mr. Bohelman: Your schedule has it broken down as one case with Richie Stokes, Jr., and a second case here with Richie Stokes Jr.

When you deliberate and when you vote, you have to consider the first instance as one thing and the Second instance as something else. The fact that you may consider the second instance deserved to be billed, and the First instance does not, that's fine. If you want to vote "no" on both, that's fine, but you can't use the fact that he had two interactions with law enforcement to establish either one or the other. Each date and each instance needs to be voted and thought separately. You're going to hear about an instance that occurred on December 13, 2016, and second instance that occurred on

February 2nd of 2017. And I do expect that Mr. Stokes has indicated to me that he will testify today. If he chooses to do that, that's fine. If he chooses at the last minute to not do that, you can't hold that against him or make any consideration from that. A couple definitions I'll give you real quickly from the Vehicle and Traffic Law: A "motor" vehicle under 125 is: Every vehicle that is operated or driven upon a public highway which is propelled by any power, not including muscular power.

There will be exceptions there for electronically driven-assisted devices, vehicles on rails, snowmobiles, ATVs, those things are excluded. They're not motor vehicles for this and you won't hear anything about this today anyway. A "public highway" is defined in 134 as: Any highway or any road or any street or any avenue, alley, public place, public driveway or any other public way.

The charges that you are going to be considering are for December 13th, a Driving While Intoxicated. This is a Driving While Intoxicated based on an intoxicated condition. February 2nd, another charge of Driving While Intoxicated based on being in an intoxicated condition. And then also for the second day of February, consumption or possession of an alcoholic beverage in a motor vehicle, and I'll read you those at the end. (emphasis added) see page 3-5

"Robert Wansell testimony; Pg. 30-42."

On page 31, line 25; "Is it fair to say that the condition he was driving the vehicle was unsafe? A: Correct; Q: I'm going to display up here on the television a couple photographs; "Grand Juror: "Is that a Cherokee?" The witness: "A Jeep Liberty" Q: Is that a photograph of the back of the vehicle? A: Yes; Q: Is it fair and accurate? A: Yes; Q: Did you take that photograph? A: I did; Q: Tie off the rim there? A: Yes; Q: The first one was number 2. This is number 3. Fair and accurate picture? A: Yes, it is." (9)

On page 34 Line 2: Q: Did you talk to him at all about why he was driving on the, we'll call it a "Flat tire"? A: Well, yeah. He actually wanted me to change it for him. He asked me to change his tire for him. I said, "No", I'm not going to change your tire I'd be more than happy to call a tow to assist with that." He went into, "well, you have to protect and serve and change my tire;" "I'm not changing your tire." One thing led to another. Like I said, we ended up running some Field Sobriety tests.

On page 38 Line 15: Q: Prior to the vehicle being towed, did you do anything to document the interior? Did you look inside the car? A: I did; Q: I want to show you what's marked GJ number 4, do you recognize that photograph? A: Yes; Q: Is that a fair and accurate depiction of how the backseat looked? A: Yes. But those are full beers there. They were in the box at the time I located it in the backseat. Q: This box here? A: Correct. I dumped them out, photographed them as that to show there were some missing. The empty ones were under the passenger seat stuffed up underneath the seat. Grand Juror: Three are missing. Q: Is this the same brand? A: Yes; Q: So there actually are open containers, but they were under the front passenger seat? A: Correct. Q: There was three of them? A: Yes; (emphasis added.)

On page 46 Line 2: Mr. Bohelman: I want to confirm that Mr. Stokes still wants to use his rights. I'll be right back. (there was a pause in the proceeding.); Mr. Bohelman: The fact that you're not going to hear any additional witnesses cannot be considered by you for any purpose whatsoever. I know I had an Exhibit Number 7 earlier. I'll give that to the foreperson. That will be received.

(The following exhibit was received into evidence: Grand Jury EXH 1.)

Mr. Bokelman: I'll give that to the foreperson. That will be received. (The following exhibit was marked and received into evidence: Grand Jury EXH 5.)

Mr. Bokelman: I have another exhibit. This will be, I believe, 5. It's a Certificate of Conviction from Town Court here in Wayne County, State of New York, indicating that Richie A. Stokes, with date of birth 01/09/1988, was convicted off Aggravated Driving while Intoxicated, a violation of the Vehicle and Traffic Law 1192.2-a(a) on or about the 19th day of February 2014. And I'll hand that to the foreperson I'll cause you that you can only consider, which is under 1193.1-c(i).

A person is guilty of Driving while Intoxicated under that offense when, or prohibited by that: No person shall operate a motor vehicle while in an intoxicated condition. And along with 1193.1-c(i): A person who operates a vehicle in violation, in this case, with subdivisions 2, 2-a, 3, 4 or 4-a.

Here it's 2-a: After having been previously convicted of a violation of any subdivisions 2, 2-a, 3, 4 or 4-a of 1192 within the preceding ten years shall be guilty of an E felony. That's the first incident.

And you can consider that separately from the second incident of February 3, 2017, Driving while Intoxicated in violation of 1192.3 and 1193.1-c(i) and that is: No person shall operate a motor vehicle while in an intoxicated condition. And a person who does violate that, both of these are 3, Subdivision 3 of 1192: After having been previously convicted of any subdivision of 1192, either 2, 2-a, 3, 4 or 4-a within the preceding ten years shall be guilty of an E felony.

So like the other one today, the intoxicated condition of 1192.3, then there's a prior which would elevate that up.

February 2nd incident, 1227.1: The consumption or possession of alcoholic beverages in a motor vehicle. The drinking of alcoholic beverages or possession of an open container containing an alcoholic beverage in a motor vehicle located upon a public highway or a right-of-way to a public highway is prohibited.

I'm going to mark the Charging Sheet that I've just read from as Exhibit Number 6. (The following exhibit was marked and received into evidence: Grand Jury Exh 6.)

Mr. Bohelman: And that can guide your deliberation if you choose to use it that way. It's not evidence. Any questions? (There was a pause in the proceeding.)

Grand Jury Foreman: 19 to 0 on all charges. see exhibit (A)

"Statement of The Case,"

The defendant Attorney James Riotta submitted a Motion to Dismiss Indictment in regards to consolidation of the charges, and dismissal pursuant to CPL Article 210 based on the grounds that the evidence before the Grand Jury was not legally sufficient to establish the offense(s) charged, or any lesser, included offense and the grand jury proceeding itself was defective; Specifically, the Grand Jury proceeding failed to conform to the requirements of Article 190 of the CPL to such degree that the integrity thereof was impaired and prejudice to the defendant resulted. CPL 210.35(5). (Dated April 21, 2017)

The People responded to said motion to dismiss on May 11, 2017 and stated on section H. "Preclusion of Physical Evidence": "No property recovered from the defendant." (emphasis added)

On September 12, 2017 at the Hall of Justice Lyons, New York Before Hon. Daniel B. Barrett, and Appearances by Christopher Bohelman Acting District Attorney, Timothy B. Chapman Assistant District Attorney and James C. Riotta II Attorney for defendant appeared for a Huntley hearing.

"Huntley Hearing" (see Appendix D).

On page 3; The Court: In this case, the matter of People v. Bruce Stokes Jr., Mr. Stokes with attorney James Riotta, Timothy Chapman for the District Attorney's office.

I had this down for Huntley, Wade, Mapp, but I don't really see a Wade or Mapp issue.

Mr. Chapman: That's correct, as far as the People are concerned, your Honor. It's just the Wade issue -- or, the Huntley issues in this case; The Court: Okay;

Mr. Riotta: Your Honor, if I could be heard? I believe when we first requested the hearing, our request was for a defective indictment based on two different incidents that took place that were consolidated in the indictment, and we were going to be heard on that. In terms of Wade, I believe and also Huntley, we ask for preclusion. We didn't ask for Wade or Huntley, we asked for a preclusion of all unnoticed statements. (emphasis added)

The Court: Well, the last time your counsel was here appearing for you, she didn't say any of this.

Mr. Riotta: I was here the last time with you.

The Court: Okay. Well I don't recall any of that being said. (continued to page 4)

Mr. Riotta: It was in our motion papers, so I and then as far as the grand jury information?

The Court: Well, you want to argue about joinder, is that what you want to do?

Mr. Riotta: No, your Honor, we came to court-- we came to grand jury when the matter was presented to testify at Grand Jury. we made a request prior to that to the District Attorney's Office to provide testimony to court one, as to court one, but then-- and then asked for the grand jury to vote on that, and then not testify to incident two. There was two separate incidents.

The Court: I understand.

Mr. Riotta: Right, And we were denied that ability and so we were essentially asking for a defective grand jury proceeding based on that. We had a defense, we had evidence that we wanted submitted to the grand jury, but we couldn't do that.

The Court: Well, I don't recall any of this being said to me.

Mr. Riotta: Sure. We were in chambers and then we did it out here, as well.

The Court: I don't think so;

Mr. Riotta: Well, I was there. I guess I don't--; (continued to pg 5)

The Court: Well, when we first scheduled the hearing, back on June 5th, and you told me we had an agreement, it was scheduled for Wade, Huntley, Alapp. Since that time, I don't recall any change in the request.

Mr. Riotta: All right. Well, I can--

The Court: So when were you here and you told me that?

Do you recall this, Mr. Chapman?

Mr. Riotta: It was Mr. Bohelman that was here during those conversations, Judge.

The Court: Regardless, do you know anything about this?

Mr. Chapman: I do not, your Honor. My understanding is we're on for the Huntley hearing; that's what we're prepared to do today. I understand there was discussion about the grand jury issue.

(continued page 5);

My understanding is that either your honor was aware of that, or made a decision on that, or was going to make a decision on that. I don't know what to tell you.

The Court: You're asking for a hearing on that issue?

Mr. Riotto: Yes, your honor, and I believe at the time, we can go back to the transcripts and pull it up, that you said you'd hear testimony from both the People and from me. (continued to page 6)

The Court: And from who?

Mr. Riotto: From the defense and from the prosecution about what took place.

The Court: Okay. Are you not prepared to do that today, Mr. Chapman?

Mr. Chapman: I'm not, your honor. That would include Mr. Bohelman, who put the case into grand jury, that would include several other grand jury individuals. That's not my understanding of why I'm here today.

Mr. Riotto: I can tell you, we asked for preclusion on Wade. As long as the People are not going to try to identify my client, then there's no issue there.

In terms of Huntley, my motion papers specifically ask for preclusion, not for Huntley, of any unnoticed statements. That's specifically what I said. So if there's going to be no issue of any unnoticed statements, then all the statements are out, as well.

(Mr. Bohelman entered the courtroom.)

The Court: Well, here's Mr. Bohelman; Mr. Riotto, you didn't appear on July 6th.

Mr. Riotto: Okay.

The Court: Well, you just told me you appeared, you told me in chambers certain things, and you weren't here. (continued on page 7)

Mr. Riotto: I don't know if it was July 6th but it did happen. I was there when it happened.

The Court: Well, a lot of things have changed since then.

Mr. Riotta: Okay

The Court: Mr. Bohelman?

Mr. Bohelman: Sir?

The Court: Do you have a moment?

Mr. Bohelman: Yes, sir.

The Court: There's a question about what this hearing's about. Mr. Riotta was saying this is scheduled for defective grand jury proceeding hearing. I don't have that. He says you were available when that was discussed in chambers.

Mr. Bohelman: I'm unaware of that, your Honor.

The Court: Okay. Well, there is no Wade issue, essentially. Identley, you're not seeking to admit any statements other than what's put on the 710.30, right?

Mr. Chapman: Everything's been noticed except one statement, your Honor, that would come out, that was provided at grand jury, and the officer testified to, so there was unnoticed statement we'd like to include, but other than that, everything's been noticed.

(continued to page 8)

The Court: Okay. So I guess we'll have a hearing on that issue.

Mr. Bohelman: Do you need me to stay, your Honor?

The Court: Well, I don't know. Mr. Riotta's telling me things that I'm not aware of, so Mr. Chapman's not prepared to do those things, so I'm not sure where that leave us. So--

Mr. Bohelman: If you need me for a witness for any hearing, I'll be happy to come up. I'll go next door and be available if you need me, your Honor.

The Court: Thank you. I guess we'll do the Huntley, and then Mr. Riotta can be heard on the issue, and then I'll determine whether that's subject to a hearing or not, and if so, I'll schedule a hearing before the trial.

Mr. Bohelman: Thank you.

(Mr. Bohelman exited the courtroom.)

The Court: So let's go ahead with the Huntley portion of it.

Mr. Riotta: Rosario material, your Honor?

The Court: What's that?

Mr. Riotta: Can I have the Rosario material, please?

Mr. Chapman: The People are providing to defense Rosario material which includes grand jury testimony, complete for each of the four officers who were initially going to testify. (continued to page 9.)

If I could just take a moment, your Honor? If I'm not going to use all four of those, if it's just for the one statement, then I'm not going to provide all four at this time. I will provide both the event search and dispatch event information -- information that was requested, the CFS logs -- one is dated 12/17/16 and one is 2/2/17 -- providing those to defense; If I may have a minute to review the grand jury minutes? As your Honor may be aware, there's two separate instances in this indictment, one dated December 13th, 2016 and one dated February 2nd 2017. The indictment covers both of those alleged instances. The statement that the people are referring to, the unnoticed statement, is involving the first offense, the one from 12/13/2016; So in that case I would just be calling the two officers that are related to that one, Thomas D'Amato and Robert Harkins; providing copies of their grand jury testimony to defense counsel at this time; So just to clarify on the record then, there's -- any of our notice statements are fully admissible, then, being waived by defense counsel, it's just the unnoticed statement we're having a hearing on, your Honor? (continued to page 10).

Mr. Riotta: So I want to make sure that everything's clear. The people have filed a 710.30 notice with the Court, it says evidence of oral statement. This is the only notice I have. Evidence of oral statement made to a public servant, Deputy D'Amato and Harkins, Klausell and Burnett, on December 13th, 2016 -- I'm sorry. February 2nd 2017, at Galen's. That's the only noticed statement I have. That was attached to the indictment. Is that what the Court has as well?

The Court: Yes, sir.

Mr. Chapman: The People's 710.30 notice is an entire packet, that is checked on the front, but also has numerous attachments, including a 710.30 about driving, has the bill of particulars, that has other alleged statements by the defendant as to where he was coming from, where he was going to. All of that was attached to the People's 710.30 notice that was filed with the Court and provided to defense counsel.

Mr. Riotta: So --

The Court: That's true; it's attached

Mr. Riotta: So which -- so I guess I would say the notice isn't sufficient then because my notice says only statement on February 2nd. The People are now asserting there's a whole packet of information that wasn't a part of the notice? (continued pages)

The Court: I --

Mr. Chapman: That was part of the Notice.

Mr. Riotta: I see one X, and I could be wrong, but I see one X --

The Court: You have a single piece of paper in front of you.

Mr. Riotta: Right.

The Court: Mr. Chapman's saying that that was served with a packet attached to it.

Mr. Riotta: Okay. Does the Court have a packet attached to it?

The Court: I do.

Mr. Riotta: The only notice I have is just what I read.

Mr. Chapman: Well, this is my copy, I'll need it back, but I'll let you take a look at what was previously served. I did check prior to the hearing.

Mr. Riotta: Your Honor, if the People are going to assert that this 25-page attachment is notice, then I would say this is insufficient notice, this is how are my -- is the defense supposed to know which of these statements, assertions, allegations, that the People are going to put in? I have to defend against 25 pages of --

The Court: I don't know. This is the first time you've made an objection to it.

Mr. Riotta: All I knew about was this one.

The Court: Are you saying you didn't get served with that packet?

Mr. Riotta: Well, I had it as part of the discovery packet, but I'm saying as far as the notice that I was provided, that's just what I read to the Court. That's the notice.

Mr. Chapman: The People's response to pretrial order also says, see 710.30 notice and attachments thereto. So the People would argue that not only was he given a 710.30, but in the response to discovery order, that that was also noticed, and the attachments at that point.

The Court: I guess that's something I'll determine. I'll let you put the proof on, Mr. Riotta can make the argument that that's not appropriate notice, but you can go ahead and put your proof on.

Mr. Chapman: That's for all the statements, Your Honor?

The Court: Anything you want to assert that should be admissible.

(continued to page 13).

Mr. Chapman: All right.

The Court: Whether or not I allow that will be something that I'll have to determine. Whether it was appropriate notice or pursuant to 710.30. Anything else?

Mr. Chapman: No, Your Honor. That's what I wanted to clarify, to see if it was the one noticed statement and what's going to happen to all the statements that the People allege were sufficiently noticed to the defense.

Mr. Riotta: And just to clarify, there's no physical evidence coming in whatsoever; all we're talking about here now is the statements, correct?

Mr. Chapman: The People are unaware of any actual physical evidence that was obtained from the defendant. There were photographs of vehicle and contents of vehicle that were within plain sight and subject to search after the defendant was arrested,

So there are photos, but no actual property was taken into custody by the defendant. So my understanding is that that's not sufficient, that there's no property actually taken from the defendant.

The Court: Okay.

Mr. Chapman: The people are also providing a supplemental response to pretrial order to Mr. Riotta. This just includes the photos that I just mentioned. People don't have exact documentation of whether those were previously provided in discovery, so just to make sure, I'm providing them again to Mr. Riotta.

The Court: Okay. Anything else?

Mr. Chapman: Again, Your Honor, if we're going to do all of the statements, then it would cover both instances, so I would also provide the grand jury testimony from Deputy Robert Mansell and Deputy Brandon Burnett to defense counsel at this time as additional Rosario Material.

The Court: I'm sorry. Who was that, Mansell and Burnett?

Mr. Chapman: Yes, Your Honor. And other than that, the People are ready to begin, Your Honor.

The Court: All right. Anything else, Mr. Riotta?

Mr. Riotta: No, sir.

The Court: Okay. Call your first witness, please.

However, Officer Thomas D'Amato and Deputy Robert Harkins testified as to Count (1) one of the indictment which took place on December, 13, 2016 in the town of Lyons New York. After the witnesses were excused defense counsel and the District Attorney argued the issues regards to the arrest.

On page 47; The Court: Do you have any further witnesses?

Mr. Chapman: Not on this incident, Your Honor. So this is the conclusive People's evidence on the first one. I didn't know if you wanted to conclude and bring in, start the second one --

The Court: Let's take out the issues with regard to this, so what --

Mr. Chapman: Would you like me to make --

The Court: Well yeah. I mean, I just want you to direct your comments to this 710.30 with attachments, there's a particular statement on a 710 that would normally be called a 710.30 notice, regarding the three lines, and then are you saying that within the context of the other documents attached, there are certain statements that you want admitted?

Mr. Chapman: Yes, your Honor. Actually on the bill of particulars, on this one, there is not. On the other case, the bill of particulars has specific instances, as well. I'm just making sure there's nothing else in the case for the statements.

That appears to be correct. Your Honor. Other than the statements we've heard, again, there was one that was unnoticed, the people recently became aware of, but other than that --; (continued page 48)

The Court: Which statement is that? Beyond the three lines that you're saying.

Mr. Chapman: That would be the one about -- you heard Deputy Starkins testify about Mr. Stokes asking him to look the other way, or isn't there something we can work out?

The Court: Okay. So those, for lack of a better term, four statements.

Mr. Chapman: Yes, Your Honor.

The Court: All right. Do you want to be heard further on that?

Mr. Chapman: Just briefly, Your Honor. I guess going to the overall -- initially Mr. Stokes was -- the deputies were investigating a vehicle based on two separate reports, as you heard, not just their own observations. There were two distinct, one from either that night or that night before.

And then the current report, they testified that he was free to go. Initially started that way, the officers then got together, shared information, learned the vehicle was still running, noticed how it was parked, reengaged the defendant, continued to interact with him, and then at that point determined, as Mr. Riotta pointed out in his cross, that they would not have let him -- or, (continued to page 6A).

at least Deputy Harkins would not have let him get back in the vehicle at that point and determined him to be intoxicated. I know we didn't address it initially with the probable cause. Again, here the vehicle was already stopped, there really wasn't a stop per se as the People would argue, but that's not an issue. Just these statements.

The Court? All right. Mr. Riotta?

Mr. Riotta: Your Honor, First I guess we'll start with the unnoticed statements. I -- I don't believe there's good cause shown to understand why the People couldn't have put these in the notice, so I'd ask that they be precluded. I believe all the statements should be suppressed based on the testimony here today. The People have not met their burden. It is clear that in order for an investigation to have been done, the police would have had to have probable cause.

The testimony from -- of Deputy D'amato clearly states he observed no vehicle and traffic infractions. He's following a vehicle that matches a description on a 911 call. That is not sufficient basis to seize a car. Getting and stopping a person on private property, there's no testimony that this vehicle was stopped in a driveway or a street, it was -- it was a private residence, and then Officer -- Deputy D'amato seized my client. He was not free to leave while he's asking him questions about operation. That never -- never occurred. There was no testimony whatsoever that Mr. Stokes operated a vehicle in an unsafe manner that would rise to the cause to a DWI standard.

So everything transpires after that, I would argue, should be suppressed based on unlawful arrest. Deputy Harkins, who was admittedly there at the same moments, 10 minutes prior to Mr. Stokes being arrested, who sees the same things, presumably, Deputy Damato sees, says he would not arrest him.

Yet, Deputy Damato is going to arrest him simply because he wouldn't take the tests.

It's clear that there was no testimony about bloodshot, watery eyes, slurred speech, all we heard was odor of alcoholic beverage. That's not sufficient for probable cause for DWI arrest. The statements that came afterwards should be suppressed. Certainly, everything that happened before 1:45, all the statements should be suppressed. In terms of what happened after Miranda,

your Honor, I would submit that those weren't statements inasmuch as they were questions. My client adamantly, (continued pg. 71) denied all along that he was operating the vehicle, and when pressed by Deputy D'Amato, he simply was asking Deputy D'Amato questions.

Mr. Chapman: We've heard testimony to that effect. It's incorrect, The Court? Please don't interrupt.

Mr. Chapman: All right.

Mr. Buotto: I'd be asking questions for clarification. They were not statements as to his guilt or admissions; there was clarifications like he didn't understand why he was there because he wasn't operating a car, which is what he said all along.

So based on all of that, I don't believe the People have met their burden initially to say there was probable cause for the arrest, they certainly didn't meet the burden in terms of whether or not these were voluntary statements and when he was free to leave.

In fact, they called Mr. Stokes back out of his house to tell him to move a vehicle, which, if they believe he was intoxicated, why would they call him back out to move a vehicle? That makes no sense. They did no follow-up investigation to see who the owner was, and had they done that, they'd have found that the owner lived right there at 111 Beavon Street, which would explain why the car

was there; (continued to page 72)

So, your Honor, based on all that, I ask the Court suppress all the statements.

The Court: Okay. Thank you. I will reserve on that.

Mr. Chapman: May I respond to Mr. Riotta briefly, your Honor?

The Court: Sure.

Mr. Chapman: I--

Mr. Riotta: I don't think there's a response portion to--

The Court: I'll let-- I'll let you respond, too. I'll give you fair time.

Mr. Riotta: Thanks.

On page 76 line 12; Mr. Chapman: Before we get to the second one, I have one more comment on the first one, your Honor. Looking through my notes, you asked a question I wanted to respond to about what other evidence we heard on--;

Mr. Riotta: Your Honor, I believe the proof is closed on that. Let's move on.

The Court: Yeah, I understand.

Mr. Chapman: All right. All right.

The Court: All right. So-- okay. I guess I'm a little confused on the page -- the first page of the 710.30 notice, it says, you know, check the box, evidence of oral statements, Deputy Damato, Deputy Harkins, Deputy Mansell, or Deputy Burnett. And then it says December 13th, 2016 in Lyons, the sum and substance of which is. And then it goes on, February 2nd.

Mr. Riotta: Your Honor, that was my initial point when we started today.

The Court: Yeah, I understand that; I was waiting for testimony. So I guess what I'm wondering -- and then the statement -- because the statement you testified to didn't relate to the arrest by Deputy Harkins -- well, Deputy Damato and confirmed by Deputy Harkins, was the three statements, and then the other statement that he said, which is,

when I was in Geneva, you were behind me, I went left, you went right.

Mr. Chapman: If you look at the second page of that, your honor, the actual 710. Notice, that's dated 12/13/2016.

The Court: Right.

Mr. Chapman: So the notice has that on December 13th, 2016 you're asking about the statements which are there, which are referenced on the notice from 12/13.

The Court: Right. So what are the statements from February 2nd?

Mr. Chapman: From February 2nd? Again, in the packet, on the actual 710.30, that's part of the bill of particulars. It says defendant was driving to casino; (continued to page 78).

Driving from Lyons, was operating the vehicle, so there are statements listed there on the bill of particulars and 710.30 notice there that have been previously provided to the defense.

The Court: Well, are you talking about the response to motion?

Mr. Chapman: No your Honor, in the 710.30 packet itself.

The Court: There's a second 710.30; is that what you're saying?

Mr. Chapman: The bill of particulars for the second incident, it's about halfway back, the second page of that for law enforcement, at the top says 710.30 notice. That's what they issue and they check boxes for the statements that are issued to them.

Mr. Riotta: And, your honor, that was my initial objection at the beginning, your honor. This is where the confusion come in, because there's one box that's checked and I'm now forced to decide -- to determine which -- which statements we're talking about.

The Court: Are you talking about on the breathalyzer checklist, essentially, which is also checked as supporting disposition.

Mr. Chapman: No your honor, let me try to clarify. It's -- the supporting disposition and bill of particulars, yes, the second page of that. That would be -- (continued + page 79)

The Court: Okay.

Mr. Chapman: -- Part A, where it has, to Deputy Wansell at scene, defendant said he was operating the vehicle, was driving to casino from Lyons.

The Court: Are you talking about the second page, the bold type at the bottom of the page?

Mr. Chapman: No, your honor. If I may approach, I can --

The Court: Yes, please.

Mr. Chapman: It's about halfway through, it's the second page of the bill of particulars, right here where it's checked, shows the defendant -- this is what they checked.

The Court: Oh, I see. okay. So you're saying that that -- above that it says, pursuant to 710.30, and that this statement was provided to counsel at -- when --

Mr. Chapman: Yes, Your honor, this is served at the defendant by the counsel. It says defendant refused to sign, but this notice is provided to defendant at time of the arraignment.

The Court: Okay. I wanted to clarify that. Do you want to be heard on that, Mr. Riotta?

Mr. Riotta: Your Honor, I simply would renew; (continued to page 80) the initial objection, which is just that it doesn't -- I don't think comports with the 710.30 notice requirements that give some specificity of what they're talking about.

The Court: So you're not requesting a hearing per se on the statements as long as these are the statements that they're trying to admit.

Mr. Riotta: That's correct.

The Court: But arguing against admissibility of the statements.

Mr. Riotta: Correct, based on a statutory violation, your honor.

The Court: Okay. So I assume we're not taking testimony then.

Mr. Chapman: That would be my understanding, your honor. There's no stop here, the vehicle was already pulled over. There was, again, photos of property received. As long as those are admissible because the property itself wasn't taken, then the People wouldn't have any objection to not having testimony, but those factors, we all want admitted. (emphasis added)

On page 83 line 10, The Court: All right. So reserving those two issues, we've got to get back to the issue about the grand jury minutes.

Mr. Riotta: Sure.

The Court: I'm going to have to inspect those, and then specifically you're asking --

Mr. Riotta: Your Honor, so if I could just be briefly heard, and I apologize. I had my assistant pull up my calendar dates when I was here. I believe we -- it was a conversation and I -- correct me if I'm wrong, it may have been May 18th or possibly the 27th.

The Court: Yeah, I think what happened was -- but then that -- your office notified us on June 5th that there was a disposition and that hearing got canceled --

Mr. Riotta: Right.

The Court: -- and then so June 15th, your, (continued to page 84) associate came in, and then your client wanted more time to think about it, and July 6th declined to take the offer, and then it was reset and we reset the hearing --.

Mr. Riotta: Yep.

The Court: -- that we -- for some reason was determined was Huntley, Wapp, and Wade.

Mr. Riotta: Sure

The Court: But I acknowledge back on May 18th you talked to me about this, so I will do this --

Mr. Riotta: I appreciate it, sir. Thank you. I didn't want you to think I was misleading the Courts.

The Court: NO, NO, NO.

Mr. Chapman: I note grand jury minutes were provided to your Honor, we have a receipt dated 3/20/17. I don't have a decision

The Court: NO, NO, I have it. (emphasis added).

Mr. Proetto: And, your honor, if I could, just so the Court is aware of what the issue is as far as the defense is, we were given notice that this -- these two matters were going to be presented to the grand jury. We let Mr. Bohelman know that we were going to be appearing, that we were asking for evidence, our client was going to testify and also provide video evidence of the incident as it -- what relates to the first count of the indictment. (continued to page 85)

I specifically requested, by email correspondence to Mr. Bohelman, that we'd be permitted to testify as to the first count, let the grand jury hear that first count, and decide it, vote it, and then we would not testify as to counts two and three.

We -- we made that request. I feel it was a very easy request, as everybody was going to be there anyways. The point of the issue was we didn't want to have two separate matters presented to the grand jury, essentially reading the same allegations of charges on two different dates. In other words, to taint the jury pool, to prejudice them that this had happened again.

We wanted an independent, fair, and full hearing of the first count with my client -- with the ability to talk about that, and present evidence, and then reserve his right to the second and third count.

My associate at the time came with Mr. Stokes, prepared, ready to go in; Mr. Bohelman declined to do that. I believe his comment was that he would try to give a limiting instruction as to not ask questions about the second and third counts, and that he couldn't -- that the grand jury couldn't consider them;

I don't believe any kind of curative instruction, when -- would have helped the grand jury proceedings at that point. It's just -- I believe it was. (continued to page 86)

a fundamentally fair thing just to simply let my client testify, put his evidence in, and demonstrate he has an alibi and a defense to this charge, and that was denied.

The Court: So he declined to testify based upon the fact that the District Attorney was going to present them both at the same time.

Mr. Riotta: Correct, that's correct, your Honor.

Mr. Chapman: Right. And Your Honor, the People my understanding from Mr. Bohelman is that at grand jury we advised Mr. Riotta that they were going to be put in together. The letter we have dated February 13th from his office just says, defendant wishes to appear as a witness at any grand jury proceeding concerning--.

The Court: Can you slow down? You're reading and you're reading fast.

Mr. Chapman: -- concerning his felony complaints. It says nothing-- the letter from his office, I don't know about the e-mails to Mr. Bohelman, but the letter says he wants to testify about his felony complaints.

My understanding is that was what we were tracking when he showed up because I was out in the; (continues page 87) hallway when that happened, that he decided not to testify at that point because of the two, he only wanted to testify to the one. At that point we already had grand jury scheduled to put both in, and the defense doesn't get to dictate how we put it in grand jury.

Mr. Riotta: Your Honor, and I would-- I could provide a mail correspondence, but as an officer of the Court, and I believe Mr. Bohelman would acknowledge, we did-- I specifically requested if we could have the first one put in and voted. That was a specific request. I will get the e-mails.

Mr. Chapman: I'm not representing that's not the case; I just don't know that.

Mr. Riotta: Sure. And I wouldn't disagree with the People's assertion that it is their right to present it. However, it's my client's constitutional right to testify at the grand jury, and he needs a fair and full opportunity to do so as it relates to each and every count.

His defense to one certainly is not going to be the same as his defense to the second one, especially in this instance. He has an important and material right to testify.

And while it's -- it's important to recognize that the defendant need not establish a prejudice, the grand jury definitely would have been impaired, an actual prejudice test would definitely would have been here, where my client had definitive video proof that this did not happen, that he was not operating a car, and that these statements that were questions, they were not statements of conditions.

The Court: Okay. Anything else?

Mr. Chapman: Just, your honor, that the defendant was present with counsel, had the opportunity to testify, declined to do so. We offered to put in the one case. Grand jury was not going to vote on them, but he could testify to the one.

Again, Mr. Bohelman, as per Mr. Riotta, offered a curative instruction; I was willing to do that. And it's offered at trial, it's offered at grand jury, juries are instructed and curative instructions are supposed to be sufficient.

The Court: Okay.

Mr. Riotta: Your Honor, finally, I believe CPL practice commentaries 190.50 outlined the tests the Court needs to, you know, balance to determine whether it was a fair opportunity. Thank you.

The Court: Thank you. Could I talk to you -- I want to get my stuff together, get together in chambers. Can I talk to both counsel in chambers?

Mr. Riotta: Sure.

Mr. Chapman: Sure.

(Continued page 89)

The Court: All right. We're back on the record, People v. Richie Stokes. I had asked at the conclusion of the hearing to talk to Counsel in chambers, to clarify the issues, and to discuss my observations, and whether or not I needed to do or should do a written decision, and I determined after speaking to counsel that I did not.

We had some discussions about a plea to -- perhaps to count two, apparently it's not going to happen today, but I'm going to schedule a later date for the remaining charge.

So with regard to count one, the testimony taken today regarding the statements, however, as Mr. Riotta pointed out there has to be probable cause for a lawful arrest and the Court finds there was not, in fact, there was not indicia of intoxication, and that the main testimony was that the defendant was at the scene. That, in fact, he was -- his demeanor was such that deputies thought that something was going on, and that there was an odor of alcoholic beverage; however, those observations came after the defendant was free to go and was asked to come back to move his car, based upon the testimony of Deputy Harkeris. (continued page 90)

The Court finds that Deputy Harkeris actually asked him to move his car and if he thought he was intoxicated, he would not do that. In fact, he admitted he wouldn't do that. That he determined after talking to him the second time, but all he testified to was an odor of alcoholic beverage, not the visual indicia, such as bloodshot eyes, slurred speech, problems walking, coordination, et cetera.

So in any event, with regard to count one, the Court is going to dismiss that for lack of probable cause. That leaves counts two and three.

We had some discussions, Mr. Chapman, you don't think you can deal with count three today, is that it?

Mr. Chapman: With count two, your honor, that's correct. I just want to make sure that that offer is going to come from our office in light of the dismissal versus something else.

The Court: All right. So what I would do is schedule it for an appearance. What I'd like to do is try to get that into position so that I can deal with the trial on the 2nd, 3rd and 4th of October.

So are either of you available on the morning of the 21st?
Mr. Aiotta: Your Honor, I have to be in Wyoming County for a Sentencing in the morning; (continued page 90)

The Court: Okay. Are you available in the afternoon?

Mr. Aiotta: Yeah, I can drive out in the afternoon, sure.

Mr. Chapman: What day is that, Your Honor?

Mr. Aiotta: Thursday

The Court: And, Mr. Chapman, you'll let me know as soon as possible, and then we can be in contact with Mr. Aiotta and see if --

Mr. Chapman: Yes, Your Honor, I'll immediately go back and let you know if there's a problem. Otherwise we'll schedule it for that time.

The Court: And if there's a plea on the 21st, there's no preplea, so we'll have to order a presentence investigation; that will take two months thereafter. All right? Anything else? No?

Mr. Aiotta: Nothing, sir. Thank you.

The Court: Thank you. see exhibit (B)

"Legal Argument Court (2) and (3)."

Robert Mansell testimony to the evidence was not only material to the charges against defendant, it was the only evidence linking him to the DWI and Open Container. The Deputy admitted dumping the box of full beers out on the back seat to see how many were missing then took a picture. He testified to ~~3~~ three empty beer cans stuck under the passenger seat but failed to take a picture of the physical evidence to support the Open Container in a Motor vehicle.

He testified that the defendant was operating a motor vehicle on a unsafe tire but never issued a traffic infraction to said charge, standing alone, would not support the indictment (People v. Martin, 32 N.Y. 2d 123; United States v. Dike, 332 U.S. 581). That being so the indictment was fatally defective because the Grand jury had no evidence before it worthy of belief that defendant had committed a crime. Possessing the knowledge he did before the entry of the plea, the prosecutor was duty bound to obtain a superseding indictment on proper evidence or to disclose the facts and seek permission from the Court to resubmit the case (CPL. 200.80, 210.20) Just as he could not sit by and permit a trial jury to decide a criminal action on evidence known to be false he could not permit a proceeding to continue on an indictment which he knew rested solely upon false evidence; (People v. Robertson 12 N.Y. 2d 355; People v. Savvides, 1 N.Y. 2d 554; Naple v. Illinois, 360 U.S. 264.);

The evidence before the Grand Jury was insufficient to support the indictment and the motion to dismiss the same should have been granted. (People v. Ferraro, 293 N.Y. 51); Matter of Ruge v. Valentine, 280 N.Y. 268; People v. Sandgren, 302 N.Y. 331; Dow v. State, 77 Ark 464, State v. Vinso, 171 Mo. 576; Weathersby v. State, 29 Tex. Cr. Rep. 278; People v. Nitzberg, 289, N.Y. 523; The motion made on behalf of defendant to dismiss the indictment at the end of the prosecution prima facie case should have been granted; that by reason of the denial thereof and the denial of the motion to dismiss the indictment the ensuing consequences thereof prejudiced defendant so that the plea of DWI and Open Container was and is nullity. (People v. Scott 3 N.Y. 2d 148, People v. James, 4 N.Y. 2d 482; People v. Kugelman 188 Misc 135; People v. Baltusnik 165 Misc 173.); Defendant plea of guilty to DWI and Open Container is a nullity because the facts alleged in and underlying the indictment could not support such conviction. (People v. Katz, 290 N.Y. 362; People v. Osinski, 281 N.Y. 129, People v. Simone 277 App Div 887; People v. De Garmo, 73 App. Div 46, 179. N.Y. 130.

In the clearest of terms the statute states that the determination as to whether a trial jury would convict upon the evidence is specifically relegated by the legislature to the judgment of the Grand jury; (People v. Eckert, 2 N.Y. 2d 126, 129.) In order to form such a judgment, however, the evidence presented to the Grand jury taken together must be the equivalent of prima facie proof that the crime charged has been committed by the defendant. If the legal evidence does not establish the commission of the crime, it would be manifestly impossible for a Grand Jury to arrive at a judgment that a trial jury might convict.

"Prosecutorial Misconduct : Election Law Fraud,"

On June 30, 2016 Attorney David M. Fulvio addressed a letter to District Attorney Richard M. Healy, regards to Republican Concerns Regarding DA Succession stating the following: "On April 21, 2016, you appeared before the Walleden Republican Committee to ask for support of your candidacy for Wayne County Judge. Out of concern that electing you as Judge would create a vacancy of Wayne County District Attorney subject to an appointment from our Democrat governor, I asked you a number of questions regarding your succession plan. At the time, you mentioned two of your full time Assistant District Attorneys as potentially assuming the duties of D.A. Following your presumed departure next January until a D.A. is elected the following fall. When a non-attorney committee member pointed out that neither of those ADAs are Wayne County residents, you first suggested residency was not required. When I pointed out that Public Officers Law 3 indeed requires your ADAs to be Wayne County residents, you then claimed that it has "never been an issue" because no one has ever raised it before. When I pointed out that because of this, the governor may have no choice but to step in and appoint a Democrat, you then said you would have to look into it further. (see exhibit D).

On April 20, 2011, The Plaintiff (hereinafter) "Village Board" has commenced a declaratory judgment action against the Defendant Kelly M. Allen (hereinafter "Allen"), seeking a declaration that the Defendant is ineligible to remain in his current office as Mayor of the Village of Sodus, New York. The action is based on the Village Board's contention that Allen was not at the time of election in November 2008, nor is he now, a resident of the Village of Sodus, thereby rendering him ineligible to serve, pursuant to village law 300(1). The Defendant maintains that he has been a resident of the Village since November 2008.

The Defendant maintains that he resides in an apartment on the second floor of a building located within the Village at 29 West Main Street, which is owned by his wife, Tracey L. Fox Esq., who has maintained her law office at that address for some eleven(11) years. On November 1, 2008, (four days before the mayoral election), Mr. Allen entered into a written lease with Mrs. Fox, pursuant to which he rented the upstairs apartment, at a cost of \$1,000 per year. He claims that this apartment is his residence. The husband and wife own a residence located at 6300 North Road within the Town of Sodus (outside the Village limits). The couple built the house sometime in 2000 and have lived there ever since, with their two children. Mrs. Fox and the children still occupy that residence.

While the Village Law does not define the term "resident," under Election Law 1-104(22), the word means "that place where a person maintains a fixed, permanent and principal home, and to which he, whenever temporarily located, always intends to return." Numerous cases have held that it is possible for an individual to maintain more than one bona fide residence. In *People v. O'Hara*, 96 NY2d 378 (2001), the Court of Appeals held that the "crucial" factor in determining the legitimacy of a particular residence under the Election Law is that the individual must manifest an intent to live there, coupled with a physical presence, "without any aura of sham." Based on the deposition testimony of Mr. Allen and his wife, Mrs. Fox, the affidavits of two private investigators hired by the Plaintiff, the Village Board maintains that Mr. Allen

use of the apartment located at 29 West main street, Sodus, New York, does not constitute a "residence" under both statutory and case law. (see Appendix F).

Despite the warning from David Fulvio on June 30th, 2016 of the residency requirements, Acting District Attorney Christopher Bohelman committed Election Law fraud by obtaining a P.O. Box in Macedon NY. as a primary residence in order to qualify for the vacant District Attorney position. He went from making \$67,756.00 to \$183,350.00 the year of 01/01/2016 - 12-31-2017. (emphasis added; see Appendix G.)

Being that Assistant District Attorney Tracey Fox husband was disqualified for being the village Mayor, and was fully aware of David Fulvio claims; as being a servant of the courts Mr. Fox allowed District Attorney Christopher Bohelman to scam the Wayne County tax payers out of \$124,000.00 dollars which questions the integrity of every District Attorney in Wayne County.

Moreover, the Petitioner challenged Assistant District Attorney Scott J. Kadien and Matthew M. Tantillo residency requirements and Judge Richards heavily denied the petition; shortly after the two (2) ADAs resigned. (emphasis added; see Appendix G.)

On February 27, 2017 the defendant received a letter from District Attorney Christopher Bohelman addressing the court: The above-named defendant was indicted by the Wayne County Grand Jury for the following: D.W.I (2 counts), Open container. Among the Assistant District Attorney was Michael D. Calarco who continued to hire "thugs"; that violates defendants Constitutional rights, and residency requirements. (emphasis added). (see Appendix H)

On April 26, 2017 Judge Kathy Wachtman, while presiding over People v. Tysean Harris, denied defense counsel's request to adjourn the defendant's preliminary hearing on drug and traffic charges, notwithstanding that defense counsel had an actual engagement in another court; conducted the preliminary hearing in the absence of counsel. Assistant District Attorney Timothy Chapman objected to the adjournment on the basis that

the prosecution's witnesses had been subpoenaed for the hearing and the defendant's transportation had been arranged from the jail.

On May 30, 2017, Wayne County Acting District Attorney Christopher Bohelman sent a letter to the Huron Town Court, offering a plea of guilty to a reduced charge, Criminal Possession of a Controlled Substance in the 7th Degree, on condition of time served in full satisfaction of all pending Penal Law and VTL charges.

On June 17, 2017, Mr. Harris pled guilty to the reduced charge of Criminal Possession of a Controlled Substance 7th Degree, a class A misdemeanor, in violation of Penal Law Section 220.03, in satisfaction of all Penal Law and VTL charges. Respondent sentenced Mr. Harris to time served i.e. 50 days and \$205 surcharge. (see Appendix F).

It's very disturbing that Attorney James Riotta did not file a motion to dismiss on behalf of the defendant 14th amendment rights violation. Being that he was incarcerated for 50 days the defendant pled guilty in fear of longer incarceration. The tactics that the two (2) District Attorneys are using happened on February 27, 2017 in The People vs. Stokes grand jury proceeding, and now here against Mr. Harris 2 months apart. (emphasis added)

On August 29, 2020 the petitioner was arrested and charged with DWI, A66 Unlicensed 2nd degree and numerous other traffic infractions. Officer Thomas P'amoto who has a personal vendetta against petitioner due to the December 13th, 2016 arrest where the charge was dismissed. The petitioner hired James Riotta to represent defendant in the matter which later fired him due to the mention conduct. Filed a motion to dismiss pro se and the judge granted it in favor of the defendant. (see Appendix J)

On January 27, 2021 the petitioner received a letter stating Please take notice that a grand jury on January 29, 2021 at 9:00 am; The Defendant was indicted by the Wayne County Grand Jury on January 29, 2021 on three charges 2 counts of

People v. Rodriguez, 94 A.D.2d 805

"In considering the evidence, apply the same good judgment that you would apply in your own business or social relationship in your daily lives. If you do this and you believe the defendant guilty to a moral certainty, then you have been satisfied beyond a reasonable doubt and it is your duty to convict. Now, do not get the impression from what I have said that the People are required to prove the defendant guilty to a mathematical certainty. Society, indeed, would be in a dangerous situation if the people were required to establish the guilt of a defendant beyond a reasonable doubt. In Courts of law where cases rest upon human memory and human recollection and testimony, you cannot establish the defendant's guilt to a mathematical certainty or beyond all possible or conceivable doubt. And the people are not required to do so. They are, however, required to prove guilt beyond a reasonable doubt." emphasis added.

Clearly, the propriety of this part of the Charge was open to challenge, and counsel's failure to object to the same was inexplicable. While the standard for determining effectiveness of counsel cannot precisely defined, "It is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense. People v. Bennett 29 NY2d 462 and who is familiar with, and able to employ at trial basic principles of criminal law and procedure.

The defendant wishes and pray that Indictment # 17-21 be dismissed with prejudice, and the petition for a writ of Certiorari should be granted.

Respectfully submitted,

Myron A. Spivey Jr.

cc: Wayne County District Attorney.

(A)