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**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

D53433

G/hu

___AD3d___

Argued – March 27, 2017

JOHN M. LEVENTHAL, J.P.
L. PRISCILLA HALL
SYLVIA O. HINDS-RADIX
VALERIE BRATHWAITE NELSON, JJ.

2016-08051

DECISION & ORDER

The People, etc., respondent, (Filed Oct. 4, 2017)
v Richard Bacquie, appellant.

(Ind. No. 896/14)

Patrick Michael Megaro, Uniondale, NY, for appellant.

Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, Nancy Fitzpatrick Talcott, and Jonathan K. Yi of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Griffin, J.), rendered July 20, 2016, convicting him of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Margulis, J.), of those branches of the

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defendant's omnibus motion which were to suppress physical evidence.

ORDERED that the judgment is modified, on the law, by vacating the convictions of criminal possession of a weapon in the second degree under counts one and two of the indictment and criminal possession of a weapon in the third degree under count three of the indictment, vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed, and that branch of the defendant's omnibus motion which was to suppress the gun recovered from the defendant's car is granted.

The police stopped the defendant's car and recovered a knife from his pocket while frisking him after he was removed from the car. Later, during an inventory search of the car, the police recovered a gun from the car. Following a hearing, the Supreme Court denied those branches of the defendant's motion which were to suppress the knife recovered from his person and the gun recovered from his car. The defendant was convicted, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree (two counts). He appeals from the judgment of conviction.

In challenging the Supreme Court's denial of those branches of his omnibus motion which were to suppress physical evidence, the defendant contends that the stop of his vehicle was not justified, and that the People did not establish the lawfulness of the search of his vehicle at the suppression hearing.

The Supreme Court properly denied that branch of the defendant's omnibus motion which was to suppress the knife recovered from his person following the stop of the vehicle that he was driving. A police officer's observation of what are suspected to be excessively tinted vehicle windows, in violation of Vehicle and Traffic Law § 375(12-a)(b), may justify a stop of that vehicle (*see People v Brock*, 107 AD3d 1025, 1026-1027; *People v Collins*, 105 AD3d 1378, 1379; *People v Hawkins*, 45 AD3d 989, 991; *People v McKane*, 267 AD2d 253). In this case, New York City Police Department Officer Kenneth Sepulveda, whose testimony regarding the stop was found credible by the court, testified that the window tints on the car that the defendant drove were dark, that it was hard for Officer Sepulveda to see inside the car, that "[a]nything under 70 percent light transmittance is a summonsable offense," that he observed the defendant's car from a distance of "[a] couple of feet," that nothing obstructed his view and there were street lights, that the defendant's car "passed directly passed [sic] me making a left," and that although he did not recall receiving training regarding tinted windows, he had experience in this area, having made thousands of stops and written hundreds of summonses for illegally tinted windows. Thus, contrary to the defendant's contention, and to our dissenting colleague's conclusion, the police lawfully stopped the defendant's car due to an apparent violation of Vehicle and Traffic Law § 375(12-a)(b) (*see People v Brock*, 107 AD3d at 1026-1027; *People v Collins*, 105 AD3d at 1379; *People v Hawkins*, 45 AD3d at 991; *People v McKane*, 267 AD2d at 253).

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However, because the People failed to establish the lawfulness of the inventory search of the defendant's car, the Supreme Court erred in denying that branch of the defendant's omnibus motion which was to suppress the gun recovered from his car. Although the uncovering of incriminating evidence may not be the purpose of an inventory search, incriminating evidence found during a valid inventory search will not be suppressed (see *People v Padilla*, 21 NY3d 268, 272; *People v Johnson*, 1 NY3d 252, 256). To further the goals justifying the exception, "an inventory search should be conducted pursuant to 'an established procedure clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably'" (*People v Johnson*, 1 NY3d at 256, quoting *People v Galak*, 80 NY2d 715, 719; see *People v Gomez*, 13 NY3d 6, 10). The police procedure must be standardized so as to "limit the discretion of the officer in the field" (*People v Galak*, 80 NY2d at 719). "Thus, two elements must be examined: first, the relationship between the search procedure adopted and the governmental objectives that justify the intrusion and, second, the adequacy of the controls on the officer's discretion" (*id.*). In other words, there must be evidence of the policy as to inventory searches and that the particular inventory search at issue complied with that policy, and the court must evaluate the adequacy of the policy itself, to ensure that it furthers the proper goals of and limits on inventory searches (see *People v Gomez*, 13 NY3d at 11; *People v Galak*, 80 NY2d at 719). The written policy itself need not be entered into evidence, but there must be some evidence of what the

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procedure requires (see *People v Gomez*, 13 NY3d at 11; *People v Taylor*, 92 AD3d 961, 962), and the officer's compliance with it (see *People v Padilla*, 21 NY3d at 272).

Here, no testimony was given at the suppression hearing about the content of any New York City Police Department policy regarding the conduct of inventory searches, or the officer's compliance with it. In the absence of any evidence satisfying the People's burden of establishing the lawfulness of the search of the defendant's automobile, the Supreme Court should have granted that branch of the defendant's motion which sought suppression of the handgun found during that search (see *People v Gomez*, 13 NY3d at 10-11; *People v Russell*, 13 AD3d 655, 657).

The defendant's contention that various remarks made by the prosecutor throughout the trial deprived him of a fair trial is only partially preserved for appellate review (see CPL 470.05[2]). In any event, while some of the prosecutor's comments were improper, they did not deprive the defendant of a fair trial (see *People v Naqui*, 132 AD3d 779, 781).

Viewing the record as a whole, the defendant was afforded meaningful representation, and thus, was not deprived of the effective assistance of counsel (see *Strickland v Washington*, 466 US 668; *People v Benevento*, 91 NY2d 708; *People v Baldi*, 54 NY2d 137; *People v Yi Qiu*, 129 AD3d 1111, 1112; *People v Fields*, 127 AD3d 782, 784).

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The defendant's remaining contentions are without merit.

LEVENTHAL, J.P., HINDS-RADIX and BRATHWAITE
NELSON, JJ., concur.

HALL, J., concurs in part and dissents in part, and votes to reverse the judgment, on the law, grant those branches of the defendant's omnibus motion which were to suppress the gun and the knife, and dismiss the entire indictment, with the following memorandum:

I agree with my colleagues in the majority that the Supreme Court should have suppressed the gun that was recovered from the defendant's car. However, I would go further and conclude that the court also should have suppressed the gravity knife that was recovered from the defendant's person, as the People failed to establish that the stop of the defendant's vehicle was lawful.

At the suppression hearing, Police Officer Kenneth Sepulveda testified that on July 4, 2013, he was a passenger in an unmarked police vehicle driven by Police Officer Joseph Algerio. At approximately 10:25 p.m., the police vehicle was stopped at a red light facing eastbound on Dunkirk Street toward Murdock Avenue when Officer Sepulveda observed the defendant's vehicle, a gray Infiniti, make a left turn from Murdock Avenue and head westbound on Dunkirk Avenue. According to Officer Sepulveda, the defendant's vehicle

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had illegal “window tints.” Officer Sepulveda explained that “[a]nything under 70 percent light transmittance is a summonsable offense” (*see* Vehicle & Traffic Law § 375[12-a][b]). When Officer Sepulveda was asked how he knew that the light transmittance of the defendant’s windows was less than 70%, he responded that it “was hard for me to see inside the vehicle.” Officer Sepulveda said that he had no training regarding window tinting, but he had experience because he had written “hundreds of tints summonses and stopped thousands of cars with illegal tints.”

After the defendant’s vehicle passed the police vehicle, Officer Algerio made a U-turn and pulled the defendant’s vehicle over. Officer Sepulveda approached the front passenger side of the defendant’s vehicle, while Officer Algerio approached the driver’s side. Officer Algerio instructed the defendant to put down all of his windows, and the defendant put down his driver’s side window. Officer Sepulveda pointed his flashlight into the passenger side window, and through that window was able to observe a dagger stuck in between the passenger seat and the center console, and a baseball bat by the defendant’s left foot. Officer Sepulveda could not remember whether the passenger side window was up or down when he looked through it to see the dagger and the bat, but when he was asked how he was able to see inside the vehicle, he said he had a “very, very strong flashlight.” The officers then removed the defendant from the vehicle and placed him in handcuffs. While frisking the defendant, the officers recovered an illegal gravity knife in his pocket.

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The defendant was then placed under arrest, and a gun was later recovered during an inventory search of the defendant's car.

At trial, Officer Algerio testified that he did not have a tint meter with him on patrol on the day of the defendant's arrest, and that the police did not verify the extent of the tint on the defendant's car. At the conclusion of the People's case, the court dismissed the sixth count of the indictment, which charged the defendant with operating a motor vehicle with a tinted window in violation of Vehicle and Traffic Law § 375(12-a)(b), on the ground that the People had failed to make out a prima facie case with respect to that count.

“On a motion to suppress physical evidence, the People bear the burden of going forward to establish the legality of police conduct in the first instance” (*People v Oden*, 150 AD3d 1269, 1270 [internal quotation marks omitted]; see *People v Berrios*, 28 NY2d 361, 367-368). In order to legally stop a motor vehicle, a police officer must have “at least a reasonable suspicion that its occupants had been, are then, or are about to be, engaged in conduct in violation of law” (*People v Sobotker*, 43 NY2d 559, 563).

I acknowledge that a police officer's observation of the windows of a vehicle may, under certain circumstances, support a reasonable suspicion that the windows were overly tinted in violation of Vehicle and Traffic Law § 375(12-a)(b) (see *People v Estrella*, 10 NY3d 945, 946; *People v McKane*, 267 AD2d 253; *People*

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v Edwards, 222 AD2d 603, 604). However, in my view, under the circumstances of this case, Officer Sepulveda's observations were not sufficient to support such a reasonable suspicion. Officer Sepulveda stated that the basis for his suspicion was that it "was hard for me to see inside the vehicle." In my view, the mere fact that it is hard to see inside a vehicle that is moving at night is not sufficient to support a reasonable suspicion that the vehicle's windows had a light transmittance of less than 70% in violation of Vehicle and Traffic Law § 375(12-a)(b).

Accordingly, I submit that both the gravity knife and the gun should have been suppressed as fruit of an illegal stop of the defendant's vehicle. Since, without that evidence, the People would be unable to adduce legally sufficient evidence to prove the defendant's guilt of the crimes charged, I vote to dismiss the entire indictment (*see People v Theodore*, 114 AD3d 814, 818).

ENTER:

/s/ Aprilanne Agostino
Aprilanne Agostino
Clerk of the Court

Short Form Order

SUPREME COURT STATE OF NEW YORK
CRIMINAL TERM – PART TAP-A QUEENS COUNTY
125-01 QUEENS BLVD., KEW GARDENS, N.Y. 11415

PRESENT:

HON. BARRY KRON, A.J.S.C.
Acting Justice

THE PEOPLE OF THE
STATE OF NEW YORK

-against-

RICHARD BACQUIE,

Defendant.

MOTION PURSUANT
TO CPL §30.30(1)(a)

DATED: April 18, 2016,

IND. NO.: 896-2014

Robert DiDio, Esq.
For the Motion

ADA Corey Barkoff, Esq.
Opposed

Defendant's motion to dismiss the indictment pursuant to CPL §30.30 is denied in accordance with the accompanying memorandum.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this decision and order to counsel for defendant and the District Attorney.

/s/ BK
BARRY KRON, A.J.S.C.

Dated: April 18, 2016

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART TAP-A

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THE PEOPLE OF THE BY: BARRY KRON, AJSC
STATE OF NEW YORK DATED: April 18, 2016
 IND. NO.: 896-2014
 -against-
RICHARD BACQUIE,
 Defendant.

----- x

The defendant has moved for an order dismissing the indictment pursuant to CPL § 30.30(1)(a), alleging that the People have failed to be ready for trial within six months since commencement of the criminal action against him.

In determining this motion the Court has considered the moving papers of defense counsel, the response of the Assistant District Attorney, and the court records.

The actual date of the filing of the accusatory instrument is not includable in the CPL § 30.30 calculation (*see People v. Stiles*, 70 N.Y.2d 765, 520 N.Y.S.2d 745 [1987]). Here, the defendant was arraigned on the felony complaint underlying Indictment No. 896-2014 on July 5, 2013, so the People had **184** days to be ready for trial pursuant to statute.

The defendant was indicted and charged under Indictment 896-2014 with two counts of Criminal Possession of a Weapon in the Second Degree (P.L.

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§§265.03[1][b] and [3]), Criminal Possession of a Weapon in the Third Degree (P.L. §265.02[1]), Criminal Possession of a Weapon in the Fourth Degree (PL §265.01[1]), and Operating a Motor Vehicle with a Tinted Window (VTL §375-12-a[b]). The defendant was arraigned on the felony complaint on July 5, 2013. The instant Indictment and Statement of Readiness was filed on April 23, 2014. On May 27, 2014, the defendant was arraigned on this Indictment.

CPL § 30.30(1)(a) requires that the People be ready for trial within six months from the commencement of the criminal action exclusive of any period of time which is properly excludable by statute or case law (*People v. Smith*, 81 AD2d 965 [3d Dept. 1981]).

The burden of proving that certain periods of time are excludable is upon the People (*People v. Berkowitz*, 50 NY2d 333 [1980]). Defendant argues that over six months of chargeable time have elapsed, requiring the dismissal of the indictment.

The Court makes the following determinations as to the proper calculation of chargeable time periods for put-poses of its CPL §30.30 determination and addresses those time periods defendant asserts are chargeable to the People:

The defendant was arraigned on the underlying felony complaint on July 5, 2013. Although this matter was adjourned several times for grand jury action, the parties both agree that defendant and his attorney filed a Waiver of CPL §§ 180.80, 190.80 and 30.30 rights (hereinafter “Waiver”) until February 10, 2014

(see ¶¶7-8 of Defendant's Motion and People's Response at ¶¶2-5). Thus, the time period from July 5, 2013 to February 10, 2014, which is not challenged by the defendant in his motion, is excludable for purposes of CPL §30.30 calculations.

On April 23, 2014, the instant indictment and certificate of readiness were filed by the People. The time period from February 10, 2014 until April 23, 2014, are chargeable to the People for a total of 72 days for purposes of CPL §30.30 calculations (see, *People v. England*, 84 NY2d 1 [1994]).

On May 27, 2014, defendant was arraigned on the indictment, a motion schedule was set, and the case was adjourned to August 21, 2014 for decision and hearings. This time is excludable for purposes of CPL §30.30 calculations, and is not contested by defendant (see Defendant's Motion at ¶9).

On August 21, 2014, the People announced not ready to proceed with the suppression hearing and requested an adjournment to August 29, 2014. The matter was adjourned to October 9, 2014 for the hearing. The People were charged a total of **8 days** for purposes of CPL §30.30 calculations (see ¶10 of Defendant's Motion and ¶9 of People's Response).

On October 9, 2014, the People were not ready to proceed with the hearing and were charged until October 14, 2014. The case was adjourned to November 12, 2014 for the hearing. The People were charged a total of **5 days** for purposes of CPL §30.30 calculations (see

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¶11 of Defendant's Motion and ¶10 of People's Response).

On November 12, 2014, the People were not ready to proceed with the hearing and were charged until November 14, 2014. The case was adjourned to December 12, 2014 for the hearing. The People were charged a total of **2 days** for purposes of CPL §30.30 calculations (see Defendant's Motion at ¶12 and People's Response at ¶11).

On December 12, 2014, the People were not ready to proceed with the hearing and were charged until December 16, 2014. The case was adjourned to January 20, 2015 for the hearing. The People were charged a total of **4 days** for purposes of CPL §30.30 calculations.

On January 20, 2015, the People were not ready to proceed with the hearing and were charged 7 days. The case was adjourned to February 26, 2015 for the hearing. The People were charged a total of **7 days** for purposes of CPL §30.30 calculations.

On, February 26, 2015, the People were ready to proceed but defense counsel was engaged on trial with another matter. The case was adjourned to March 20, 2015 for the hearing to commence. This time is excludable for purposes of CPL §30.30 calculations and is not challenged by defendant in his motion.

On March 20, 2015, the the People were ready to proceed but defense counsel was unavailable due to a medical condition (see Defendant's Motion at ¶16). The case was adjourned to April 7, 2015 for the hearing to

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commence. This time is excludable for purposes of CPL §30.30 calculations and is not challenged by defendant in his motion.

On April 7, 2015, the People were ready to proceed and the case was sent to the Honorable Judge Ira H. Margulis. The case was adjourned to April 9, 2015 for the continuation of the hearing. This time is excludable for purposes of CPL §30.30 calculations and is not challenged by defendant in his motion.

The case was adjourned several times in Part K12 for purposes of rendering a decision on the hearing. By written decision dated August 12, 2015, Judge Margulis denied defendant's motion to suppress. The case was adjourned to October 14, 2015 for trial. This time is excludable for purposes of CPL §30.30 calculations and is not challenged by defendant in his motion (see Defendant's Motion at 1117-20).

On October 14, 2015, the People were not ready to proceed and were charged until October 22, 2015. The case was adjourned to November 17, 2015 for purposes of trial. The People were charged a total of **8 days** for purposes of CPL §30.30 calculations.

On November 17, 2015, the People were ready to proceed but defense counsel was engaged on trial with another case. The case was adjourned until January 5, 2016 for trial. This time is excludable for purposes of CPL §30.30 calculations and is not challenged by defendant in his motion.

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On January 5, 2016, the People were not ready to proceed and were charged until January 20, 2016. The case was adjourned to January 25, 2016 for purposes of trial. The People were charged a total of **15 days** for purposes of CPL §30.30 calculations.

On January 25, 2016 defense counsel was engaged and the case was adjourned to March 16, 2016 for trial. This time is excludable for purposes of CPL §30.30 calculations and is not challenged

On March 16, 2016, the People were ready to proceed but defense counsel was engaged. The case was adjourned until April 14, 2016 for trial. This time is excludable for purposes of CPL §30.30 calculations and is not challenged by defendant in his motion.

On April 14, 2016, the instant motion was filed. Any subsequent time period is not chargeable because the matter is under consideration by the Court.

In addition to arguing that 156 days of speedy trial time have elapsed against the People, defendant claims that 294 days are chargeable to the People because they were not actually ready to proceed until February 26, 2015 (*see* ¶24 of Defendant's Motion). Defendant relies in large measure on the holding in *People v. Sibblies*, 22 NY3d 1177 (2014), for asserting that the time periods between the dates that the People indicated that they would be ready and the dates when they answered not ready should be charged to the People (*see* Defendant's Motion at ¶¶24, 26-33). Defendant errs in his reliance on the holding in *People v. Sibblies*, 22 NY3d at 1177, which is inapposite and

specifically addresses the off-calendar filing of a certificate of readiness by the People. Additionally, the People's unreadiness on consecutive court appearances, standing alone, does not provide a basis for questioning prior claims of readiness (see, *People v. Zale*, 2016 NY App. Div. LEXIS 2126 [1st Dept. 2016] [trial court properly denied defendant's speedy trial motion where case did not involve an off-calendar certificate of readiness undermined by the People's subsequent request for an adjournment]; *People v. Brown*, 126 AD3d 516, 517-519 [1st Dept. 2015] [post-readiness declaration by the People that they are not ready does not by itself render the prior statement of readiness illusory]; *People v. Boumoussa*, 104 AD3d 863 [2d Dept. 2013]; *People v. Lynch*, 103 AD3d 919 [2d Dept. 2013]; *People v. Camillo*, 279 AD2d 326 [1st Dept. 2001]).

Defendant conclusorily argues that *Sibblies* applies even though the instant case does not involve the filing of off-calendar statement(s) of readiness because the People "cast serious doubt" on their readiness to proceed prior to February 26, 2015 (see Defendant's Motion at ¶30). Equally unpersuasive is defendant's reliance on *People v. Rodriguez*, 135 AD3d 587 (1st Dept. 2016), which is similarly inapposite to the facts presented. Unlike the facts presented in *Sibblies* and *Rodriguez*, there is naming in the record to indicate that the People's statement of readiness was illusory. The People never filed an off-calendar certificate of readiness to stop the time chargeable to them. The People therefore should only be charged for the time requested by them (see *Sibblies*, 22 NY3d 1180-1181).

["there is a presumption that a statement of readiness is truthful and accurate"]).

The People are charged with post-readiness delays only when the delay is solely and exclusively the fault of the prosecution, and the time cannot otherwise be excluded under Section 30.30(4) (*see also People v. Cortes*, 80 N.Y.2d 201,210 [1992]); *People v. Anderson*, 66 N.Y.2d 529 [1985]). Only the amount of time that the People request on the record is chargeable to them (*see e.g. People v. Bruno*, 300 A.D.2d 93, 95 [1st Dept. 2002]; *People v. Bailey*, 221 A.D.2d 296 [1st Dept. 1995]; *People v. Urraea*, 214 A.D.2d 378 [1st Dept. 1995]). Taken to its logical conclusion, defendant's argument would undermine all existing case law on speedy trial analysis. When the People are not ready and ask for a later date and defense counsel requests and receives a subsequent date, the People's original request is not per se negated because they are not ready to proceed on a later date. There are a myriad of circumstances why their original projection into the future falls short – ADAs being on trial on another matter, ADAs taking other jobs, witness availability in a constant state of fluctuation – just to name a few possibilities. Consecutive not ready situations does not render the date initially requested by the People suspect. Nor should it require ongoing factual hearings in every case, something that is impractical and ignores the reality of calendar practice in very busy Calendar Parts with voluminous calendars. This in no way means that a failure by the People to be ready for a reason that exists consistently throughout the calendar process

should shield the People from being charged with speedy trial time because they did not realistically ask for dates consistent with the problem that prevents them from going forward.

In a nutshell, the People are charged with the time they ask for, and a hearing or factual inquiry is not needed on a per se basis as to whether the time they requested was made in good faith solely because they are not ready on a subsequent date, absent some indication or hint that the deficiency in proceeding has been consistent and ongoing.

In summary, upon review of the court file and submissions of the parties, the court finds that the People are not chargeable with more than six months of chargeable time. CPL §30.30(1)(a) requires that the People be ready for trial within six months from the commencement of the criminal action. Here, a calculation results in a total of **121 days** chargeable to the People.

In view of the foregoing, the defendant's motion to dismiss the indictment pursuant to CPL §30.30(1)(a) is denied.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this decision and order to counsel for the defendant and the District Attorney.

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DATED: April 18, 2016

/s/ BK
BARRY KRON, A.J.S.C.

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State of New York

Court of appeals

BEFORE: HONORABLE PAUL G. FEINMAN

Associate Judge

THE PEOPLE OF THE
STATE OF NEW YORK,

Respondent,

-against-

RICHARD BACQUIE,

Appellant.

**ORDER
DENYING
LEAVE**

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: February [15], 2018

/s/ Paul G. Feinman

Associate Judge

* Description of Order: Order of the Appellate Division, Second Department, dated October 4, 2017, modifying a judgment of Supreme Court, Queens County, rendered July 20, 2016, and as so modified, affirming the judgment.

**RELEVANT CONSTITUTIONAL PROVISIONS,
STATUTES AND RULE**

U.S. Const., Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const., Amend. XIV. § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

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the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Criminal Procedure Law § 30.20(1)

After a criminal action is commenced, the defendant is entitled to a speedy trial.

New York Criminal Procedure Law § 30.20(1)(a)

Except as otherwise provided in subdivision three, a motion made pursuant to paragraph (e) of subdivision one of section 170.30 or paragraph (g) of subdivision one of section 210.20 must be granted where the people are not ready for trial within:

(a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony;

New York Civil Rights Law § 12

In all criminal prosecutions, the accused has a right to a speedy and public trial, by an impartial jury, and is entitled to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor. An alien is not entitled to a jury,

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composed in part of aliens or strangers, in an action or special proceeding civil or criminal.

New York Penal Law § 265.00(5)

As used in this article and in article four hundred, the following terms shall mean and include:

“Gravity knife” means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

New York Penal Law § 265.03(3)

A person is guilty of criminal possession of a weapon in the second degree when:

(3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person’s home or place of business.

New York Penal Law § 265.02(1)

A person is guilty of criminal possession of a weapon in the third degree when: Such person commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime;

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22 NYCRR § 1200, Rule 3.7.

Lawyer As Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal. (b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM PART
TAP-A

----- X	
THE PEOPLE OF THE	NOTICE OF
STATE OF NEW YORK	MOTION TO DIS-
-against-	MISS INDICTMENT
RICHARD BACQUIE,	PURSUANT TO
	C.P.L. § 30.30 & 30.20
Defendant	Indictment No.:
----- X	896/2014

PLEASE TAKE NOTICE that upon the annexed affirmation of Robert DiDio, Esquire, duly affirmed the 13th day of April, 2016, the undersigned will move this Court, located at 12501 Queens Boulevard, Kew Gardens, New York, Part Tap-A, on the 14th day of April, 2016 at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order dismissing the indictment pending against Mr. Bacquie pursuant to CPL §§ 30.30, 30.20, 210.20(f)(g), and 210.45, and granting such other and further relief as this Court deems just and proper.

DATED: April 13, 2016
Kew Gardens, New York

Respectfully submitted by;
Robert DiDio, Esquire
Robert DiDio & Associates
Attorneys for the Defendant
80-02 Kew Gardens Road, Suite 307
Kew Gardens, New York 11415
(718) 575-5145

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TO: HON. RICHARD A. BROWN
District Attorney
Queens County
MAUREEN D'AQUILA
Supreme Court Clerk
County of Queens
Criminal Term

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM PART
TAP-A

-----	X	AFFIRMATION IN
THE PEOPLE OF THE		SUPPORT OF
STATE OF NEW YORK		MOTION TO DIS-
		MISS INDICTMENT
-against-		PURSUANT TO
RICHARD BACQUIE,		C.P.L. § 30.30 & 30.20
		Indictment No.:
Defendant		
-----	X	896/2014

I, Robert DiDio, an attorney duly admitted before the Courts for this State, affirm under penalty of perjury that the following statements are true, except those statements made upon information and belief, which I believe to be true.

1. Unless otherwise specified, all of the information in this affirmation is based upon personal knowledge, inspection of the records and proceedings in this case, and information derived from legal authorities and public records.

2. CPL § 30.30(1)(a) provides that the People must be ready for trial within six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony. CPL § 30.30 protects a defendant's right to a speedy trial.

3. Subdivision four of CPL § 30.30, however, sets forth certain periods of time that are excludable from a speedy trial calculation. For instance, periods of delay resulting from pre-trial motions, requests for bills of particulars, and demands to produce are excludable from any speedy trial calculation. CPL § 30.30(4)(a). Likewise excludable are periods of delay resulting from a continuance granted by the court at the request of, or with the consent of the defendant or his counsel, CPL § 30.30(4)(b), as well as periods of time where the defendant has failed to appear in court. CPL § 30.30(4)(e)(i)-(ii).

4. A defendant's right to a speedy trial is guaranteed by the United States Constitution and by statute. U.S. Const. Amends VI, XIV; C.P.L. § 30.20; N.Y. Civ. Rights Law § 12. C.P.L. § 30.20(1) provides that "after a criminal action is commenced, the defendant is entitled to a speedy trial." The responsibility of protecting the defendant's right to a speedy trial rests with the People.

5. The law is clear that no specific time period must elapse in order for the court to find that a defendant has been denied his right to a speedy trial. *People v. Taranovich*, 373 N.Y.S.2d 79, 81 (1974); *People v.*

Mason, 509 N.Y.S.2d 842 (2d Dep't 1986) (Queens) (Rotker, J.). Rather, "the assertion by the accused of his right to a speedy trial requires the court to examine the claim in light of the particular factors attending the specific case under scrutiny." *People v. Taranovich*, 373 N.Y.S.2d at 82. Specifically, the court must consider: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired due to the delay. *Taranovich*, at 82. No factor is determinative, as the Court must consider the circumstances of each case.

6. Mr. Bacquie is charged with two counts of criminal possession of a weapon in the second degree, one count of criminal possession of a weapon in the third degree, one count of criminal possession of a weapon in the fourth degree, and operating a motor vehicle with a tinted window. Therefore, taking into account time excludable under statute, the People in this case had six months to be ready for trial.

7. On July 5, 2013, Mr. Bacquie was arraigned in criminal court on a felony complaint charging him with the above listed charges. Initially, he executed a waiver of his CPL Section 30.30 speedy trial rights and his 180.80 rights, and the Court adjourned the matter until July 22, 2013 in Part AP-6 for a conference. **0 days are chargeable to the People.**

8. After several other consent adjournments in Part AP-6, the matter was eventually adjourned for Grand Jury Action. The previously executed waiver of speedy trial time expired on February 10, 2014. The defendant was thereafter indicted by a Grand Jury for the above listed crimes and he was arraigned on the indictment in Part Tap-A on May 27, 2014. **107 days are chargeable to the People.**

9. At the Supreme Court arraignment, Justice Kron set a motion schedule wherein the defense was to file an Omnibus Motion on or before July 9, 2014 and the People were to respond to the motion on or before July 31, 2014. The Court then adjourned the case to Part Tap-A until August 21, 2014 for decision and hearings.

10. On August 21, 2014, the Court rendered a decision and ordered a *Dunaway/Mapp* hearing. The People answered not ready for the hearing and requested an adjournment until August 29, 2014. The Court then adjourned the matter until October 9, 2014 for the hearing. **8 days are chargeable to the People.**

11. On October 9, 2014 the People answered not ready for the scheduled hearing and requested an adjournment until October 14, 2014. The Court therefore adjourned the matter until November 14, 2014. **5 days are chargeable to the People.**

12. On November 12, 2014 the People answered not ready for the scheduled hearing again and requested an adjournment until November 14, 2014. The

Court therefore adjourned the matter to December 12, 2014. **2 days are chargeable to the People.**

13. On December 12, 2014 the People answered not ready for the scheduled hearing and requested an adjournment until December 16, 2014. The Court adjourned the matter until January 20, 2015. **4 days are chargeable to the People.**

14. On January 20, 2015 the People answered not ready for the scheduled hearing and requested an adjournment until January 27, 2015. The Court then adjourned the matter until February 26, 2015. **7 days chargeable to the People.**

15. On February 26, 2015 the People finally answered ready for the hearing, however Mr. DiDio was actually engaged on trial regarding another case. The Court therefore adjourned the matter until March 20, 2015. **0 days are chargeable to the People.**

16. On March 20, 2015 the People answered ready for the scheduled hearing, however Mr. DiDio was unavailable again due to a medical condition. The Court therefore adjourned the matter until April 7, 2015. **0 days are chargeable to the People.**

17. On April 9, 2015 both parties answered ready for the hearing, and the matter was transferred to Part K-12, where the pre-trial hearing was conducted. At the conclusion of the hearing, the Court adjourned the matter until May 21, 2015 for the Court's decision on Mr. Bacquie's motion for suppression. **0 days are chargeable to the People.**

18. On May 21, 2015 the matter was adjourned until July 9, 2015 for decision on the motion to suppress. **0 days are chargeable to the People.**

19. On July 9, 2015 the matter was adjourned again until August 12, 2015 for decision on the motion to suppress. **0 days are chargeable to the People.**

20. On August 12, 2015 the Court rendered a decision on the suppression motion, and then adjourned the matter until October 14, 2015 for trial in Part Tap-A. **0 days are chargeable to the People.**

21. On October 14, 2015 the matter People answered not ready for trial and requested and adjournment until October 22, 2015. The Court therefore adjourned the matter until November 17, 2015 for trial. **8 days are chargeable to the People.**

22. On November 17, 2015 the People answered ready trial, however Mr. DiDio was actually engaged on trial regarding another case. The Court therefore adjourned the matter until January 5, 2016. **0 days are chargeable to the People.**

23. On January 5, 2016 the People again answered not ready for trial, they requested January 20, 2016. The case was Turned until January 25, 2016 for trial. **15 days chargeable to the People.**

24. As set forth in paragraphs (7) through (23), at least 156 days of speedy trial time have elapsed against the People since the commencement of the action. Mr. Bacquie maintains, however, that because the People were never actually ready to bring the case to

trial until February 26, 2015, the amount of speedy trial chargeable to the People totals **294 days**, thereby far exceeding the statutory allowance.

25. To start, in order to validly announce their readiness for trial, the People must (1) declare in open court that they are ready for trial or (2) file an off-calendar certificate of readiness and serve it on defense counsel. Furthermore, the People must “in fact be ready to proceed at the time they declare readiness.” *People v. Chavis*, 91 N.Y.2d 500, 505 (1998); *People v. Kendzia*, 64 N.Y.2d 331 (1985) (stating that acquiescence by the People to a date set by the court does not satisfy the government’s requirement to communicate actual and present readiness to proceed to trial).

26. Here, on August 21, 2014, the People were not ready for trial, and they requested an 8-day adjournment. Subsequently, however, on October 9, 2014, the People were again not ready for the scheduled hearing, and thus the entire adjournment between August 21, 2014 and October 9, 2014 should be charged to the People. See *People v. Smith*, 82 N.Y.S.2d 676 (1993) (rejecting the People’s contention that an adjournment which is extended because the defense rejects the original date requested by the People should be excluded from the time chargeable to them); *People v. Sibblies*, 22 N.Y.3d 1174 (2014) (holding that the period of time between an off-calendar declaration of readiness for trial by the People and their statement of un-readiness at the next court appearance may not be excluded from the statutory speedy trial period unless the People’s un-readiness is occasioned by an exceptional fact or

circumstance). On January 21, 2016, in an opinion joined by Judges Sweeny, Acosta, and Moskowitz, the First Department, citing this Court's decision in *Sibblies* concluded that a certificate of readiness filed and served by the People shortly after the defendant's arraignment was illusory for speedy trial purposes absent any explanation as to why, on the next court date, the People indicated on the record that they were not ready for trial. See *People v. Rodriguez*, 135 A.D.3d 587 (1st Dep't 2016). In *Rodriguez*, the People had apparently filed two off calendar certificates of readiness, yet on each of the next court dates, they answered not ready without explanation. *Rodriguez*, at 588. Explaining, the court stated, "Nothing in the record, express or inferred, explains [the People's] change in status from ready to not ready." *Id.* Then, quoting *Sibblies*, the *Rodriguez* court indicated that because the People "gave no explanation for the change in circumstances between the initial statement of readiness and the subsequent admission that the People were not ready to proceed," the off calendar certificate of readiness "did not accurately reflect the People's position." *Id.* Finally, although the People argued that the court had not asked the People for a reason, and that they therefore should not have been required to offer one, the *Rodriguez* court cited to *People v. Salgado*, 27 A.D.3d 71, 75 (1st Dep't 2006), rejected the People's argument, and stated, "the burden rests on the People to clarify, on the record, the basis for the adjournment." *Id.* See also *People v. Liotta*, 79 N.Y.2d 841, 843 (1992) (stating even as to postreadiness adjournments, the "burden rests on the People to clarify, on the record, the basis for the

adjournment"). Accordingly, **41 additional days are chargeable to the People.**

27. Similarly, on October 9, 2014, the People were not ready for trial and requested a 5-day adjournment. Again, however, they were not ready to proceed on November 12, 2014, the subsequent adjourn date, and for the reasons outlined in paragraph (23), the entire adjournment between October 9, 2014 and November 12, 2014 should therefore be charged to the People. **34 additional days are chargeable to the People.**

28. On November 12, 2014, the People were not ready for trial, they requested a 2-day adjournment, and the Court adjourned the matter to December 12, 2014. Because the People were not ready on December 12, 2014, however, for the reasons set forth in paragraph (23), the entire adjournment between November 12, 2014 and December 12, 2014 should be charged to the People. **28 additional days are chargeable to the People.**

29. On December 12, 2014, the People were not ready and requested a 4-day adjournment, but were again subsequently not ready for the hearing on January 20, 2015. The entire adjournment between December 12, 2014 and January 20, 2015, as per paragraph (23), should therefore also be charged to the People. **35 additional days are chargeable to the People.**

30. In *Sibblies*, the Court of Appeals reaffirmed the legislative purpose of section 30.30, which is to prevent chronic delays within the court system that deprive defendants of their right to a prompt trial, hinder

the People's ability to try cases effectively, and undermine public confidence in the criminal justice system. Sibblies, at *2. While this is not a case where the People made an off calendar statement of readiness, and then subsequently announced they were not ready for trial in open court, the prosecution nevertheless repeatedly represented that they could be ready for trial within a short period of time, but then announced at the subsequent court date that they were not in fact ready to proceed, thereby casting serious doubt on whether they were ever actually ready to bring Mr. Bacquie to trial prior to February 26, 2015 – over 19 months after the commencement of the action.

31. This Court is well aware that after a defendant establishes a delay in prosecution exceeding the statutory period – which, Mr. Bacquie most respectfully submits he has indeed established – the Government has the burden of showing that certain periods of that delay are excludable. *People v. Berkowitz* 50 N.Y.2d 333 (1980); *People v. Santos*, 68 N.Y.2d 859 (1986).

32. The People can satisfy this burden by producing a record of proceedings sufficient to enable the court to reach “an informed decision” as to whether there is indeed time that is excludable, *People v. Cortes*, 590 N.Y.S.2d 9 (1992), and if there are unresolved issues of fact, the court must order a hearing.

33. Here, however, as set forth above, **294 days** are chargeable to the People, and they the therefore well over the statutory limit. Accordingly, the need for

a hearing is obviated, and the question of whether the People have met their obligation of speedily bringing Mr. Bacquie to trial must clearly be answered in the negative.

WHEREFORE, Mr. Bacquie respectfully requests that this Court issue an Order dismissing the indictment on the ground the People have failed to comply with their speedy trial obligations under CPL Sections 30.20 and 30.30, and granting such other and further relief as the Court deems just and proper.

DATED: April 13, 2016
Kew Gardens, New York

Respectfully submitted,

/s/

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To be argued by
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(20 Minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION – SECOND DEPARTMENT

THE PEOPLE OF THE
STATE OF NEW YORK

A.D. Docket # 2016-8051

-against-

Queens County

RICHARD BACQUIE,

Supreme Court

Indictment # 896-2014

Defendant-Appellant.

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[vii] SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X **Docket # 2016-8051**

THE PEOPLE OF THE
STATE OF NEW YORK,

-against-

RICHARD BACQUIE,

Defendant-Appellant

**STATEMENT
PURSUANT TO
CPLR § 5531**

Queens County
Indictment # 896-2014

-----X

1. The indictment number in the court below was Indictment # 896-2014.
2. The full names of the original parties were the People of the State of New York against Richard Bacquie.
3. This actions was commenced in the Queens County Supreme Court, Criminal Term with the filing of Indictment # 896-2014
4. This is an appeal as of right. Defendant-Appellant appeals from a judgment of conviction after a jury trial in the Supreme Court, Queens County, Criminal Term (Hon. James P. Griffin at trial and sentencing, Hon. Ira Margulis at suppression hearing, Hon. Barry Kron at motion to dismiss) of two counts Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03(3)) (counts 1 and 2) and two counts of Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02(1)) (counts 3 and 4). Judgment was entered on July 20, 2016, and Defendant-Appellant was sentenced to a determinate term of imprisonment of

four and one-half years followed by five years of Post-Release Supervision on counts 1 and 2 and a definite sentence of one year imprisonment on counts 3 and 4, all sentences to run concurrently.

5. The Defendant-Appellant is appealing on the original record.

Dated: October 11, 2016

/s/ Patrick Megaro
PATRICK MICHAEL MEGARO

[viii] SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X **Docket # 2016-8051**

THE PEOPLE OF THE
STATE OF NEW YORK,

-against-

RICHARD BACQUIE,

Defendant-Appellant

-----X

**CERTIFICATE
OF COMPLIANCE**

Queens County
Indictment # 896-2014

PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms as follows under penalty of perjury pursuant to 22 NYCRR § 670.10.3(f):

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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Name of typeface: Times New Roman
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Dated: October 11, 2016

/s/ Patrick Megaro
PATRICK MICHAEL MEGARO

[1] **PRELIMINARY STATEMENT**

This is an appeal as of right. Defendant-Appellant appeals from a judgment of conviction after a jury trial in the Supreme Court, Queens County, Criminal Term (Hon. James P. Griffin at trial and sentencing, Hon. Ira Margulis at suppression hearing, Hon. Barry Kron at motion to dismiss) of two counts Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03(3)) (counts 1 and 2) and two counts of Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02(1)) (counts 3 and 4). Judgment was entered on July 20, 2016, and Defendant-Appellant was sentenced to a determinate term of imprisonment of four and one-half years followed by five years of Post-Release Supervision on counts 1 and 2 and a definite

sentence of one year imprisonment on counts 3 and 4, all sentences to run concurrently.

A timely notice of appeal was served and filed upon the Queens County District Attorney and the Clerk of the Queens County Court. Defendant-Appellant is appealing on the original record and is represented by Patrick Michael Megaro, Esq. An application for a stay of execution of sentence is made concurrently with the filing of this Initial Brief, which has not yet been decided. Defendant-Appellant remains incarcerated pursuant to the judgments herein appealed. Defendant-Appellant was the only original defendant in this case.

[2] QUESTIONS PRESENTED

1. Whether the Trial Court Properly Denied Defendant-Appellant's Motion to Suppress Physical Evidence Where the Evidence Established the Police Unlawfully Stopped Defendant-Appellant's Vehicle in the Absence of Reasonable Suspicion and Where the People Failed to Establish that Police Conducted a Proper Inventory Search of the Vehicle Once it Was Impounded?

2. Whether Defendant-Appellant was Denied Due Process and a Fundamentally Fair Trial Where the Prosecutor Repeatedly Shifted the Burden of Proof to the Defense Despite Being Admonished Several Times to Refrain from Doing So, Repeatedly Presented his Own Personal Beliefs and Opinions Regarding the Credibility and Guilt to the Jury During Cross-Examination of Defendant-Appellant and on Summation,

Called Defendant-Appellant a Liar in his Summation, and Improperly Asked Defendant-Appellant if the Police Were Lying In their Testimony?

3. Whether Defendant-Appellant Received Effective Assistance of Counsel Where His Attorney Violated the Advocate-Witness Rule By Placing Himself in a Position Where He Was the Sole Witness for a Sharply Disputed Fact that Would Have Corroborated Defendant-Appellant's Testimony on a Key Issue for the Theory of Defense, But Failed to Move to Withdraw or Present to the Jury the Significant Exculpatory Evidence that Counsel Alone Possessed?

[3] 4. Whether Defendant-Appellant's Constitutional and Statutory Rights to a Speedy Trial Were Violated Where the People Failed to Announce Ready Within Six Months and Where the People Failed to Move the Case to Trial for Almost Three Years?

STATEMENT OF THE FACTS

The April 7, 2015 Suppression Hearing

On April 7, 2015, a suppression hearing was held before the Honorable Ira Margulis in the Queens County Supreme Court. At the hearing, NYPD OFFICER KENNETH SEPULVEDA of the 113th Precinct testified that on July 4, 2013, he was working in an unmarked vehicle when he saw a vehicle driving with tinted windows at approximately 10:20 p.m. (H2-7). He assumed the tints were illegal because it was hard for him to see inside the vehicle at 10:20 p.m.

(H:7). He and his partner made a U-turn to follow the vehicle and pulled it over by activating the police lights. (H:8). Sepulveda testified he received no training in the police academy as to tinted windows or in the use of a “tint meter” that measures the gradation of tinted windows. (H:21-22). Sepulveda admitted that on July 4, 2013, he never used a tint meter to test Defendant-Appellant’s window tint after admitting he did not even have one with him. (H:22-24). Sepulveda admitted the driver committed no other traffic violations and there was no other basis to pull over the vehicle. (H:27-28).

[4] As Sepulveda and his partner approached the vehicle after the stop, he saw Defendant-Appellant in the car and claimed he saw what he characterized as the handle of an illegal dagger in the front seat of the vehicle as well as a baseball bat. (H:9-11). He defined an “illegal dagger,” based upon his experience and training as a police officer, as “a straight blade with a sharp tip.” (H:33). However, Sepulveda testified he saw the object he did not immediately recognize it as an illegal weapon, saying, “Fit was illegal because it’s a knife.” (H:34-35).

Sepulveda instructed his partner to remove Defendant-Appellant from the vehicle and handcuff him, at which time he was searched and an alleged gravity knife was recovered from Defendant-Appellant’s pocket. (H:11). At no time prior did Defendant-Appellant reach for anything or make any furtive movements. (H:38). After Defendant-Appellant was taken into custody, Sepulveda determined the knife in the front seat

to be what he described as an illegal dagger. (H:42). Defendant-Appellant was taken from the scene to the 113th Precinct and Sepulveda's supervisor drove Defendant-Appellant's vehicle to the precinct. (H:12). Once Sepulveda reached the precinct and placed Defendant-Appellant in a jail cell, he was instructed to conduct an inventory search of the vehicle. (H:12). During the course of the search, police found a loaded handgun in the rear seat area of the vehicle. (H:13-14).

[5] Following the submission of post-hearing memoranda, in which defense counsel argued for suppression based upon an illegal stop, an unlawful detention, and an invalid inventory search (court file, Defendant's Memorandum of Law filed June 19, 2015, Defendant's Memorandum of Law filed July 17, 2015), the court below denied the motion to suppress. (court file, decision and order dated August 13, 2015).

The Motion to Dismiss Based Upon a Speedy Trial Violation

On April 14, 2016, Defendant-Appellant filed a motion to dismiss the Indictment pursuant to CPL §§ 30.20, 30.30, New York Civil Rights Law § 12, and the Sixth and Fourteenth Amendments of the United States Constitution. (court file, motion filed April 14, 2016), arguing his speedy trial rights had been violated. Defendant-Appellant alleged that two hundred ninety-four (294) days of chargeable time under CPL § 30.30 had elapsed. (court file, motion filed April 14, 2016). Defendant-Appellant argued that the time

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period from February 10, 2014 through May 27, 2014, which was the expiration of speedy trial waiver until Defendant-Appellant's arraignment upon the Indictment was chargeable for a total of one hundred seven (107) days. (*Id.*). The motion focused on five particular consecutive dates during which the case was scheduled for a suppression hearing, and during which the People answered "not ready" each time but requested short adjournments:

[5] August 21, 2014 through October 9, 2014
October 9, 2014 through November 12, 2014
November 12, 2014 through December 12, 2014
December 12, 2014 through January 20, 2015
January 20, 2015 through February 26, 2015

In a written decision, the court below (Hon. Barry Kron) denied the motion, finding only one hundred twenty-one (121) days chargeable to the People. (court file, court decision dated April 18, 2016). However, the decision failed to address Defendant-Appellant's Constitutional speedy trial claims.

The Trial

The People's Case

POLICE OFFICER JOSEPH ALGERIO was working an Anti-Crime patrol, a plain clothes detail in an unmarked car, within the 113th Precinct of the NYPD on July 4, 2013. (T1:396-397). At approximately 10:25 p.m., he observed a car driving in a residential area of Queens that he testified had "excessively tinted" windows bearing a New Jersey license plate. (T1:399-403).

He pulled the vehicle over based upon the tinted windows and because he was familiar with the area and had never seen that car in that neighborhood. (T1:403). As he approached the driver's side window, he saw Defendant-Appellant seated in the driver's seat, the sole occupant of the car, and requested his license and registration before ordering the Defendant-Appellant out of the car. (T1:404-405). He then frisked Defendant-Appellant, removing what he alleged was a gravity knife from his pants pocket, and arrested [7] him. (T1:406-407). Defendant-Appellant and his car were transported to the 113th Precinct. (T1:408-409). The knife was received in evidence as People's Exhibit #1, and Officer Algerio demonstrated for the jury how the knife opened. (T1:410). At the precinct, Officer Algerio and another officer then conducted a search of the vehicle, finding a firearm in the back seat that was loaded. (T1:414). Neither officer wore gloves or did anything to preserve any possible DNA or fingerprints on the firearm. (T1:499-501). The firearm and ammunition were received into evidence as People's Exhibit #2. (T1:417-418).

On cross-examination, Algerio testified the knife was stored with the NYPD property clerk from July 4, 2013 until approximately one week prior to trial, and that the evidence bag had already been opened when he saw the knife. (T1:492-493). This cross-examination resulted in two off-the-record sidebars, after which the following transpired in open court:

THE COURT: Mr. Didio, will you stipulate that the bag in which the knife was opened up

in your presence, it had been sealed and opened up in your presence?

MR. DIDIO: I will stipulate, yes.

(T1:494).

POLICE OFFICER KENNETH SEPULVEDA was working on Anti-Crime patrol with Officer Algerio on July 4, 2013. (T1:529-530, 533). He testified that as he approached Defendant-Appellant's stopped vehicle, he saw a knife handle between the passenger seat and console of Defendant-Appellant's car, and directed [8] Algerio to remove Defendant-Appellant from his car. (T1:538). That knife was received in evidence as People's Exhibit #5, along with an instruction from the court that Defendant-Appellant was not charged with possession of that particular knife, and that it is not illegal to possess that knife. (T1:543-546).

After Defendant-Appellant was arrested, Sepulveda handled the alleged gravity knife recovered from Defendant-Appellant's pocket and flicked it open with one hand. (T1:540). Over objection, Sepulveda testified that People's Exhibit #1 was not only a gravity knife, but a switchblade as well. (T1:548-549). Sepulveda testified he found the firearm in the back seat pocket of Defendant-Appellant's vehicle during an inventory search at the precinct later on that night. (T1:554-555).

TROY HOLDER, a criminalist employed by the Office of the Chief Medical Examiner for the City of New York, was qualified as an expert in the field of forensic DNA analysis. (T1:642, 652). He reviewed the

tests of three swabs containing possible DNA taken from the firearm, all of which contained insufficient DNA for analysis. (T1:653, 656-657).

DETECTIVE COLLEEN HORAN, qualified as an expert in the field of firearms identification and analysis, tested People's Exhibit #2 and determined that the firearm and ammunition were operable. (T2:678-680, 685-689).

POLICE OFFICER MATTHEW BARTOWSKI of the NYPD Queens South Evidence Collection Team responded to the 113th Precinct on July 4, 2013 and [9] swabbed the firearm for possible DNA. (T1:691-694). He also tested the firearm for possible fingerprints, finding none. (T2:696).

DETECTIVE EDWARD SAWTELL of the NYPD Internal Affairs Bureau testified that on July 9, 2013 he spoke with Defendant-Appellant, who called into his bureau to report his complaint that the 113th Precinct did not return his vehicle. (T2:711-712). The call was recorded and an excerpt was received into evidence as People's Exhibit #10. (T2:713). Based upon the complaint, Detective Sawtell referred the matter back to the 113th Precinct for further action. (T2:716). Pursuant to a stipulation, a transcript of the excerpt was received in evidence and published to the jury. (T2:718-720).

LIEUTENANT NICHOLAS VAN DYKE was the supervisor of the Anti-Crime patrol on July 4, 2013. (T2:724-725, 729). After Defendant-Appellant was arrested, he drove his car back to the 113th Precinct.

(T2:732). Once he arrived, he gave the keys to the car to Officer Sepulveda and directed him to conduct an inventory search, and accompanied him to the search. (T2:734-735). As Officer Sepulveda searched the back seat area, he showed Lieutenant Van Dyke a handgun he recovered. (T2:736). He conducted a computer check to see if Defendant-Appellant had a firearms permit, with negative results. (T2:740).

Following Lieutenant Van Dyke's testimony, the People rested. (T2:787). The trial court dismissed Count #6 of the Indictment charging Defendant-Appellant with [10] a violation of VTL § 375(12-a)(b), Operating a Motor Vehicle with a Tinted Window. (T2:796-797).

The Defense Case

JAMES FURGAL was qualified as an expert in gravity knives. His prior employment included twenty-seven (27) years in the cutlery industry. He was president of a company that manufactured knives, and was familiar with the operation, design, and manufacture of utility knives, gravity knives, and switchblade knives. (T2:798-799, 806). Mr. Furgal testified that gravity knives opened with the application of centrifugal force, being a circular motion made by the hand away from the body, or by the force of gravity which allows the blade of the knife to drop open and lock into place. (T2:806-807, 816-817).

Mr. Furgal was shown People's Exhibit #1 in evidence and testified he first saw that particular knife in court the same day as his testimony. (T2:819). The

weekend before his testimony, trial counsel supplied him with a brand new knife that was the identical make and model of People's Exhibit #1 purchased from Amazon.com, and he inspected it and determined it was not a gravity knife because it would not open either by the force of gravity or by the application of centrifugal force, despite his attempts. (T2:819-823, 826, 829-831, 838).

Comparing the brand new knife to People's Exhibit #1, Mr. Furgal testified the blade on People's Exhibit #1 was looser. (T2:827). He explained these types of [11] knives are folding knives, in which the blade is housed in the handle, attached by a pivot pin, around which the blade rotates. (T2:827). The pivot pin is held into place by a screw, which is tightened and holds the blade in place. (T2:827-828). However, he said the screw and pivot pin in People's Exhibit #1 were considerably looser than the brand new knife, reducing the resistance to the opening motion of the blade and rendering it much easier to open. (T2:828, 862-863). Mr. Furgal testified the knife was not manufactured or sold with the blade as loose as it was on People's Exhibit #1. (T2:828-829). He said it was possible the knife, in its loosened state, could be opened with either linear or momentum force, but neither of those forces would be gravity or centrifugal force. (T2:866). Mr. Furgal testified in his expert opinion, People's Exhibit #1 was not a gravity knife or a switchblade. (T2:875).

MARK MCDONOUGH, a supervisor for the Local 147 Tunnel Workers Sandhogs labor union, was employed as a tunnel miner at Grand Central Station in

New York City. (T2:878-881). He worked with Defendant-Appellant as his supervisor from 2011-2014, and Defendant-Appellant was a foreman, whose duties included supervising seven other miners in excavating for a new subway line. (T2:883-885). As a tunnel miner, Defendant-Appellant was required to have a number of tools with him, including a knife for various functions, including safety, life-saving measures, and preparing explosives for excavation. (T2:886-887). He [12] testified both People's Exhibit #1 and #5 were the types of knives commonly used by tunnel workers, including Defendant-Appellant. (T2:888-889).

ANTHONY VEGA, a construction worker and friend of Defendant-Appellant, was with two friends named Joey and Red on July 4, 2013, when he received an invitation from Defendant-Appellant to attend a barbecue in Queens. (T2:907-910). He and his two companions took a taxi to Flushing Meadow Park to meet Defendant-Appellant at the barbecue and socialized with him for some time until Joey became intoxicated and got into an altercation with another individual. (T2:910-911). The four left in Defendant-Appellant's car, with Mr. Vega sitting in the front, and Joey and Red riding in the back seat. (T2:912). Joey remained belligerent and started talking about shooting people, at which point Defendant-Appellant kicked them all out of the car on a side street and gave them \$20 for cab fare, telling Mr. Vega to get Joey away from him. (T2:912-914).

At approximately 1:00 a.m. or 2:00 a.m., Joey called Mr. Vega on his cell phone and told him he left his

“ratchet” in the car, referring to a handgun. (T2:939). He tried to call Defendant-Appellant but his phone was not responding. (T2:94). A few days later, he made contact with Defendant-Appellant, informed him of what Joey had said, and the two of them tried to locate Joey with no success. (T2:940, 949).

[13] RICHARD BACQUIE testified in his own defense. In 2013, he was working as a union tunnel miner and supervisor on the Second Avenue subway line project. (T2:971-974, 992). As a miner, he was required to have several tools, including at least one knife for various functions, including prepping explosives for excavation, cutting ropes and opening boxes. (T2:976). Both People’s Exhibit #1 and #5 were used as tools for work. (T2:1004).

He testified when he purchased People’s Exhibit #1 on Amazon.com, he inspected it to make sure it worked properly and that the blade was tightly screwed to the handle. (T2:983-984). He was unable to open the knife with one hand by using a linear motion, gravity, or centrifugal force. (T2:982-983). Defendant-Appellant testified that on July 4, 2013, the knife was in good condition and was not loose, tightly screwed into the handle as when he first purchased it. (T2:984). He said People’s Exhibit #5 was inside the front console in his car, hidden from plain view. (T2:984-985). He took his knives home from work with him because there was an issue with lockers being broken into and property being stolen at his job site. (T2:985-986).

On July 3, 2014, Defendant-Appellant was invited to a barbecue and carried his pocket knife because it had a bottle opener on it. (T2:981, 986-987). He called his friend Anthony Vega and invited him to meet him at the barbecue, and Mr. Vega arrived with two friends named Joey and Red, who Defendant-Appellant did not [14] know. (T2:988-989). Joey became intoxicated, aggressive, and confrontational with another person at the barbecue and Defendant-Appellant was asked to remove Joey and the others from the event. (T2:990). Defendant-Appellant took the three others to his car, intending to go to a different party with them, with Mr. Vega riding in the front seat and Joey and Red in the back seat. (T2:990).

On the way to the second party, Joey's behavior continued so Defendant-Appellant pulled over and ordered all three of them out of the car, giving them \$20 for cab fare. (T2:991). Defendant-Appellant was driving through an unfamiliar residential neighborhood when he was pulled over by an unmarked police car. (T2:995). Defendant-Appellant gave police his license and registration, and police started searching his car, finding People's Exhibit #5 inside the console. (T2:996). The officer informed Defendant-Appellant that he was under arrest, frisked him, and found People's Exhibit #1 in his pants pocket. (T2:997). Defendant-Appellant was transported to the 113th Precinct, where police asked him if there was anything inside his car. (T2:998). Defendant-Appellant unequivocally said he did not know a gun was inside his car. (T2:999, 1004-1005).

The following day, Defendant-Appellant was arraigned, made bail, and went back to the precinct to retrieve his car, but the police refused to return it to him. (T2:1000). After several days of unsuccessful attempts to get his car back, Defendant-Appellant called the NYPD Internal Affairs Bureau to make a complaint [15] that the police refused to give him back his car. (T2:1001). Later, he also received a call from Anthony Vega, who informed him that Joey had admitted that he left a gun inside Defendant-Appellant's car. (T2:1003). Defendant-Appellant and his nephew then canvassed the neighborhood, speaking with people who might know how to contact Joey, but were ultimately unsuccessful in finding him. (T2:1003-1004).

On cross-examination, the jury heard that Defendant-Appellant's complaint to Internal Affairs included a claim that other valuable items had been stolen from his vehicle. (T2:1031-1032). After being visited by two detectives from Internal Affairs, Defendant-Appellant agreed to use a recording device and return to the 113th Precinct in an attempt to gather incriminating statements from the police. (T2:1032-1033).

After Defendant-Appellant testified, both sides rested. (T2:1042).

Jury Deliberations and Verdict

During deliberations, the jury requested re-instruction on all charges contained in the Indictment and a specific request for a definition of a gravity knife. (T2:1153). After complying with this request and further deliberations,

the jury sent out a second request to see People's Exhibit #1. (T2:1162). However, at this point it became apparent that the screw holding the blade to the handle had fallen out. A court officer found the screw on the floor and it was still out of the knife. (T2:1162-1163).

[16] There was an extended discussion concerning whether the jury would be able to handle the knife and if it would be told the screw had fallen out and been placed back in by court staff. Ultimately, the court decided to show the knife to the jury and that if jurors wanted to handle it, to submit another note. (T2:1162-1167). After showing jurors the knife, they immediately sent another note now requesting to test the gravity knife. (T2:1167)

Defense counsel argued the knife was not loose when it was purchased or recovered by the police and urged the court to permit jurors to test the knife, instructing them that the screw had fallen out and had been placed back in. (T2:1168-1169). The District Attorney vigorously objected, now blaming defense counsel for loosening the screw by "playing" with the knife during his summation. (T2:1170). The following then ensued:

THE COURT: He wasn't playing with the knife.

MR. DIDIO: I think I need to comment on that. ***A month and-a-half ago when I inspected the knife and handled the knife at the DA's office, that blade was not***

loose. I opened it. I handled it for quite a while. I don't know how it got loose. Certainly, the first time it got loose wasn't when I was handling it during summation. It was loose beforehand when the expert testified. So, any suggestion that somehow my actions caused the bolt to fall out is not based upon –

(T2:1170) (emphasis added).

Over the People's objection, the court instructed jurors the screw had fallen out of the knife and "right now we have no way of knowing the actual condition of [17] the knife at the time it was recovered from the defendant." (T2:1171-1175). The next note sent by the jury requested the definition of a gravity knife to be read twice. (T2:1175). Following that, jurors sent a series of notes requesting read-back of testimony, indicating they were deadlocked, and requesting an instruction on reasonable doubt and intent before rendering a verdict of guilty on all four counts remaining in the Indictment. (T2:1178, 1184, 1188-1193, 1196, 1204-1206).

The Motion for a New Trial and Sentencing

Prior to sentencing, Defendant-Appellant moved for a new trial pursuant to CPL § 330.30, renewing his motion to dismiss based upon a speedy trial violation, arguing prosecutorial misconduct during summation, and challenging the statutes criminalizing possession of a gravity knife as unconstitutionally overbroad. (court file, motion to set aside verdict). In a written

decision dated July 17, 2016, the trial court denied the motion, finding that the speedy trial decision was already the law of the case, having been decided by another Supreme Court Justice, any error in summation was remedied by sustaining objections and curative instructions and did not result in any prejudice, and Defendant-Appellant's challenge to the constitutionality of the statute was defective because he failed to serve the New York Attorney General with the motion and based upon the recent Court of Appeals decision in *People v. Parrilla* which settled that particular question of law. (court file, decision and order dated July 17, 2016).

[18] On July 20, 2016, Defendant-Appellant was sentenced to four and one-half years (4 1/2) followed by five years of Post-Release Supervision on counts #1 and #2 and one (1) year imprisonment on counts #3 and #4, all sentences to run concurrently. (S:12-13).

ARGUMENT

POINT I – THE TRIAL COURT IMPROPERLY DENIED SUPPRESSION WHERE THE EVIDENCE AT THE HEARING ESTABLISHED THAT THE POLICE UNLAWFULLY STOPPED DEFENDANT-APPELLANT’S VEHICLE IN THE ABSENCE OF REASONABLE SUSPICION THAT HE COMMITTED A TRAFFIC OFFENSE AND WHERE THE PEOPLE FAILED TO ESTABLISH THAT POLICE CONDUCTED A PROPER INVENTORY SEARCH OF DEFENDANT-APPELLANT’S VEHICLE ONCE IT WAS IMPOUNDED

The Fourth Amendment of the United States Constitution and Article I, § 12 of the New York State Constitution guarantee each citizen to be free from unreasonable searches and seizures. It is well-established law that if evidence is discovered as a direct consequence of unlawful police conduct in violation of the Fourth Amendment or Article I, § 12 of the New York State Constitution, it must be suppressed. *Dunaway v. New York*, 442 U.S. 200 (1979); *Wong Sun v. United States*, 371 U.S. 471 (1963). The Fourth Amendment and Article I, §12 of the New York State Constitution act as a safeguard against “arbitrary intrusions by government” and is designed to protect the citizenry from those intrusions that are [19] “based upon mere whim, caprice or idle curiosity.” *People v. De Bour*, 40 N.Y.2d 210, 217 (1976).

A traffic stop is a seizure within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 12 of the New York

State Constitution. See *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Harrell*, 268 F.3d 141, 148 (2d. Cir. 2001); *United States v. Scopo*, 19 F.3d 777, 781 (2d. Cir. 1994). Therefore, in order to stop a car, the police must have either “probable cause or a reasonable suspicion, based on specific and articulable facts, of unlawful conduct.” *Scopo*, 19 F.3d at 781 (citations and internal quotations omitted); accord *Whren v. United States*, 517 U.S. 806, 809-810 (1996); *People v. Robinson*, 97 N.Y.2d 341 (2001). Evidence seized incident to an unlawful traffic stop “is subject to the fruit of the poisonous tree doctrine, and may be suppressed.” *Scopo*, 19 F.3d at 781.

A. The Record Establishes that the Stop Was Not Based on Reasonable Suspicion

VTL § 375(12-a)(b) limits the amount of tint on car windows to 70 percent of light transmittance or more. *People v. Tompkins*, 6 Misc.3d 30, 31, 789 N.Y.S.2d 797 (App. Term, 2d. Dept. 2004). Thus, in order to reasonably suspect a car’s window tints are illegal, something more than a statement that a police officer is unable to see inside a vehicle is required. The officer’s testimony that it was hard to see inside a moving vehicle, driving in an opposite direction from him, on a [20] residential street in Queens at 10:20 p.m. was insufficient to support a valid basis for the stop. Accordingly, this Court should find that the stop itself was illegal, and suppress as a consequence. Importantly, the charge against Defendant-Appellant for his car having illegal tint, the sole basis for the initial stop of the vehicle, was

dismissed at the close of the People's case because there was insufficient evidence to even make out a prima facie case.

B. The People Failed to Sustain Their Initial Burden that the Inventory Search Was Lawful

It is axiomatic that at a suppression hearing, the People bear the burden of coming forward with the evidence to show that a search was lawful. In the inventory-search context, the People must present evidence that the police performed the search pursuant to standardized procedures and that those procedures also appropriately limited the inventorying officer's discretion with respect to the scope and manner of the search. *People v. Gomez*, 13 N.Y.3d 6 (2009), *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); *People v. Galak*, 80 N.Y.2d 715 (1993).

Inventory procedures may be proved by reference to written regulations or by testimony regarding standard practices. *United States v. Thompson*, 29 F.3d 62, 65 (2d Cir. 1994). The New York Court of Appeals has taken judicial notice of the fact that "the NYPD has a standardized, written protocol governing inventory searches in its Patrol Guide." *Gomez, supra* at 11. While this procedure need not be offered into evidence, a description of the requirements must be proffered by the People. *Id.*

[21] An inventory search must be conducted according to a "familiar routine procedure" and the procedure must meet two standards of reasonableness:

(1) it must be rationally designed to meet the objectives that justify the search in the first place; and (2) it must limit the conduct of the individual officers to assure that the search is carried out consistently and reasonably and does not become “little more than an excuse for general rummaging to discover incriminating evidence.” The proper purposes and reasons for an inventory search are: (1) to produce a detailed and carefully recorded inventory to protect the property while it is in police custody; (2) to ensure against claims of loss, theft, or vandalism; and (3) to protect the police from potential danger. *Florida v. Wells*, 495 U.S. 1, 4 (1990); *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976); *People v. Johnson*, 1 N.Y.3d 252, 256 (2003); *People v. Galak*, 80 N.Y.2d 715, 719 (1993).

Once the People establish that routine procedures existed, they must show that in effectuating the search, the police officer acted in accordance with the procedures. If the search did not follow specific and clear standard procedures the search is invalid. *See, e.g., People v. Gomez, supra, People v. Minto*, 272 A.D.2d 558 (2d Dept. 2000) (People’s allegation that the seizure of marijuana from the defendant’s car had been pursuant to an inventory search was not supported by the hearing record where there was no evidence presented to indicate that the police had acted pursuant to any standardized procedure); *People v. Colon*, 202 A.D.2d 708 (3d Dept. 1994) [22] (search invalid where, aside from a few questions pertaining to an inventory record sheet asked on cross examination of the officer who conducted the search, there was no evidence

adduced to indicate that the officer acted pursuant to any standardized procedure); *People v. Lesane*, 284 A.D.2d 249, 250 (1st Dept. 2001) (warrantless search of impounded vehicle proper since it was conducted “pursuant to routine police procedure” that provided for a preliminary inventory search to secure valuables when vehicle was left in an unsecured area); *People v. Antoine*, 285 A.D.2d 649, 650 (2d Dept. 2001) (detective’s testimony and inventory form which he completed soon after the search were sufficient to establish that he followed police procedure rationally designed to meet the objectives justifying such a search and which effectively limited his discretion); *People v. White*, 262 A.D.2d 122, 123 (1st Dept. 1999) (People established that car’s impoundment and subsequent search of closed briefcase were accomplished in accordance with standard police inventory procedures by the admission of police inventory search bulletins and relevant police testimony); *People v. Black*, 250 A.D.2d 494, 494 (1st Dept. 1998) (officer’s testimony and the inventory form containing precise guidelines to be followed were sufficient to establish that a standardized police procedure was followed).

Here, the People did not sustain their initial burden of establishing a valid inventory search. Although the NYPD has a standardized, written protocol governing inventory searches in its Patrol Guide, the People offered no evidence the [23] police officers conducted this search in accordance with the protocol. It was actually the defense that brought out the fact that the NYPD Patrol Guide had a specific section on inventory

searches. There was conflicting and contradictory testimony given by Officer Sepulveda at the hearing as to whether, and to what extent, he was familiar with the inventory search protocols contained in the NYPD Patrol Guide.

However, there was no testimony that such protocols were followed. Sepulveda admitted he had no training on how to conduct an inventory search, but he was familiar with Section 218-13 of the NYPD Patrol Guide that set forth the procedure for an inventory search of a vehicle. (H:54-55). He further admitted he did not complete any required forms for the inventory search, such as an Activity Log PD 112-45, and admitted that he did not even know what that form was. (H:54-55). The inventory search was conducted at approximately 10:50 p.m. on July 4, 2013, but the vehicle was not vouchered until 5:38 a.m. the next morning. (H:56-58). He further admitted that no forms or documents were created contemporaneous to the inventory search. (H:58-59).

When asked to explain what was recovered from the car, Sepulveda could not say what items were recovered and vouchered. (H:60). After the items were recovered, he waited a period of time before completing a property voucher. (H:62). Sepulveda further admitted that an NYPD arrest number was not generated until after the inventory search was complete, as was a complaint number. (H:64, 69).

[24] Further, the search failed to produce the single most important document necessary to justify such a search, the hallmark of an inventory search – an actual inventory. Officer Sepulveda testified that while he did vouch for various items recovered from Defendant-Appellant's car, they were vouchered separately. The vouchers themselves were not presented at the hearing as evidence of a proper inventory search.

Nor was there any permissible reason to impound Defendant-Appellant's car to begin with. There was no basis to believe (1) the car was used in the commission of a crime; (2) the car was unregistered, uninsured, or uninspected; (3) Defendant-Appellant lacked a valid driver's license or was intoxicated; (4) the car was illegally parked, abandoned, or presented a danger or impediment to traffic; (5) the car was stolen; (6) the car was involved in a fatal automobile accident. Rather, the record of the hearing establishes that none of those bases were present. Further, the law is well established that the arrest of a driver, standing alone, does not trigger a right to impound a vehicle and conduct an inventory search.

Simply put, the search at bar was not designed to produce an inventory, but rather constituted a rummaging around for possible evidence. Because the police did exactly what the Fourth Amendment proscribes, the court below should have granted Defendant-Appellant's motion to suppress. As a consequence, this Court should reverse, grant suppression, and dismiss the Indictment.

[25] POINT II – DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL WHERE THE PROSECUTOR REPEATEDLY SHIFTED THE BURDEN OF PROOF TO THE DEFENSE DESPITE BEING ADMONISHED SEVERAL TIMES TO REFRAIN FROM DOING SO; REPEATEDLY PRESENTED HIS OWN PERSONAL BELIEFS AND OPINIONS REGARDING THE DEFENDANT-APPELLANT’S CREDIBILITY AND GUILT TO THE JURY DURING CROSS-EXAMINATION OF DEFENDANT-APPELLANT AND ON SUMMATION, CALLED DEFENDANT-APPELLANT A LIAR IN HIS SUMMATION, AND IMPROPERLY ASKED DEFENDANT-APPELLANT IF THE POLICE WERE LYING DURING THEIR TESTIMONY DURING CROSS-EXAMINATION

Both the United States Supreme Court and the New York Court of Appeals have recognized that prosecutors have a special duty under the United States Constitution and the New York State Constitution to ensure a fair trial. In *Strickler v. Greene*, 527 U.S. 263, 281 (1999), the Supreme Court described the special role. “played by the American prosecutor in the search for truth in criminal trials.” *Id.*

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such,

he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

[26] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[A]lthough counsel is to be afforded the widest latitude by way of comment, denunciation or appeal in advocating [counsel's] cause, summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his command. There are certain well-defined limits . . . Summation must remain within the four corners of the evidence and avoid irrelevant comments which have no bearing on any legitimate issue in the case. Thus the District Attorney may not refer to matters not in evidence or call upon the jury to draw conclusions which are not fairly inferable from the evidence.

People v. Wright, 25 N.Y.3d 769, 780 (2015) (internal citations omitted).

Where a prosecutor engages in misconduct in order to secure a conviction, a defendant's Due Process right to a fundamentally fair trial is violated, requiring reversal of the conviction. *See People v. Hopkins*, 58

N.Y.2d 1079 (1983); *Tankleff v. Senkowski*, 135 F.3d 235 (2d. Cir. 1998).

Here, the Assistant District Attorney engaged in a repeated, persistent, and widespread pattern of misconduct in his opening statement, in his cross-examination of defense witnesses, and most especially during his summation. The prosecutor expressed a personal opinion as to the guilt and truthfulness of Defendant-Appellant, repeatedly called him a liar, and impermissibly shifted the burden of proof on numerous occasions, despite being admonished by the trial court several times to refrain from such conduct. As a result, the cumulative effect of those errors deprived Defendant-Appellant of a fundamentally fair trial, necessitating reversal.

[27] *A. The Prosecutor Impermissibly Shifted the Burden of Proof Throughout the Trial*

A prosecutor who wishes to argue in summation that the government's evidence has been largely uncontradicted must walk a fine line . . . On the other hand, she must avoid commenting in a way that trenches on the defendant's constitutional rights and privileges. For example, she may not permissibly comment on the failure of the defendant to testify, or invite the jury to "presume" in the absence of countervailing evidence that the government's view of the case is correct, or suggest that the defendant has any burden of proof or any obligation to adduce any evidence whatever.

United States v. Parker, 903 F.2d 91, 98 (2d. Cir. 1991); citing *United States v. Gotchis*, 803 F.2d 74, 81 (2d. Cir. 1986); *United States v. Walker*, 835 F.2d 983, 988-89 (2d. Cir. 1987); *United States v. Cruz*, 797 F.2d 90, 93 (2d. Cir. 1986); *United States v. Pena*, 793 F.2d 486, 491 (2d Cir. 1986).

New York courts have consistently held that a prosecutor may not argue or even imply to a jury that the defendant has an obligation to offer an explanation, a defense, or to come forward with any proof to contradict the People's case. See *People v. LaPorte*, 306 A.D.2d 93 (1st Dept. 2003); *People v. Walters*, 251 A.D.2d 433 (2d Dept. 1998); *People v. Torres*, 223 A.D.2d 741, 742 (2d Dept. 1996); *People v. Kent*, 125 A.D.2d 590, 591 (2d Dept. 1986); *People v. Aguilar*, 14 Misc.3d 1, 2 (App. Term 1st Dept. 2006). This Court has held a prosecutor cannot even comment on whether a defense attorney failed to ask a certain question of a particular witness, [28] as that impermissibly shifted the burden of proof to the defendant. *People v. Grant*, 94 A.D.3d 1139, 1141 (2d Dept. 2012).

The People attempted to shift the burden onto the defense on several occasions during summation, arguing that "at the end of the People's case, the defense had two options. One was to call this a plant by the police, meaning that the police put this gun in his car" drawing a sustained objection and admonition by the trial court. (T2:1106). After this, the People attempted to argue that Defendant-Appellant failed to make this allegation during his call to Internal Affairs, again drawing a sustained objection and an instruction not

to shift the burden and to move on from this argument. (T2:1107).

Undeterred, the Assistant District Attorney ignored the trial court's admonitions and immediately returned to that same argument, now drawing an objection and a motion for a mistrial, which was denied. (T2:1107-1108). Later in his summation, the prosecutor again tried to shift the burden onto the defense, this time displaying open disrespect to the trial court when an objection was sustained:

Vega didn't tell you anything about a function or charity event, said this was a barbecue and they were drinking and he got wasted. Does that sound look a fundraiser for kids on July 4th? That makes no sense. How about the fact that the defendant testified that there was another guy in the car, this guy named Red. Anthony Vega didn't say anything about Red being in the car while they were driving.

MR. DIDIO: Objection. That's not true.

THE COURT: Sustained. The jury will decide.

[29] MR. BARKOFF: So, that's overruled.

THE COURT: Yes. Thank you for informing me of that and don't do it again.

(T2:1113).

Undeterred, the prosecutor then immediately again tried to shift the burden, arguing that that Defendant-Appellant's failure to call a witness meant

that the theory of defense was a lie, again drawing a sustained objection. (T2:1114).

The Assistant District Attorney attempted to shift the burden not only during summation but during his cross-examination of Defendant-Appellant. The District Attorney stated that the police officers did not bring up the Internal Affairs investigation, implying that Defendant-Appellant was lying as a result, drawing a sustained objection and a curative instruction that Defendant-Appellant had no burden of proof. (T2:1034-1035). The prosecutor also questioned Defendant-Appellant about his purported failure to give his attorney information regarding Joey, prompting repeated sustained objections. (T2:1015-1016, 1022, 1028, 1036). The District Attorney then stated, rather than asked, to Defendant-Appellant that in making a report to Internal Affairs, “anybody else would say they had no clue where that gun came from,” again drawing a sustained objection. (T2:1038).

By shifting the burden of proof, the District Attorney deprived Defendant-Appellant of Due Process and his fundamental right to a fair trial.

[30] *B. The District Attorney Impermissibly Asked Defendant-Appellant Whether the Prosecution and Defense Witnesses Had Lied During Their Testimony and Expressed his Personal Opinions of Defendant-Appellant's Credibility and Guilt, Repeatedly Calling Defendant-Appellant a Liar During his Summation*

The law is well-settled that it is reversible error when prosecutor expresses or injects personal opinions as the truthfulness of a witness or the guilt of the defendant. *People v. Bailey*, 58 N.Y.2d 272 (1983), *People v. Gordon*, 50 A.D.3d 821 (2d. Dept. 2008); *People v. Porter*, 136 A.D.3d 1344 (4th Dept. 2016); *United States v. Carr*, 424 F.3d 213 (2d. Cir. 2005).

In *People v. McDowell*, 59 A.D.2d 948 (2d. Dept. 1977), this Court reviewed a conviction after trial where the prosecutor cross-examined the defendant by posing certain questions which required him to say whether a particular witness for the People had been lying or telling the truth. Addressing this particular line of questioning, this Court held:

We believe that such prosecutorial tactics were fundamentally unfair and prejudicial and should have been curtailed at their inception. The right of an accused to submit proof, by compulsion, if necessary, is constitutionally guaranteed, and an integral component of his right to justice. Thus, no stigma should be attached to the testimony of a witness on a crucial issue solely because it is rendered for one side rather than the other. Cross-examination and summation may not be based upon

fictitious assumptions which only confuse the fact-finders and impede the search for the truth.

Id. at 949 (internal citations omitted).

[31] Since *McDowell* was decided almost forty (40) years ago, this Court and the New York Court of Appeals have repeatedly held this line of questioning is improper, violates a defendant's constitutional rights, and has reversed convictions as a result. *See People v. Galloway*, 54 N.Y.2d 396 (1981); *People v. Berrios*, 298 A.D.2d 597 (2d. Dept. 2002); *People v. Simms*, 130 A.D.2d 525 (2d. Dept. 1987); *People v. Sykes*, 114 A.D.2d 478 (2d. Dept. 1985); *People v. Sepulveda*, 105 A.D.2d 854 (2d. Dept. 1984); *People v. Calderon*, 88 A.D.2d 604 (2d. Dept. 1982); *People v. Santiago*, 78 A.D.2d 666 (2d. Dept. 1980); *People v. Crossman*, 69 A.D.2d 887 (2d. Dept. 1979); *People v. Davis*, 63 A.D.2d 685 (2d. Dept. 1978).

Here, the pattern of misconduct began during the opening statement, in which the District Attorney argued:

Now, members of the jury, after hearing all what I just explained to you, hearing from the multiple experts, the DNA experts, I believe that you will find this defendant guilty beyond a reasonable doubt.

MR. DIDIO: Objection as to what he believes.

THE COURT: Sustained as to that.

MR. BARKOFF: I believe after hearing all of that evidence you will find the defendant guilty beyond a reasonable doubt.

MR. DIDIO: Objection as to what he believes.

THE COURT: Sustained.

I am confident that at the end of this case, you'll find the only verdict that is consistent with the law, that is consistent with the evidence and that is consistent with your common sense and that is consistent with justice and that is guilty of all counts.

MR. DIDIO: Objection as to justice.

[32] THE COURT: Sustained as to justice.

(T1:385, 387)

The misconduct continued during the prosecutor's cross-examination of Defendant-Appellant when he was repeatedly asked whether Mr. Vega and Mr. McDonough had lied during their testimony and whether the police officers had lied during their testimony. (T2:1015-1016, 1022, 1028, 1036). He further asked Defendant-Appellant whether he took the law into his own hands when work lockers were broken into, and why he had failed to call police, again prompting sustained objections. (T2:1023).

The District Attorney also injected his own personal opinion of Defendant-Appellant's truthfulness, asking:

Q: Throughout this whole trial, this case – withdrawn. Let’s talk more about that phone call because **I think there are some things that are very telling in that phone call.**

MR. DIDIO: Objection to what counsel thinks.

THE COURT: Sustained.

(T2:1037) (emphasis added)

Q: So, you are telling me that when you had internal affairs on the phone and you had an opportunity to tell them about any misconduct that this police officer might have done, any misconduct, you had an opportunity to do that and you left out the part about the police just coming in your car and searching your car while you’re sitting in there? You left out that part?

A: Excuse me. I’m not being rude to you. There is no reason for you to yell at me.

[33] **Q: *You know what, because you are not being honest.***

A: I am being honest.

MR. DIDIO: Objection.

THE COURT: Sustained. Sustained.

(T2:1030) (emphasis added).

Throughout his summation, the District Attorney referred to Defendant-Appellant’s testimony as his “story” no less than six (6) times, each time drawing a

sustained objection. (T2:1093, 1112-1115, 1118). The prosecutor further presented his own personal beliefs that the gun belonged to Defendant-Appellant, not the other individual, and that during his call to Internal Affairs, Defendant-Appellant did not admit to possession of the gun because “that would be essentially pleading guilty to the charges.” (T2:1108, 1094).

In making these arguments, the District Attorney argued not the evidence but his own personal opinions about Defendant-Appellant’s credibility and his guilt, depriving him of a fair trial.

C. The Pervasive Pattern of Prosecutorial Misconduct Was Not Harmless Error

The Court of Appeals has recognized that “[a] court’s instructions to a jury to disregard matters improperly brought to their attention cannot ‘always assure elimination of the harm already occasioned.’” *People v. Calabria*, 94 N.Y.2d 519, 523 (2000), *citing People v. Carborano*, 301 N.Y. 39, 42-43 (1950). As recently as July, 2016, this Court has recognized that where a prosecutor engages in repeated, persistent and widespread misconduct, a court’s sustaining objections, admonitions, [34] and curative instructions still will be insufficient to prevent prejudice to the defendant, reversing a conviction where the Queens County District Attorney repeatedly engaged in improper conduct during summation, despite the fact that many objections to the remarks at issue were sustained. *People v. Redd*, 141 A.D.3d 546 (2d. Dept. 2016), *see also People*

v. Casanova, 119 A.D.3d 976 (3d. Dept. 2014), *People v. Sandy*, 115 A.D.2d 27 (1st Dept. 1986), *People v. Lindo*, 85 A.D.2d 643 (2d. Dept. 1981).

This was not harmless error.¹ The evidence at trial was less than overwhelming, given the inconstancies in the police officers' testimony, the lack of any admission by Defendant-Appellant, the defense evidence, which included expert witness testimony, and the jury's clear struggle with the definition of the gravity knife. As a result, the cumulative effect of prosecutor's pervasive misconduct throughout the trial cannot be considered harmless. *People v. Anderson*, 35 A.D.3d 871 (2d. Dept. 2006), *People v. Maldonado*, 97 N.Y.2d 522 (2002), *People v. Crimmins*, 36 N.Y.2d 230 (1975).

[35] Based upon the foregoing reasons, Defendant-Appellant respectfully urges this Court to reverse the convictions and remand for a new trial.

¹ There were various other instances of misconduct as well. In his summation, the District Attorney argued to the jury that People's Exhibit #1 was also a switchblade, drawing a sustained objection and a correction by the trial court that Defendant-Appellant was not charged with possession of a switchblade. (T2:1090). The District Attorney went on to argue that the defense did not dispute that the firearm was operable, and that if DNA had been found on the gun, it would have established that Defendant-Appellant knowingly possessed the firearm, drawing sustained objections. (T2:1092).

POINT III – DEFENDANT-APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL VIOLATED THE ADVOCATE-WITNESS RULE BY PLACING HIMSELF IN A POSITION WHERE HE WAS THE SOLE WITNESS FOR A SHARPLY DISPUTED FACT THAT WOULD HAVE CORROBORATED DEFENDANT-APPELLANT’S TESTIMONY ON A KEY ISSUE FOR THE THEORY OF DEFENSE, BUT FAILED TO MOVE TO WITHDRAW OR PRESENT TO THE JURY THE SIGNIFICANT EXCULPATORY EVIDENCE THAT COUNSEL ALONE POSSESSED

Both the Federal and State Constitutions guarantee the right to effective assistance of counsel. United States Constitution, Sixth Amendment, New York Constitution, Article I, § 6. “The fundamental right to the ‘effective assistance of counsel’ is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial’ in an adversarial system of justice.” *People v. Benevento*, 91 N.Y.2d 708, 711 (1998), citing *People v. Claudio*, 83 N.Y.2d 76, 80 (1993); *Rosario v. Ercole*, 601 F.3d 118 (2d Cir. 2010); *United States v. Cronin*, 466 U.S. 648, 658 (1984).

The Supreme Court has held that “[t]he benchmark of judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under [36] the *Strickland* standard, ineffective

assistance of counsel is established when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *Id.* at 687.

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. *Strickland* cautions courts to refrain from second-guessing counsel's strategic decisions from the superior vantage point of hindsight. *Id.* at 689. "Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690-691. (emphasis added).

At the same time, "virtually unchallengeable" does not mean wholly unchallengeable. *See Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir. 2001), *see also* [37] *Phoenix v. Matesanz*, 233 F.3d 77, 82 (1st Cir. 2000). "Certain defense strategies, however, may be so 'ill-chosen' as to render counsel's overall representation

constitutionally defective.” *Adams v. Balkcom*, 688 F.2d 734, 738 (11th Cir. 1982). “So called ‘strategic’ decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference.” *Hardwick v. Crosby*, 320 F.3d 1127, 1186 (11th Cir. 2003) (citations omitted).

“What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation.” *People v. Baldi*, 54 N.Y.2d 137, 146 (1981). However, the Court of Appeals has held that single error may qualify as ineffective assistance when it is “sufficiently egregious and prejudicial as to compromise a defendant’s right to a fair trial.” *People v. Caban*, 5 N.Y.3d 143, 152 (2005).

The Court of Appeals and the Appellate Division have dealt with the advocate-witness rule set forth in Rule 3.7 of the Rules of Professional Conduct (formerly Disciplinary Rule 5-102(a), 22 NYCRR §1200.21(a)), which states as follows:

[38] Lawyer As Witness

(a) A lawyer ***shall not*** act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact ***unless***:

- (1) the testimony relates solely to an uncontested issue;
- (2) the testimony relates solely to the nature and value of legal services rendered in the matter;

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- (3) disqualification of the lawyer would work substantial hardship on the client;
 - (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
 - (5) the testimony is authorized by the tribunal.
- (b) A lawyer may not act as advocate before a tribunal in a matter if:
- (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
 - (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

22 NYCRR § 1200, Rule 3.7.

In *People v. Papemo*, 54 N.Y.2d 294 (1981), the Court of Appeals held that the advocate-witness rule contained in Disciplinary Rules 5-101(B) and 5-102 of the Code of Professional Responsibility requires a lawyer to withdraw from representation when it appears that the lawyer would be called to testify regarding a disputed issue of fact, specifically including the situation where the lawyer must testify on behalf of their own client. *Id.* at 299-300.

In *People v. Berroa*, 99 N.Y.2d 134 (2002), defense counsel presented the testimony of two witnesses, who

had previously told counsel that they were unable [39] to pinpoint the defendant's whereabouts on the date of the actual murder. However, at trial the witnesses' testimony presented an alibi to counsel's surprise. After the trial court and the District Attorney posited that counsel might now be a witness for the People in order to impeach the defense witnesses, counsel stipulated that neither witness had previously told counsel that they were with the defendant on the date of the murder, and the stipulation was read to the jury. There, the Court of Appeals held that defense counsel was ineffective when she stipulated to facts that directly contradicted defense witness testimony. The Court further recognized the advocate witness rule, specifically holding that lay attorney also should not continue to serve as an advocate when it is obvious that the lawyer will be called as a witness on behalf of the client." *Id.* at 140.

In *People v. Ortiz*, 26 N.Y.3d 430 (2015), the defendant was charged with Burglary in the First Degree, Burglary in the Second Degree, and related offenses after Defendant allegedly followed a male and a female complainant as they were about to enter their apartment and threatened them with a razor blade, demanding money or jewelry. A struggle ensued during which the male complainant struck the defendant in the head, causing him to drop the razor blade, and permitting them to restrain the defendant while they called 911 and waited for police. At trial, the defendant testified that he and a friend went to the apartment building to look for a room to rent and got into an

argument with the complainant, which turned into a full-[40] fledged fight in which the complainant pulled defendant into the apartment and threatened the defendant with a kitchen knife.

On cross-examination, the People attempted to impeach Defendant with a statement made by defense counsel at the defendant's arraignment, in which she stated her understanding of the facts was that the complainant attacked the defendant with a razor blade, rather than a kitchen knife. The People sought to introduce this statement to show defendant had made a prior inconsistent statement to his attorney. Defense counsel vigorously objected, arguing her client's right to confront her about the statement would require her to take the stand and tell the jury she mistakenly said razor blade when in fact the defendant had told her the complainant had used a knife. The trial court denied her motion for a mistrial and the defendant was convicted.

The Court of Appeals reversed and remanded for a new trial, citing the advocate-witness rule contained in Rule 3.7 of the Rules of Professional Conduct (formerly Disciplinary Rule 5-102(a), 22 NYCRR § 1200.21(a)). The Court recognized the rule is designed to "avoid 'the unseemly circumstances of placing an attorney in a position in which he must argue the credibility of his own testimony' which many 'confuse the factfinder and impair the fairness of the trial.'" *Ortiz* at 438. (internal citations omitted). The Court of Appeals held that the People's use of the statement to attack the defendant's credibility by the "one

person in the courtroom whose job it was to advocate for it” placed defense counsel in an [41] untenable situation, requiring her to withdraw from the case, and required the trial court to either grant a mistrial or permit counsel to withdraw.

Here, a hotly contested issue at trial was whether the knife was a gravity knife on July 4, 2013 when it was recovered by police from Defendant-Appellant. Specifically, the issue was whether prior to trial, someone had loosened the screw holding the blade to the handle, enabling it to function as a gravity knife. In his summation, trial counsel argued the police officers were not credible for a host of reasons and compared the credibility of the police officers against the credibility of Defendant-Appellant, arguing there was no evidence to corroborate the police officers’ testimony, which was compromised by prior inconsistent statements and a lack of independent forensic evidence. (T2:1061-1065, 1067-1068, 1083-1084).

To the contrary, counsel argued there was evidence to corroborate Defendant-Appellant’s testimony that he did not knowingly possess a firearm, the knife was not a gravity knife when he purchased it and was not a gravity knife when it was recovered by police, based upon of the defense expert witness’ testimony. (T2:10701080). Trial counsel argued:

Mr. Bacquie told you when he purchased the knife and he received it, it was not loose like that. When it was recovered from him on July 4, 2013, it was not loose like that, and by being loose like that in the

handle, that means there's less friction on the blade. There's two sort of bolts here or pivots here and you can look at that in the jury room. **If those bolts or pivots are loosened and actually one of them is coming off right now, I will try [42] to close it. If those pivots or bolts are loosened, then this knife and the blade will be loose in the handle and what would that do? That would create a situation where the blade opens in a way that was not designed to open.** It opens perhaps in this force of way when actually would never open that way. This knife as explained by the expert opened manually. That's the way it is designed to open, but if this blade and the resistance is loose, it may open through that act of pulling down or pushing down lineal and it may appear to be a gravity knife, but by design when it was purchased, when it was possessed by Mr. Bacquie, it was not a gravity knife by definition, so the defense submits to you for all those reasons, my client should be acquitted of that charge, the charges regarding the gravity knife.

(T2:1073-1074) (emphasis added).

Thus, the theory of defense was that if the police tampered with evidence and lied about the condition of the knife at the time of Defendant-Appellant's arrest, they could not be believed, and Defendant-Appellant's credibility would have been greatly enhanced, as there was other evidence that the police officers were corrupt. The record is also clear that approximately one and one-half months prior to trial, defense counsel

went to the District Attorney's Office for the purpose of conducting an inspection of the knife received in evidence as People's Exhibit #1 (T2:1170).

At the pre-trial inspection, the evidence bag for the gravity knife was sealed and unopened at the time of the pre-trial inspection. (T1:493-494). The record is also clear that the defense expert retained by Defendant-Appellant did not accompany counsel to that meeting or otherwise conduct a pre-trial inspection of the knife in [43] question. In fact, the expert first examined the knife while on the witness stand where his expert opinion raised the sharply disputed issue whether the knife opened with either gravity or centrifugal force. (T2:819-823, 826, 829-831, 838). The jury clearly struggled with the issue, repeatedly inquiring about the definition of a gravity knife and sought to inspect it to see if it was, in fact, a gravity knife.

Clearly jurors were trying to determine who to believe – Richard Bacquie or the police. Finally, when the condition of the knife was altered through no fault of those present in the courtroom, the trial court instructed jurors “right now we have no way of knowing the actual condition of the knife at the time it was recovered from the defendant.” (T2:1171-1175).

By examining the knife without someone else present, defense counsel placed himself in a position where he alone had exculpatory information as to the condition of the knife when it was recovered by police. Because he failed to take another person with him, especially the expert, during the pre-trial inspection of

the evidence, counsel made himself the sole witness as to the sharply disputed fact of the condition of the knife – whether it was a gravity knife when it was recovered from Defendant-Appellant, or did police alter the evidence and manipulate the knife in order to cause it to function in a way for which it was never designed. This was made even more important in light of counsel’s stipulation that the evidence bag was sealed when he inspected the knife. (T1:494).

[44] But this was never presented to the jury because trial counsel could not call himself as a witness at his own trial. He could not make himself an unsworn witness even if he tried. His status as a fact witness only came to light in an entirely unforeseen way during jury deliberations.

No court in New York has ever been called upon to answer the specific question of whether trial counsel’s failure to move to withdraw as counsel constitutes ineffective assistance of counsel where trial counsel is the sole defense witness to a disputed issue of fact that is central in the case, and fails to present that evidence at trial.² Further, as recognized by the Bronx Supreme Court, no appellate court in the State of New York has ever dealt with the question of whether the alteration or destruction of an exhibit received in evidence at trial that deprives a jury of its use during deliberation constitutes a basis to disturb a verdict and reverse a

² Undersigned counsel has been unable to find any case on this specific issue in the Federal system, or reported in any other State.

conviction. *People v. Paulino*, 24 Misc.3d 832, 878 N.Y.S.2d 871 (Bronx Co. Sup. Ct. 2009) (Price, J.). Thus, the issue presented herein is an issue of first impression in this Court.

The only case nationwide that undersigned counsel was able to find even remotely similar to the case at bar was *People v. Lee*, 38 Cal.App.3d 749 (Ca. Ct. of Appeal, 1st Dist. Div. 2 1974). In that case, all of the physical exhibits, except a [45] knife, were mistakenly thrown into the garbage by the night janitor who cleaned up the jury room after the jury had ceased deliberations for the evening after the second day of deliberations. No mention of the lost exhibits was made until after the verdict, when defense counsel discovered that the exhibits were missing and moved for a new trial. The California Court of Appeal held that there was no error because the exhibits at issue added little to the case, the jury had access to the exhibits on the first day and second day of deliberations, and the defendant did not make any showing that any additional viewing or consideration of the exhibits (mainly photographs) would have helped him in any way or that he suffered any prejudice from their being thrown away.

In contrast, here People's Exhibit #1 was the crux of the case. Unlike in *Lee*, the jury here had only limited access to People's Exhibit #1 during their deliberations as the trial court made clear it would not allow the jurors to handle the knife in the absence of a court officer for safety reasons. Here, the jury specifically requested to inspect the knife two times during

deliberations and repeatedly requested the legal definition of a gravity knife.

Counsel's failure to either have the expert, or anyone else, accompany him to the pre-trial inspection, or to ask to be relieved so he could testify about this contested issue was objectively unreasonable and a clear violation of the Rules of [46] Professional Conduct. There was no legitimate strategic or tactical reason for this failure.

However, this failure greatly prejudiced Defendant-Appellant, who had no one to corroborate his testimony as to the actual condition of the knife as of July 4, 2013, the date of his arrest, as opposed to the condition of the knife at trial almost three years later. On the other hand, the police officers' testimony corroborated each other on the same issue. Because trial counsel failed to offer the exculpatory evidence that only he possessed, it was Defendant-Appellant's word against three NYPD officers, and Defendant-Appellant was deprived of the one witness who would have corroborated his testimony on the issue that determined his credibility.

Defendant-Appellant received ineffective assistance of counsel and this Court must reverse the conviction and order a new trial.

POINT IV – DEFENDANT-APPELLANT’S RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE UNITED STATES CONSTITUTION, THE NEW YORK CONSTITUTION, AND CRIMINAL PROCEDURE LAW §§ 30.20 AND 30.30 WAS VIOLATED WHERE THE PROSECUTION FAILED TO BRING THE CASE TO TRIAL FOR ALMOST THREE YEARS

A. Defendant-Appellant’s Constitutional Right to a Speedy Trial Was Violated

The Speedy Trial clause of the Sixth Amendment states that “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”

[47] The evils at which the [Speedy Trial] Clause is directed are readily identified. It is intended to spare an accused those penalties and disabilities – incompatible with the presumption of innocence – that may spring from delay in the criminal process. The Court recognized in *United States v. Ewell*, 383 U.S. 116, 120, (1966), that the speedy-trial right ‘is an important safeguard to prevent undue and oppressive incarceration prior to trial.’ We also recognized in *Ewell* that a speedy trial is intended ‘to minimize anxiety and concern accompanying public accusation.’

Dickey v. Florida, 398 U.S. 30, 41 (1970) (Brennan, J., concurring).

The right to a speedy trial is “one of the most basic rights preserved by our Constitution,” and is enforceable against the states through the Fourteenth

Amendment. *Klopper v. North Carolina*, 386 U.S. 213, 226 (1967). In addition, the New York Court of Appeals has long held that, under the New York Constitution, “unreasonable delay in prosecuting a Defendant-Appellant constitutes a denial of due process of law.” *People v. Singer*, 44 N.Y.2d 241, 253 (1978) (quoting *People v. Staley*, 41 N.Y.2d 789, 791 (1977)). Where, as here, a constitutional speedy trial violation is established, the charges must be dismissed with prejudice. See *Strunk v. United States*, 412 U.S. 434, 440 (1973); *People v. Taranovich*, 37 N.Y.2d 442, 444 (1975).

In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court adopted a four-part balancing test to determine whether a defendant’s Sixth Amendment right to a speedy trial has been violated in a pending criminal prosecution:

- [48] (1) length of delay,
- (2) the reason for the delay,
- (3) defendant’s assertion of his right, and
- (4) prejudice to defendant

Id. at 530.

The Court further held that “none of the four factors identified above [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Id.* at 533. “[B]ecause of the imprecision of the right to speedy trial, the

length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, ***the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.*** *Barker, supra* at 530-531 (emphasis added).

The right to a speedy trial is also guaranteed by the New York State Constitution, encompassed in the Due Process Clause contained in Article I, § 6 and Civil Rights Law § 12. The New York Court of Appeals has “long held that in criminal prosecutions an unreasonable delay in prosecuting a defendant following an arrest can constitute a violation of the Due Process Clause of our Constitution.” *Matter of Benjamin L.*, 92 N.Y.2d 660, 667 (1999). This right is codified in the New York Bill of Rights, specifically in the Civil Rights Law § 12, which guarantees that “[i]n all criminal prosecutions, the accused has a right to a speedy and public trial . . .” [49] and further codified in Criminal Procedure Law § 30.20(1) which provides that “[a]fter a criminal action is commenced, the defendant is entitled to a speedy trial.” *People v. Berkowitz*, 50 N.Y.2d 333, 348 (1980).

The speedy trial guarantee established by the 6th Amendment to the Federal Constitution and embodied in CPL 30.20 and Civil Rights Law §12 is intended to ensure fair and humane treatment of an accused person by protecting him or her against prolonged imprisonment while awaiting trial, providing

relief from the anxiety and public suspicion that accompanies a criminal accusation which remains untried, and reducing the possibility that through the loss of witnesses or the dulling of memory the means of proving his or her innocence may be lost. It also serves the interests of society in seeing that those accused of crime are swiftly brought to justice.

People v. Anderson, 66 N.Y.2d 529, 534-35 (1985) (citations omitted).

Similar to the United States Supreme Court, the New York Court of Appeals has also formulated a multi-prong test in determining whether a defendant's state Constitutional right to a speedy trial has been violated. In *People v. Taranovich*, 37 N.Y.2d 442, 444-445 (1975), the Court of Appeals enunciated the following factors that a trial court confronted with a speedy trial claim must examine:

- (1) the extent of the delay;
- (2) the reason for the delay;
- (3) the nature of the underlying charge;
- (4) whether or not there has been an extended period of pretrial incarceration; and
- (5) whether or not there is any indication that the defense has been impaired by reason of the delay.

Id. at 445.

[50] Like the Supreme Court, the *Taranovich* court was quick to "add that no one factor or combination of

the factors set forth below is necessarily decisive or determinative of the speedy trial claim, but rather the particular case must be considered in light of all the factors as they apply to it.” *Taranovich, supra* at 445 (internal citation omitted). However, above all else, a trial court’s weighing of these factors “must be carried out with full recognition that the accused’s interest in a speedy trial is specifically affirmed in the Constitution.” *Barker, supra* at 533.

1. The Extent of the Delay

The first prong of both the *Barker* and *Taranovich* test focuses on the extent of the delay. “The first factor, the extent or duration of the delay, is, of course, important inasmuch as it is likely that, all other factors being equal, the greater the delay the more probable it is that the accused will be harmed thereby.” *People v. Romeo*, 12 N.Y.3d 51, 56 (2009), *quoting Taranovich, supra* at 445.

Where a defendant is charged with a felony, the People must be ready for trial within six months of the commencement of the criminal action, less excludable periods. CPL § 30.30(1)(a). “If the People are not ready for trial within the time sanctioned by the statute, the indictment must be dismissed and the defendant released.” *People v. Dean*, 45 N.Y.2d 651, 656 (1978). “[T]he right to a speedy trial guaranteed by CPL § 30.30, which relates to prosecutorial readiness, is not dependent in any way on whether the defendant has expressed his readiness for trial [51] or whether the

defendant can demonstrate prejudice resulting from the delay.” *People v. Hamilton*, 46 N.Y.2d 932, 934 (1979).

In the case at bar, Defendant-Appellant was charged with one of the most common offenses to appear daily on a New York City criminal court’s calendar: criminal possession of a weapon resulting from a traffic stop involving police officer witnesses. There was nothing complex, unusual, or extraordinary about the charges in his case. As demonstrated at trial, this case did not involve any expert witnesses by the People, any forensic evidence, or unusual or complex issues of law or fact, nor was there any indication as such in pre-trial proceedings. Nonetheless, the delay occasioned by the People’s failure to move this case to trial resulted in a garden variety gun and knife possession case taking almost three years to be tried – an unreasonable amount of time.

2. The Reason for the Delay

The second prong of both the *Barker* and *Taranovich* test considers the reason the prosecution assigns to the delay. Reasons such as negligence, court congestion, or engagement by the prosecutor on other cases “nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the Defendant-Appellant.” *Barker, supra* at 531. The New York Court of Appeals has likewise held that court congestion does not relieve the People from its obligation to move a case

to trial. *See People v. Correa*, 77 [52] N.Y.2d 930, 931 (1991), *People v. Cortes*, 80 N.Y.2d 201 (1992). The Court of Appeals and the Appellate Division have further recognized that assistant district attorneys are fungible and, therefore, the District Attorney's office is required to supply substitute attorneys to avoid being held accountable for delay. *See People v. Jones*, 68 N.Y.2d 717 (1986); *People v. Warren*, 85 A.D.2d 747 (2d Dept. 1981); *People v. McCaffery*, 78 A.D.2d 1003 (4th Dept. 1980).

Here, while the People's response to Defendant-Appellant's motion did not give any reasons as to why the People were not ready, the reasons justifying the extensive delay in this case cited by the court below were:

When the People are not ready and ask for a later date and defense counsel requests and receives a subsequent date, the People's original request is not per se negated because they are not ready to proceed on a later date. There are a myriad of circumstances why their original projection into the future falls short – ADAs being on trial on another matter, ADAs taking other jobs, witness availability in a constant state of fluctuation – just to name a few possibilities. Consecutive not ready situations does not render the date initially requested by the People suspect. Nor should it require ongoing factual hearings in every case, something that is impractical and ignores the reality of calendar practice in very busy Calendar Parts with voluminous

calendars. This in no way means that a failure by the People to be ready for a reason that exists consistently throughout the calendar process should shield the People from being charged with speedy trial time because they did not realistically ask for dates consistent with the problem that prevents them from going forward.

(court file, decision and order dated April 18, 2016).

[53] Accordingly, the court below cited as negligence, court congestion, or engagement by the prosecutor on other cases as justification – the exact reasons rejected the *Barker* court.

3. The Nature of the Underlying Charge

Upon such a serious charge, the District Attorney may be expected to proceed with far more caution and deliberation than he would expend on a relatively minor offense. Of course, this is not to say that one's right to a speedy trial is dependent upon what one is charged with, but rather that the prosecutor may understandably be more thorough and precise in his preparation for the trial of a class C felony than he would be in prosecuting a misdemeanor.

Taranovich, supra at 446.

As set forth above, this case was an unremarkable weapon possession case involving no complex issues of law or fact.

4. Prejudice to the Defendant-Appellant

“Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. The Supreme Court has identified three such interests: (i) to prevent oppressive pretrial incarceration, (ii) to minimize anxiety and concern of the accused, and (iii) to limit the possibility that the defense will be impaired.” *Barker*, at 532. Because the case took almost three years to be tried, prejudice should be presumed.

[54] 5. Defendant-Appellant’s Assertion of the Right

Above all else, the Supreme Court has recognized that “[t]he defendant’s assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.” *Barker*, at 531532. The law in New York is equally well-settled that adjournments consented to by the defense must be clearly expressed to relieve the People of the responsibility for the delay. Defense counsel’s failure to object to the adjournment or failure to appear does not constitute consent to an adjournment. *People v. Smith*, 82 N.Y.2d 676, 678 (1993), *see also People v. Liotta*, 79 N.Y.2d 841 (1992); *People v. Cortes*, 80 N.Y.2d 201, 216 (1992).

That being said, Defendant-Appellant’s assertion of his speedy trial right in this particular case was constant. After Indictment, Defendant-Appellant stood ready, willing and able to stand trial for several years,

and did not consent to the case taking that long to be brought to trial. Accordingly, this Court should find that Defendant-Appellant's Constitutional right to a speedy trial was violated.

B. The People Failed to Move the Case to Trial Within the Time Allotted by CPL § 30.30(1)(a)

“A defendant seeking a speedy trial dismissal pursuant to CPL § 30.30 meets his or her initial burden on the motion simply by alleging only that the prosecution failed to declare readiness within the statutorily prescribed time period.” *People v. Luperon*, 85 N.Y.2d 71, 77-78 (1995). Accordingly, once a defendant has shown the [55] existence of an unexcused delay greater than six months, the burden of showing that time should be excluded falls upon the People. *People v. Santos*, 68 N.Y.2d 859, 861 (1986) (citations omitted); see also *People v. Luperon*, *supra* at 78 (“the People must ordinarily identify the exclusions on which they intend to rely”).

In *People v. Kendzia*, 64 N.Y.2d 331 (1985) the Court of Appeals reviewed its prior decisions and explained that a statement of readiness consists of two elements: (1) a communication of readiness by the People which appears on the record, and (2) an indication of present readiness as opposed to a prediction or expectation of future readiness. A conditional statement of possible future readiness is insufficient. *People v. Gonzalez*, 136 A.D.3d 581 (1st Dept. 2016).

In *People v. Rodriguez*, 135 A.D.3d 587 (1st Dept. 2016), the First Department held that two of the People's certificates of readiness were illusory under the principles discussed in *People v. Sibblies*, 22 N.Y.3d 1174 (2014). In that case, the People filed a certificate of readiness five (5) days after the defendant's arraignment, but answered not ready at the next court date. Nothing in the record explained their change in status from ready to not ready and the People failed to give an explanation for the change of circumstances, thus rendering the certificate of readiness inaccurate. Because that was illusory, the People were charged with the entire time period preceding the illusory certificate of readiness.

[56] The second certificate of readiness was filed about one (1) week after the People answered not ready for trial because the ADA was on trial on another case. On the next court date, the People again answered not ready for the same reason. Again, nothing in the record indicated that the People were actually ready on the date they filed the statement of readiness, rendering the statement illusory. As a result, the First Department held the entire time period was properly charged to the People, finding that the People failed to sustain their burden of clarifying the basis for the adjournments, and reversed and dismissed the indictment.

The *Rodriguez* decision very recently was cited with approval by the Appellate Term, Second Department, Second, Eleventh, and Thirteenth Judicial Districts, in *People v. Carthon*, N.Y.S.3d, 2016WL3659755, 2016 N.Y. Slip Op. 26216 (June 23, 2016). In *Carthon*,

the People filed a certificate of readiness off calendar, only to answer not ready on the next court date. The Court found the People's statement of readiness was nothing more than a "mere empty assertion of readiness" and affirmed the dismissal of the case pursuant to CPL § 30.30.

While the court below was technically correct that *Sibblies* involved off-calendar statements of readiness, the logical extension of the rule in *Sibblies* requires the same result here. When the People request short adjournment dates, knowing full well how extremely unlikely it would be that the court would continue the case two days to an already full calendar, the People were not announcing actual readiness, [57] but rather future possible readiness. When the People announced not ready on five consecutive dates spanning six (6) months, their requests for shorter dates were proven illusory. Therefore, the entire time should have been properly assessed against the People, whose burden it was to move the case to trial.

This case illustrates how far removed the theory behind CPL § 30.30 is from reality. In theory, CPL § 30.30 is intended to force the People to move cases to trial faster to prevent a violation of a Constitutional right to a speedy trial. In practice, however, the current application of CPL § 30.30 promotes the exact kind of gamesmanship that resulted in a garden variety weapon possession case taking almost three years to be brought to trial. Accordingly, this Court should reverse and dismiss.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing reasons, Defendant-Appellant respectfully requests this Court reverse the judgment of conviction and dismiss the Indictment, or in the alternative, reverse the judgment of conviction and remand for a new trial, and grant such other and further relief as this Court may deem just, proper, and equitable.

Dated: October 18, 2016

Respectfully Submitted,

/s/ [Illegible]

PATRICK MICHAEL MEGARO
