
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

BARBARA BOUCHEY,
Defendant.

NOTICE OF MOTION

Ind. No.: 34-7323
Hon. Stephen W. Herrick

PLEASE TAKE NOTICE, that the defendant, BARBARA BOUCHEY, on the annexed Affirmation/ Memorandum of Law, through her attorneys, SACCO TYNER, PLLC, Mark J. Sacco, Esq. of Counsel, will move this Court on May 28, 2015 at 9:00 a.m., for the following relief:

GRAND JURY PROCEEDINGS

1. An Order pursuant to CPL 210.20(1)(b), and 210.20(1-a) dismissing the indictment, or reducing each count to a lesser included offense, *because the evidence presented to the grand jury was not legally sufficient* to establish the offenses charged.
2. An Order, pursuant to CPL 210.30, providing that the Court examine the stenographic minutes of the grand jury proceedings and disclose information to defense counsel.
3. An Order dismissing the indictment, pursuant to CPL Article 210 because the instructions and evidence presented to the grand jury were legally and facially insufficient.
4. An Order, pursuant to CPL 210.35(1) and in the interests of justice because the grand jury was illegally constituted in violation of Article I, §§ 1, 2, 3, 4, 5,

6, 11, 12 and 14 of the New York Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

5. An Order, pursuant to CPL 210.35(2) & (3) dismissing the indictment if the grand jury was conducted before fewer than 16 grand jurors or fewer than 12 grand jurors who heard all of the evidence concurred in the finding of the indictment.

6. An Order, pursuant to CPL 210.35(5), dismissing the indictment because the grand jury proceedings failed to conform to the requirements of CPL Article 190 to such a degree that the integrity of the proceedings was impaired and prejudice to defendant may result.

7. An Order, pursuant to CPL 210.40, dismissing the indictment if the prosecutor engaged in misconduct during the presentation to the grand jury.

8. An Order, pursuant to CPL 210.25(1), dismissing the indictment because the grand jury proceedings failed to conform to the requirements of CPL Article 200, rendering the indictment defective.

9. An Order dismissing the indictment as any alleged criminal activity did not occur within this Court's jurisdiction.

SEVERANCE

10. An Order severing the trial of Barbara J. Bouchey from that of her co-defendants pursuant to CPL 200.40(1).

MOTION TO COMPEL

11. Pursuant to CPL §§ 255.10(1)(c), 255.20, 240.20(1), 240.20(2), 240.35, 240.40(1), 240.60, 240.80 and 240.90(2), an Order of the Court directing the People to:

(a) Disclose to the defendant and make available for inspection, photographing,

copying or testing, the property specified in the defendant's Demand to Produce;

- (b) Make such disclosure within 15 days of the service of the defendant's Demand, or as soon thereafter as practicable, with the exception of the information specified in CPL §§ 240.43, 240.44 and 240.45;
- (c) Serve a written refusal setting forth the grounds of their belief as fully as possible, consistent with the objective of the refusal, with regard to the refusal to disclose any demanded property;
- (d) Make a diligent, good faith effort to ascertain the existence of demanded property and to cause such property to be made available for discovery where it exists but is not within the People's possession, custody or control; and obtain by subpoena *duces tecum* demanded material which the defendant may not thereby obtain;
- (e) Review all of the evidence in their possession, and in the possession of any related law enforcement entity, and disclose to the defendant any Brady material; and
- (f) Comply with their continuing duty to disclose discoverable material; and directing that if, after complying with the provisions of CPL Article 240 or an Order pursuant thereto the People find, either before or during trial, additional material subject to discovery or covered by such Order, they shall promptly comply with the Demand or Order.

12. Pursuant to CPL § 240.43, an Order of the Court requiring the People to disclose to the defendant, at the appropriate time, all specific instances of the defendant's prior uncharged criminal, vicious or immoral conduct of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the defendant.

13. Pursuant to CPL §§ 240.44(1) and 240.45(1)(a), an Order of the Court requiring the People to take appropriate action, make appropriate requests and inquiries, etc. to ascertain the location of, and to ensure the preservation of, any so-called Rosario material (*i.e.*, any written or recorded statement made by a person whom the People intend to call as a witness at any pre-trial hearing and/or at trial), and to disclose such information to the defendant at the appropriate times.

14. Pursuant to CPL §§ 240.44(2) and 240.45(1)(b), an Order of the Court requiring the People to take appropriate action, make appropriate requests and inquiries, etc. to ascertain the existence of any judgment(s) of conviction of any person the People intend to call as a witness at any pre-trial hearing and/or at trial, and to disclose such information to the defendant at the appropriate times.

15. Pursuant to CPL §§ 240.44(3) and 240.45(1)(c), an Order of the Court requiring the People to take appropriate action, make appropriate requests and inquiries, etc. to ascertain the existence of any pending criminal action against any person the People intend to call as a witness at any pre-trial hearing and/or at trial, and to disclose such information to the defendant at the appropriate times.

16. An Order compelling the People to provide a Bill of Particulars.

MOTION TO SUPPRESS STATEMENTS

17. An Order, pursuant to CPL 710.20(3) and 710.70(1) suppressing any oral or written statements or admissions, allegedly made by defendant, or attributable to him, upon grounds the grounds the statements were involuntary as defined by CPL 60.45, or direct a hearing upon the issue pursuant to CPL 710.60(4) and the authority of *People v. Huntley*, 255 N.Y.S.2d 838 (1965).

MOTION TO SUPPRESS EVIDENCE

18. An Order pursuant to Section 710.20 of the Criminal Procedure Law suppressing tangible property illegally seized by law enforcement officials, or, an Order requiring a *Mapp* and *Dunaway* hearing.

BRADY MATERIAL

19. An Order, directing the district attorney to furnish defendant with all evidence favorable to the defense pursuant to the authority of CPL 240.20(1)(h) and

Brady v. Maryland, 373 U.S. 83.

ROSARIO MATERIAL

20. An Order, directing the district attorney to turn Rosario material, including all radio, telephonic or other electronic communications, over to the defense in advance of trial, or applicable hearings. This material is necessary for the defense to conduct adequate cross-examination of witnesses and prepare defendant's defense.

SANDOVAL/MOLINEUX/VENTIMIGLIA/CPL 240.43 MOTION

21. An Order prohibiting the district attorney from presenting at trial any evidence that the defendant committed any other crime or engaged in any other vicious, immoral or otherwise unscrupulous conduct, pursuant to Article I, §§ 1, 2, 5, 6 and 11 of the New York Constitution, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and *People v. Molineux*, 168 N.Y. 264, 61 N.E.2d 286 (1901), or direct a hearing on the issue under the authority of *People v. Molineux*, 168 N.Y. 264.

22. An Order, pursuant to Article I, §§ 1, 2, 5, 6 and 11 of the New York Constitution, the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974), prohibiting the district attorney from questioning defendant, should he choose to testify at trial, regarding any alleged prior bad acts, arrests or convictions with which he may have been involved, solely for the purpose of impeaching his credibility, or direct a hearing upon the issue under the authority of *People v. Ventimiglia*, 52 N.Y.2d 350 (1981); or in the alternative an Order, pursuant to CPL 240.43 directing the People to

provide defendant with written confidential disclosure of any prior crimes and bad acts, charged or uncharged the people intend to introduce in their case in chief or for impeachment.

RENEWAL OF MOTIONS AND HEARINGS 20 DAYS BEFORE TRIAL

23. An Order, providing that requested hearings be held at least twenty (20) days prior to trial.

24. An Order, pursuant to CPL 710.40(4) permitting defendant to renew pre-trial motions.

In support of this motion, defendant submits the attached affirmation/ memorandum of law of Mark J. Sacco. In making these motions, defendant also relies upon his right to due process, his right to compulsory process, his right to confrontation, his right to equal protection, his right to be tried only on an indictment issued by a properly constituted grand jury, his right to a grand jury drawn from a fair cross-section of the community, and other rights guaranteed under Article I, §§ 1, 2, 3, 4, 5, 6, 11, 12, and 14 of the New York Constitution, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, CPL Articles 190, 200, 210, and 600 and other applicable state and federal law.

WHEREFORE, the defendant, respectfully requests that the Court grant the above relief, and such other and further relief as this Court deems just and proper.

Dated: May 28, 2015
Schenectady, New York

SACCO TYNER, PLLC



By:

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cc: Clerk, Albany County Court
Holly Trexler, Esq. – Special Assistant District Attorney
Hon. Stephen W. Herrick
Barbara J. Bouchey

STATE OF NEW YORK
COUNTY COURT

COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

**ATTORNEY'S
AFFIRMATION**

-against-

BARBARA J. BOUCHEY,
Defendant.

MARK J. SACCO, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, affirms under penalty of perjury:

1. I represent the Defendant, Barbara J. Bouchey ("Bouchey") in this matter, and make this affirmation in support of the defendant's omnibus motion.

2. This affidavit is based upon my own knowledge and upon information and belief. The source of my knowledge and the basis of my belief is a review of the materials provided by the District Attorney's office, a review of the file maintained by my office, and conversations with witnesses.

3. The defendant has been arraigned before this Court and has pled "not guilty".

MOTION TO INSPECT GRAND JURY MINUTES

4. The defendant requests the Court conduct an *in camera* inspection of the grand jury minutes to determine their sufficiency, and disclose the information to defense counsel.

5. Upon information and belief there are not sufficient facts alleged therein to

sustain the charges set forth in the indictments and the same should be dismissed.

6. Upon information and belief the Grand Jury was not instructed / was improperly instructed concerning the statutory definitions contained in Penal Law 156.00.

DISMISSAL – FAILURE TO PROPERLY ADVISE THE GRAND JURY

7. Upon information and belief the Grand Jury was not instructed / was improperly instructed concerning the potential defense contained in Penal Law section 156.50(1). See People v. Lancaster, 69 NY2d 20 (1984).

8. In pertinent part, Penal Law 156.50 provides:

In any prosecution:

1. under section 156.05 or 156.10 of this article, it shall be a defense that the defendant had reasonable grounds to believe that he had authorization to use the computer.

9. As will be discussed *infra*, not only did Bouchey have reasonable grounds to believe she had authorization to use the computer, she had *actual* authorization to use the computer.

10. Although few New York Courts have addressed the issue of authorization when examining a Computer Trespass case under Penal Law 156.10(2), the Court in People v. Katakam, 172 Misc.2d 943 (1997, NY County) held an Indictment is insufficient when a Grand Jury is not provided with evidence that accessing a computer was forbidden, or that the person accessing said computer had received notice that is was forbidden.

11. The evidence presented to the Grand Jury did not include any proof that

Bouchev used the NXIVM computer without authorization.

DISMISSAL – FALSE TESTIMONY

12. Bouchev's belief that she had permission to use the computer was electronically recorded in a telephone conversation between Bouchev and Inv. Kirsopp. Upon information and belief the entirety of this discussion was not played for the Grand Jury.

13. Upon information and belief the instructions given to the grand jury by the District Attorney were insufficient, and therefore the indictments should be dismissed.

14. Upon information and belief the grand jury was illegally constituted, in that it was not a representative group of the community, and therefore the indictments should be dismissed or, in the alternative, the defense should be provided with a list of the names, races and genders of the members of the grand jury who were present for the vote as to the indictments.

15. Whether there were 16 grand jurors present or whether fewer than 12 who heard all of the information concurred in the finding in the indictments is for this court to determine after a review of the grand jury minutes. If there were fewer than 16 grand jurors present, or if fewer than 12 who heard all the information concurred in the finding in the indictments, the indictments should be dismissed.

16. Upon information and belief Investigator Kirsopp provided testimony consistent with his inaccurate Incident Report. This testimony, if provided, was false.

17. In the Incident Report narrative dated March 31, 2014, Kirsopp states, "she (Bouche) acknowledged that she did not have the authorization from Kotlin to do so." See Incident Report, attached hereto as Exhibit "A," page 28-29.

18. This statement is simply untrue.

19. It is clear from listening to the Audio CD that Kirsopp *never* asks Bouche if she had authority, *nor* does Bouche ever state that she didn't have it. However, Bouche *does* advise Kirsopp that she is in possession of an e-mail from NXIVM with Kotlin's username and password, *which she considered was authority*. See e-mail from Ben Myers to Barbara Bouche dated March 20, 2009, attached hereto as "Exhibit "B."

20. Ben Myers is a computer contractor that works for NXIVM. See supporting deposition of Benjamin T. Myers dated May 23, 2015, attached hereto as "Exhibit "C."

21. In that capacity as an agent for NXIVM, he provided Bouche with both the username and password. Therefore, Kirsopp's statement on the incident report that Bouche did not have authority to access the NXIVM computer is an inaccurate conclusion. See Exhibit "A," page 28.

22. In the Incident Report narrative written on March 31, 2014, Kirsopp writes:

BOUCHEY confirmed the areas of the website that she looked at including the Humanities, the calendar and coach list. Id. at 28-29.

23. Again, this conclusion is untrue. A detailed review of the Audio CD reveals Bouche was asked:

Kirsopp: so your purpose was not to obtain proprietary info but just to look at upcoming classes and are they are growing . . . you are right, you were on the humanities community group, sales testimonials, and calendar of upcoming events.

And in response states:

Bouchey: that's all that's on there.

24. Of note, in comparing the Audio CD with Inv. Kirsopp's post telephone "notes" of his conversation with Bouchey, it is apparent Kirsopp *never* asks Bouchey if she looked at a Coach List, and Bouchey does not state she viewed a Coach List¹.

25. Of equal importance, the Coach List is the only thing appearing on Kirsopp's incident report that he, and NXIVM, considers "proprietary" as the other areas of social humanities and workshop calendars are considered non-proprietary. On page 25 of Kirsopp's Incident Report, it is clear that even the Investigator believed the accessed computer to contain only public information. The report states, "Access to areas of the server was granted but areas may be public areas of the server/website." Id. at 25.

26. Again, Kirsopp's statement on the incident report is not accurate.

27. Bouchey believed she had three forms of permission, and her *only* login using Kotlin's username and password took place on January 8, 2014. The only information accessed was public information. In fact, upon close examination and listening to the CD Audio, the statements from Bouchey and Kirsopp validate this assertion.

Bouchey: "I have lots of emails and documents in my computer (from NXIVM)"...."I came across Svetlana member name and

¹ A "Coach List" is a list of current NXIVM Coaches, which NXIVM claims is proprietary, which Bouchey did not access. A "Coach Tree," which is not proprietary, is intended for when NXIVM wants to send an emergency quick message to Coaches. However, since Kotlin was merely a student, no Coach Tree information would be available for viewing as a student.

password"...because I was a field trainer"...I logged on curious to see if they were still growing"

Bouchey: "That was the only reason I went on and only thing that I did"...I could see the training and social calendar, an application to sign up for a class. button for testimonials, and there was an area you could print out a sheet to help you set your goals"...it was all social stuff"...it is what I noticed was on there."

Kirsopp: "What you have told me agrees with me on what activity they have reported to us"...your purpose in using the name and password was just to look at the social calendar?"

Bouchey: "that is all that's on there"...it's not their proprietary system cause it's their social page, like when their next intensive is and movie night is, cause that's all that is on there."

Kirsopp: "so your purpose was not to obtain proprietary info but just to look at upcoming classes and are they are growing"...you are right, you were on the humanities community group, sales testimonials, and calendar of upcoming events"

28. Incident Report narrative written on January 14, 2014, Kirsopp lists a review of the pageload data provided by Myers, which does not list Bouchey accessing a "Coach List", contrary to the narrative written March 31, 2014. Id. at 23-24; 28-29.

29. It is important to note that the pageload data was not provided to the Defendant, nor is there any indication that the data provided by a NXIVM employee was authenticated by the New York State Police.

DISMISSAL - JURISDICTION

30. Upon information and belief, any alleged access to any computer material did not occur in Albany County and this Court is therefore without jurisdiction over the Defendant.

31. In the event the Court does not dismiss the indictments, the defendant

requests an Order, providing that the Court examine the stenographic minutes of the grand jury proceeding, reducing each count to a lesser included offense on the grounds that the evidence was not legally sufficient to establish the elements of the count.

INSUFFICIENT EVIDENCE PRESENTED TO THE GRAND JURY

32. Penal Law section 156.10(2) requires that the defendant (1) knowingly uses a computer network without authorization, (2) knowingly gains access to computer material, and, (3) that the defendant did not have reasonable grounds to believe that she had authorization to use the computer.

Knowing Use of a Computer Network Without Authorization

33. The evidence that Bouchey lacked authorization is insufficient to sustain the Indictment.

34. Bouchey had three forms of permission to access the NXIVM computer network. Bouchey was given permission to access the NXIVM computer network, (1) by NXIVM while Bouchey was a student, (2) by NXIVM while she was a field trainer, and (3) by Svetlana Kotlin, a NXIVM student. See Intensive Program Application, attached hereto as Exhibit "D", and, See Accounting of Tuition Fees paid by Barbara Bouchey for ESP Programs totaling \$50,465.00, attached hereto as Exhibit "E", and, See e-mail from Ben Myers to Barbara Bouchey dated March 20, 2009, attached hereto as Exhibit "A". See Ethier Affidavit, attached hereto as Exhibit "F."

35. Permission to access a computer Under Penal Law 156.10, Computer Trespass, can be given by, "the owner or lessor or someone licensed or privileged by the owner." PL 156.10(8).

36. Concerning access permitted to NXIVM students, as stated by Clare Bronfman in her April 6, 2012 Supporting Deposition to the NYSP, "Everyone that has taken classes through ESP has access to the computer system." See Clare Bronfman Supporting Deposition, Attached hereto as Exhibit "G."

37. The three separate, distinct grants of authorization to access the NXIVM computer were never revoked by the respective grantors.

38. First, lessor Kotlin gave verbal permission to Bouchey to ask owner NXIVM's computer privileged person for her username and password, because she forgot it, which Bouchey did. When Bouchey received the NXIVM e-mail with Kotlin's username and password, she verbally communicated to Kotlin the information². Kotlin and Bouchey also had an understanding that Bouchey could continue to use it if she needed it for any reason. Kotlin and Bouchey were close friends and since there was no sensitive information on the NXIVM site, this agreement was a reasonable one. See Exhibit "B."

39. Second, Bouchey received an e-mail from Ben Myers, a NXIVM employee, providing Bouchey with the username and password of Svetlana Kotlin's (Kotlin). Said permission was never revoked. Id.

40. Third, Bouchey has paid NXIVM over \$50,000.00 as a student and was granted access to the NIXVM network, as part of a contractual agreement. At no time was this access revoked. See Exhibit "D" and Exhibit "E."

41. In discussing the issue of authority to access the NXIVM computer,

² At the time Bouchey requested Kotlin's username and password, Bouchey was employed by NXIVM and also had her own log in

Kirsopp *never* asks Bouchey in any form if she had authority, *nor* does Bouchey ever state that she didn't have it. It was simply assumed by Bouchey that Kirsopp understood she had authority. It certainly should have been clear to Kirsopp that this was Bouchey's reasonable belief. However, Bouchey *does* state having the e-mail from NXIVM with Kotlin's username and password, *which she considered was authority*.³

See Exhibit "B." Therefore, Kirsopp's statement to the contrary in the incident report is not accurate.

42. In the Incident Report narrative written on January 14, 2014, Kirsopp writes:

On 01/08/2014 at 2:02 AM, an unknown party [Bouchey] accessed NXIVM website . . . used the username and password of KOTLIN . . . MYERS was not able to provide KOTLIN's last known authorized access but he would research this information. See Exhibit "A," page 23.

43. On January 16, 2014, Kirsopp writes after phone call with Investigator Vandusen:

According to the current records obtained from the NXIVM server, KOTLIN has 26 entries with 11 successful logins to the server/website. Id. at 24.

44. On March 13, 2014, Kotlin's statement given over the phone, however, directly *contradicts* this when Kirsopp writes,

[Kotlin] stated that she has not been an active member of NXIVM for over six years. KOTLIN denied using her NXIVM username and password for

information.

3 At the time of the January 8, 2014 alleged login, Bouchey could not recall her own student login username and password, however, she ran across an old email regarding her friend, Kotlin, which contained an email from NXIVM providing Kotlin's login information.

access to the NXIVM website. Id. at 28.

45. On December 7, 2014, upon information and belief, this is further contradicted in a meeting between Kotlin and Bouchey wherein Kotlin admitted to Bouchey her recollection to Kirsopp was inaccurate, because Kirsopp scared her saying that giving name/password out was illegal. Additionally, Kotlin was caught off guard, terrified that NXIVM Founder Keith Raniere (her ex-business partner) would "torture" and harm as he had done to Bouchey, and she was asked to remember things on the spot from six years earlier. It is clear her recollection was not accurate, and she was afraid to call Bouchey at the time to validate. Further, Kotlin admitted remembering giving permission and asking Bouchey to get her NXIVM name/password from NXIVM's computer person, because she forgot it, so she could login to buy Dalai Lama social event tickets. See Exhibit "F."

46. Kotlin visited Bouchey's house many times after Bouchey resigned from NXIVM, and they had an understanding she could login using her password as it was just a social webpage. This also contradicts Kirsopp's incident report citing Kotlin stated not being to Bouchey's home since before she resigned from NXIVM.

47. On the same day when Kotlin and Bouchey met, Kathy Ethier was present, who was a witness to Kotlin admitting her previous recollection, and the statement given to Kirsopp were not accurate along with everything mentioned above as evidenced in her attached affidavit. Id.

48. The 26 entries attributable to Kotlin's username and password as noted on Kirsopp's incident report were not done by Bouchey nor are they attributable to her.

These entries are mysteriously missing from the NXIVM log file provided in discovery. It is a reasonable conclusion that Kotlin also granted others authorization to use her login credentials. See Exhibit "A," page 24.

49. NXIVM never revoked Kotlin's access even when she left on bad terms in 2004. In Kotlin's ability to access remained viable for over eleven (11) years because she was considered a student of NXIVM.

50. From 2000 to 2009, Bouchey is not aware of NXIVM ever revoking a single person's access to this social webpage.⁴ It is clear from the argument above that Bouchey has authorization to access the NXIVM computer. Accordingly the Indictment must be dismissed.

Knowingly Gains Access to Computer Material

51. Bouchey did not gain access to computer material as defined by Penal Law 156.10.

52. Under Penal Law 156.10, "Computer Material" is property and means any computer data or computer program which:

- (a) contains records of the medical history by that person;
- (b) contains records maintained by the state or any political subdivision thereof or duplicated; or
- (c) is not and is not intended to be available to anyone other than the person or persons rightfully in possession thereof or selected persons having access thereto with his, her or their consent and which accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof.

⁴ Upon information and belief, Bouchey's student login username and password is currently viable. If Bouchey could remember the password, she could legally login today and access the exact information she is alleged to have accessed on January 8, 2014.

53. The only "computer material" that Bouchey assessed is considered by NXIVM as non-proprietary and public, which is also validated by both Kirsopp's statements made on the CD Audio and his incident report reflecting NXIVM activity log pageloads for Bouchey. Therefore, what Bouchey assessed does not even fall within the purview of that which is prohibited by PL 156.10.

54. As the authorization given to Bouchey by Kotlin was "STUDENT" access, a brief discussion of the types of access granted to those wishing to access the NXIVM computed system is warranted.

55. In NXIVM vs. Foley et al, NXIVM describes STUDENT vs. COACH access. STUDENT access permits the user to access basic, non-proprietary information such as social and workshop calendars, sales testimonials, etc. See Transcript of NXIVM vs. Foley et al, 1:14-cv-01375-LEK-RFT dated March 17, 2015, attached hereto as Exhibit "H."

56. Kotlin is referred to by NXIVM, and is listed on the Felony Complaint and the Indictment, as a STUDENT. Therefore, *any* access by Bouchey to the NXIVM computer network could have only resulted in Bouchey accessing *non-proprietary information and public information*. See Felony Complaint, attached hereto as Exhibit "I" and Indictment, attached hereto as Exhibit "J."

57. This assertion is further established in a review of the Audio CD wherein Bouchey discusses the allegations with Inv. Kirsopp. As she states, Bouchey simply accessed non-proprietary information when she logged on using Kotlin's password.

58. Bouchey believed she had permission to access the public portions of the network.

59. Kirsopp provided a CD Audio copy of his conversation with Bouchey from March 25, 2014, and a copy of his 29-page incident report. See Exhibit "A."

60. In the Incident Report narrative of March 31, 2014, Kirsopp writes:

She [Bouchey] acknowledged that she did not have the authorization from KOTLIN to do so. Id. at 28.

61. This statement is simply untrue.

62. In the Incident Report narrative written on March 31, 2014, Kirsopp writes:

BOUCHEY confirmed the areas of the website that she looked at including the Humanities, the calendar and coach list. Id.

63. This conclusion is untrue. A detailed review of the Audio CD reveals Bouchey was asked:

Kirsopp: so your purpose was not to obtain proprietary info but just to look at upcoming classes and are they are growing . . . you are right, you were on the humanities community group, sales testimonials, and calendar of upcoming events.

And in response states:

Bouchey: that's all that's on there.

64. In comparing the Audio CD with Inv. Kirsopp's post telephone "notes" of his conversation with Bouchey, it is apparent Kirsopp *never* asks Bouchey if she looked at a Coach List *nor* does Bouchey ever state that she did. Of further importance, is the Coach List is the only thing appearing on Kirsopp's incident report that he, and NXIVM, considers "proprietary" as the other areas of social humanities and workshop calendars are considered non-proprietary. Therefore, Kirsopp's statement on his incident report is

not accurate.

65. In the Incident Report narrative of January 14, 2014, Kirsopp lists a review of the pageload data provided by Myers, which does not list Bouchey accessing a "Coach List." Rather the data provided by Myers indicates that a "coach tree" was accessed. Id. at 23-24.

66. There is a significant distinction between a "coach list" and a "coach tree." A "Coach List" is a list of current NXIVM Coaches, which NXIVM claims is proprietary, which Bouchey did not access. A "Coach Tree" is intended for when NXIVM wants to send an emergency quick message to Coaches. It is important to note that Kotlin's Coach Tree page contained no information.

67. Any access to the NXIVM computer network by Bouchey was limited to information available to the general public, and not "proprietary information." A present review of the NXIVM website at www.executivesuccessprograms.com, <http://www.espvancouver.com>, <http://www.espmexico.com>, <http://www.esplosangeles.com>, and <http://www.nxivm.com> reveals a wealth of information about NXIVM, including the NXIVM sales, testimonials, calendars, class schedules and other information. See ESP Los Angeles located at www.executivesuccessprograms.com, attached hereto as Exhibit "K", page viewed on May 27, 2015.

68. NXIVM's website, which is accessible to the general public *without* a member protected password, has the same social humanities and workshop calendars plus sales testimonials that Bouchey assessed, which can be viewed at

www.espian.net, <http://www.executivesuccessprograms.com>,
<http://www.espvancouver.com>, <http://www.espmexico.com>,
<http://www.esplosangeles.com>, and <http://www.nxivm.com>.

This directly contradicts what NXIVM states, which is that this information is for “members only” and only accessible via a password protected website. Please note that NXIVM is analogous to Executive Success Programs, Inc. or ESP NXIVM’s recent court filing dated April 2015, describes in detail STUDENT vs. COACH access. See Exhibit “H.”

69. NXIVM clearly defines STUDENT access allows only basic non-proprietary information such as social and workshop calendars, sales testimonials, etc. KOTLIN is referred by NXIVM, and listed on the Felony Complaint and Indictment as a STUDENT. Further, Bouchey states during the recorded telephone conversation, only non-proprietary information was assessable when she allegedly logged on. See Exhibit “I” and Exhibit “J.”

70. Any information accessed by Bouchey is not “computer material” as defined by Penal Law 156.00. Accordingly the Indictment must be dismissed.

Defendant had reasonable grounds to believe that she had authorization

71. The evidence in this case clearly shows that Bouchey had reasonable grounds to believe she had authorization to access the public and non-proprietary area of the NXIVM computer.

72. The arguments and factual claims asserted in paragraphs 33 through 70 support the request for an Order of Dismissal. The conduct of Kotlin and Myers alone

would create the reasonable belief in the average person that they were granted authority to access the NXIVM computer. Second, the fact that Barbara Bouchey had student status with the NXIVM company and had paid over \$50,000.00 for this status, would lead a reasonable person to believe that she had authorization. Third, the defense asserts that Barbara Bouchey currently has legal standing to access the student accessible areas of the NXIVM computer. At no time did NXIVM provide a written or verbal revocation of her right as a student to use the NXIVM computer. Had Bouchey been able to remember her student password, we would not be before the Court today.

73. Bouchey reasonably believed she had three forms of permission, and her only login using Kotlin's username and password took place on January 8, 2014. The only information accessed was public information. In fact, upon close examination and listening to the Audio CD, the statements from Bouchey and Kirsopp validate this assertion.

Bouchey: I have lots of emails and documents in my computer (from NXIVM) . . . I came across Svetlana member name and password . . . because I was a field trainer . . . I logged on curious to see if they were still growing

Bouchey: That was the only reason I went on and only thing that I did . . . I could see the training and social calendar, an application to sign up for a class. button for testimonials, and there was an area you could print out a sheet to help you set your goals . . . it was all social stuff . . . it is what I noticed was on there.

Kirsopp: What you have told me agrees with me on what activity they have reported to us . . . your purpose in using the name and password was just to look at the social calendar?

Bouchev: that is all that's on there . . . it's not their proprietary system cause it's their social page, like when their next intensive is and movie night is, cause that's all that is on there.

Kirsopp: so your purpose was not to obtain proprietary info but just to look at upcoming classes and are they are growing . . . you are right, you were on the humanities community group, sales testimonials, and calendar of upcoming events.

74. It is clear from the factual and legal arguments above, that the People have failed to provide sufficient evidence to sustain the charge of Computer Trespass, Penal Law section 156.10(2) against Barbara Bouchev.

75. First, it is clear that Barbara Bouchev had at least three (3) different authorizations to use the NXIVM computer.

76. Second, Ms. Bouchev did not knowingly gain access to computer material because the NXIVM website was composed solely of non-proprietary and public material.

77. And third, Ms. Bouchev had reasonable grounds, through Kotlin, through her student relationship with NXIVM, and through NXIVM employee Ben Myers, to believe that she had authorization to access the NXIVM computer. See Exhibit "F," Exhibit "D," and Exhibit "B."

78. For the foregoing reasons, the Court must dismiss the Indictment charging Barbara Bouchev with Computer Trespass.

SEVERANCE

79. The trial of Barbara Bouchev must be severed from that of her codefendants pursuant to CPL 200.40(1).

80. In the instant case the defenses to be raised among the defendants are mired in conflict such that the 'core' of each defense will be rationally irreconcilable with the others. Thus, the various defenses to be raised by each defendant in this proceeding are in such conflict that a jury, in order to believe one defense, must necessarily disbelieve that of the other, *People v. Kyser*, 26 AD3d 839, 809 NYS2d 342 (2006).

81. The Court in *People v. Mohboubian*, 74 NY2d 174, recognized that this dilemma mandates a severance. "Separate trials are compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed, that the conflict alone will lead the jury to infer defendant's guilt," See also, *People v. McGriff*, 219 AD2d 829, 631 NYS2d 969 (antagonistic defenses required severance); *Zafiro v. U.S.*, 506 U.S. at 539.

82. This is particularly so where one defense attorney takes an aggressive adversarial stance against the other defendants, "in effect becoming a second prosecutor,' and elicits damaging evidence, creating "the sort of compelling prejudice that could have been avoided by the grant of the requested severance,' *People v. Cardwell*, 78 NY2d 996. (*State likelihood that counsel for a codefendant will bring out testimony which will be unduly prejudicial*). See also, *U.S. v. Tarango*, 396 F3d 666 (5th Cir, 2005) (spillover effect where major portion of incriminating evidence related to absent codefendant).

83. Bouchey's criminal culpability is of such a lessor degree that the defense will be put in a position to argue that Bouchey committed no crime, but it is clear that

others did.

84. Accordingly, your affirmant respectfully requests that this court exercise its discretion under CPL 200.40 and sever defendant's trial.

MOTION TO COMPELL

85. Pursuant to CPL §§ 255.10(1)(c), 255.20, 240.20(1), 240.20(2), 240.35, 240.40(1), 240.60, 240.80 and 240.90(2), the defendant moves to compel the People to:

- (a) Disclose to the defendant and make available for inspection, photographing, copying or testing, the property specified in the defendant's Demand to Produce;
- (b) Make such disclosure within 15 days of the service of the defendant's Demand, or as soon thereafter as practicable, with the exception of the information specified in CPL §§ 240.43, 240.44 and 240.45;
- (c) Serve a written refusal setting forth the grounds of their belief as fully as possible, consistent with the objective of the refusal, with regard to the refusal to disclose any demanded property;
- (d) Make a diligent, good faith effort to ascertain the existence of demanded property and to cause such property to be made available for discovery where it exists but is not within the People's possession, custody or control; and obtain by subpoena *duces tecum* demanded material which the defendant may not thereby obtain;
- (e) Review all of the evidence in their possession, and in the possession of any related law enforcement entity, and disclose to the defendant any Brady material; and
- (f) Comply with their continuing duty to disclose discoverable material; and directing that if, after complying with the provisions of CPL Article 240 or an Order pursuant thereto the People find, either before or during trial, additional material subject to discovery or covered by such Order, they shall promptly comply with the Demand or Order.

86. Once a Demand to Produce served, the People must either comply therewith or serve a proper refusal to comply. See CPL § 240.80(2); CPL § 240.80(3).

87. The people did not respond to many of the defendant's specific demands.

88. A refusal to comply with a Demand to Produce must, absent good cause, be made within 15 days. See CPL § 240.80(2).

89. Absent a refusal to comply with a Demand to Produce, compliance with the Demand must be made within 15 days of the service thereof, or as soon thereafter as practicable. See CPL § 240.80(3).

90. If the People refuse to disclose any demanded property which they reasonably believe is not discoverable, they must serve a written refusal setting forth the grounds of their belief as fully as possible, consistent with the objective of the refusal. See CPL § 240.35.

91. The People must make a diligent, good faith effort to ascertain the existence of demanded property and to cause such property to be made available for discovery where it exists but is not within the People's possession, custody or control; and obtain by subpoena *duces tecum* demanded material which the defendant may not thereby obtain. See CPL § 240.20(2).

92. In this regard, both the New York State Court of Appeals and the United States Supreme Court have made clear that:

The mandate of Brady extends beyond any particular prosecutor's actual knowledge. Furthermore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." The People therefore were not relieved of their obligation to turn over Brady material by the trial prosecutor's failure to discover that the police were in

possession of exculpatory information. People v. Wright, 86 N.Y.2d 591, 598, 635 N.Y.S.2d 136, 139 (1995) (emphasis added) (citation omitted) (quoting Kyles v. Whitley, 514 U.S. 419, ___, 115 S. Ct. 1555, 1567).

93. This Court should do the same.

94. The People have a continuing duty to disclose discoverable material. See CPL § 240.60.

95. In this regard, if, after complying with the provisions of CPL Article 240 or an Order pursuant thereto the People find, either before or during trial, additional material subject to discovery or covered by such Order, they must promptly comply with the Demand or Order, refuse to comply, or apply for a protective order. See CPL § 240.60.

96. Upon motion of the defendant, the Court must Order discovery as to any material not disclosed upon demand pursuant to CPL § 240.20 if it finds that the People's refusal to disclose such material is not justified. See CPL § 240.40(1)(a).

97. Where the People fail to serve a timely written refusal pursuant to CPL § 240.35, the Court must, upon motion of the defendant, Order discovery (or any other Order authorized by CPL § 240.70(1)), as to any material not disclosed upon demand pursuant to CPL § 240.20, unless the People show good cause why such an Order should not be issued. See CPL § 240.40(1)(b).

98. The Court may also Order discovery with respect to any other property which the People intend to introduce at trial. See CPL § 240.40(1)(c).

99. The Court of Appeals has made clear that CPL Article 240:

[E]vinces a legislative determination that the trial of a criminal charge should not be a sporting event where each

side remains ignorant of facts in the hands of the adversary until events unfold at trial. Broader pretrial discovery enables the defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence. In short, pretrial discovery by the defense and prosecution contributes substantially to the fair and effective administration of justice.

People v. Copicotto, 50 N.Y.2d 222, 226, 428 N.Y.S.2d 649, 652 (1980) (citation omitted).

100. Although the People have provided numerous discovery documents, they have failed to provide *any* discovery documents pertaining to the defendant's charges arising from the alleged incident date, January 8, 2014 at 2:05 a.m. More specifically, the People have failed to provide any documentation regarding the investigation completed by Investigator Kirsopp and Investigator Vandusen as outlined in New York State Incident Report, incident number 4582273, pages 23 through 29.

101. Specifically, defendant requests all information regarding the January 8, 2014 log on including:

- a. All emails from O'Connell and Aronowitz and any employee or subcontractor, or any other law firm, to the New York State Police and/or Prosecutor regarding the investigation,
- b. All information provided by Ben Myers, or other NXIVM employees, to the New York State Police and/or Prosecutor regarding the investigation,
- c. All email headers provided to the New York State Police regarding the investigation,
- d. Copies of the NXVIM access log for January 7, 2014,
- e. Copies of the page access log/page loads for KOTLIN username,

- f. Copies of the supporting deposition obtained from Ben Myers by Investigator Kirsopp on January 14, 2014,
- g. Copies of the login information contained on a disc received by Trooper Keating on January 16, 2014,
- h. Copies of the NXIVM log file and Apache web server file containing information regarding the investigation,
- i. Copies of the subpoena results from Time Warner Cable regarding the investigation, and
- j. Copies of any sworn statement or deposition made by Svetlana Kotlin or an attorney on her behalf to the New York State Police regarding the investigation; and,
- k. Access to the servers of NXIVM by a qualified computer forensic analyst.

102. Finally, despite timely service of a formal Request for a Bill of Particulars on March 16, 2015, the People have failed to provide a Bill of Particulars more particularizing the allegations contained in the Information.

103. A Bill of Particulars is essential to the Defendant's ability to defend against the charges.

104. As stated in the McKinney's Practice Commentaries,

The bill of particulars supplementing an indictment assumes a critical role at trial. It serves as a guideline to prevent the case from being prosecuted and submitted to the petit jury for ultimate determination on a theory other than the one charged by the Grand Jury. Where that occurs, the error is known as "variance" which, upon timely objection, is reversible error. See *People v. Grega (Roberts)* 72 N.Y.2d 489, 534 N.Y.S.2d 647, 531 N.E.2d 279 (1988). McKinney's Practice Commentary, CPL 200.

105. As such, the Defendant respectfully requests the Court Order the People to fully comply with the Request for a Bill of Particulars and Demand for Discovery and Inspection.

MOTION TO SUPPRESS STATEMENTS

106. On or about December 23, 2014 the people served notice under CPL §710.30(1)(a) of their intent to introduce statements allegedly made by the Defendant.

107. The defendant moves for a Huntley hearing or, in the alternative, for summary suppression of each and every statement referenced in the People's CPL §710.30 notice the following evidence in this action:

108. Upon information and belief, any statements of the defendant included and sufficiently described in the People's CPL § 710.30 notice were involuntarily made within the meaning of CPL § 60.45.

109. CPL § 710.60(3)(b) expressly provides that the absence of factual basis does not permit denial of a motion to suppress a statement claimed to have been involuntarily made to a law enforcement official. Thus, . . . "there *must* be a hearing whenever defendant claims his statement was involuntary no matter what facts he puts forth in support of that claim." People v. Weaver, 49 N.Y.2d 1012, 1013, 429 N.Y.S.2d 399, 399 (1980). See also People v. Jones, 95 N.Y.2d 721, 725 n.2, 723 N.Y.S.2d 761, 764 n.2 (2001); People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922, 924 (1993); People v. Misuis, 47 N.Y.2d 979, 419 N.Y.S.2d 961 (1979).

110. Upon information and belief the aforesaid statements were involuntarily made and were secured in violation of the defendant's rights under the constitutions

and laws of this state and the United States. Therefore said statements should be suppressed pursuant to CPL 710.20 (3) and 710.70(1).

111. The defendant moves to suppress the statement under CPL §§ 60.45, 710.20(3) and 710.40(1), and contends it was illegally obtained on the following grounds.

- (a) It is the tainted fruit of an unlawful arrest.
- (b) It was made after defendant was subjected to custodial interrogation without first being advised of his Miranda rights. See, CPL § 60.45(2)(b)(ii).
- (c) The defendant made the statement without knowingly and intelligently waiving his right to remain silent.
- (d) The defendant involuntarily made the statements. See, CPL § 60.45(2).
- (e) This statement was secured in violation of defendant's right to counsel. See People v. Cunningham, 49 N.Y. 2d 203, 424 N.Y.S.2d 421 (1980).

MOTION TO SUPPRESS EVIDENCE

112. The defendant moves for a Dunaway/Mapp (i.e., probable cause/suppression) hearing or, in the alternative, for summary suppression of the following evidence in this action:

- (a) Any post-arrest statements made by the defendant, along with the fruits thereof, on the ground that such statements are the fruit of an unlawful arrest without probable cause; and
- (b) Any tangible property, or other evidence, obtained from the defendant's computer, email service provider or other electronic data; and

113. Of course, "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961). See also Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254 (1975).

114. The defendant was arrested without a warrant.

115. The defendant was arrested without probable cause.

116. The defendant has standing to challenge a search of her person, vehicle, vehicle in which he was a passenger and home.

117. In support of this motion, your affirmant makes the following sworn allegations of fact.

118. As is expressly permitted by CPL § 710.60(1), such allegations are made upon information and belief.

119. The sources of such information and the grounds of such belief are conversations had with the defendant, review of the paperwork provided to the defendant relating to this matter, and research with regard to, as well as knowledge of, the law and police procedures.

120. Critically, none of the discovery material provided to the defendant contains a basis for the arrest of the defendant, let alone a lawful one.

121. This allegation is more than sufficient to raise an issue of fact requiring a Dunaway/Mapp hearing.

122. It is well settled that a hearing is *required* whenever "the papers submitted raise a factual dispute on a material point." People v. Gruden, 42 N.Y.2d 214, 215, 397

N.Y.S.2d 704, 705 (1977). See also CPL § 710.60(3), (4); People v. Mendoza, 82 N.Y.2d 415, 426, 604 N.Y.S.2d 922, 926 (1993); People v. Marquez, 246 A.D.2d 330, ___, 667 N.Y.S.2d 359, 360 (1st Dep't 1998); People v. Bailey, 218 A.D.2d 569, ___, 630 N.Y.S.2d 499, 500-01 (1st Dep't 1995); People v. Marshall, 122 A.D.2d 283, ___, 504 N.Y.S.2d 782, 783 (2d Dep't 1986).

123. "It is not necessary that a moving defendant raise an issue of fact as to every factual allegation put forth by the prosecution in order for a hearing to be ordered." People v. Bennett, 240 A.D.2d 292, ___, 659 N.Y.S.2d 260, 261 (1st Dep't 1997).

124. The Court of Appeals has expressly rejected a prosecution claim that the "defendant must offer an innocent explanation for his conduct." People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995). See also Bailey, 218 A.D.2d at ___, 630 N.Y.S.2d at 501 (same); People v. Lopez, 263 A.D.2d 434, ___, 695 N.Y.S.2d 76, 77 (1st Dep't 1999) (defendant "need not prove his entire case in the motion papers").

125. Rather, the standard to be used in deciding whether the defendant's motion papers raise a factual dispute on a material point was set forth by the Court of Appeals in Mendoza: "We conclude that the sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) *defendant's access to information*." 82 N.Y.2d at 426, 604 N.Y.S.2d at 926 (emphasis added).

126. The third factor (*i.e.*, the defendant's access to information), is controlling in this case.

127. In this regard, Mendoza makes clear that "[i]t would be unreasonable to construe the CPL to require precise factual averments when, in parallel circumstances,

defendant . . . does not have access to or awareness of the facts necessary to support suppression." Id. at 429, 604 N.Y.S.2d at 928.

128. As the Court aptly stated in People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dep't 1994):

[I]t should be stressed that whether or not the defendant knew he had done something illegal was not the relevant issue in determining whether there had been an unreasonable search and seizure; it was rather whether the *police* knew a sufficient amount about any transgressions by the defendant to render their intrusion upon him legal. Plainly, the defendant was not obliged globally to assert his innocence of all wrongdoing as a condition of maintaining his motion to suppress. All that he was obliged to do was to raise an issue as to the legality of the arrest, and to do that no more could reasonably have been required than that he cast into question, to the extent possible given the nature of the factual context and the information made available to him, whether the arresting officers' knowledge of any wrongdoing by him was sufficient to constitute probable cause. * * *

As Mendoza implicitly recognizes, and as is in any case obvious, it was not the Legislature's intention in enacting CPL § 710.60 to create an insuperable barrier to the assertion of possibly meritorious suppression claims. Id. at ____ - ____, 613 N.Y.S.2d at 597-98 (emphasis added).

129. "While it may turn out that [the defendant's claims are not] borne out by the facts ultimately found, the existence of sworn allegations supporting these viable legal arguments mandates that a hearing be held (*see*, CPL 710.60[4])." Marshall, 122 A.D.2d at ____, 504 N.Y.S.2d at 783.

130. Simply stated, the Appellate Courts of this State (a) "have frequently criticized the practice of summarily denying suppression motions without a hearing where defendant sets forth a minimally sufficient showing to warrant a hearing on the

suppression issue," People v. Harris, 160 A.D.2d 515, ___, 554 N.Y.S.2d 170, 171 (1st Dep't 1990), and (b) routinely hold appeals in abeyance and Order that improperly denied suppression hearings be conducted.

131. Indeed, in Mendoza the Court of Appeals expressed its preference that a suppression hearing be granted where the defendant claims that evidence was unlawfully obtained, *even if the defendant's factual allegations are deficient*.

132. In this regard, the Mendoza Court made clear that, in addition to the three traditional factors to be utilized in deciding the sufficiency of a defendant's motion papers, a fourth factor -- "(4) Court's Discretion to Conduct a Hearing" -- comes into play. See 82 N.Y.2d at 429-30, 604 N.Y.S.2d at 928-29.

133. In explaining why it is preferable for a Court to conduct suppression hearings where the defendant claims that evidence was unlawfully obtained, the Mendoza Court stated:

The CPL does not mandate summary denial of defendant's motion even if the factual allegations are deficient (see, CPL 710.60[3] ["The court *may* summarily deny the motion"] [emphasis added]). If the court orders a Huntley . . . hearing, and defendant's Mapp motion is grounded in the same facts involving the same police witnesses, the court may deem it appropriate in the exercise of discretion to consider the Mapp motion despite a perceived pleading deficiency. Indeed, considerations of judicial economy militate in favor of this procedure; an appellate court might conclude that summary denial of the Mapp motion was improper, requiring the parties and witnesses to reassemble for a new hearing, often months or years later. 82 N.Y.2d at 429-30, 604 N.Y.S.2d at 928-29.

BRADY MATERIAL

134. Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), your affirmant requests that the prosecution provide all information, in

whatever form available, supporting the position that the defendant did not commit the crime(s) charged, including but not limited to:

- (a) Any record of previous arrests or convictions or any other evidence or information demonstrating participation in dangerous, vicious, immoral or criminal behavior on the part of the victim, and/or any persons intended to be called as witnesses by the prosecutor, including but not limited to "rap sheets", police personnel records, or other memoranda; see *People v. Pressley*, 234 A.D.2d 954, 652 N.Y.S.2d 436 (4th Dep't 1996), order aff'd, 91 N.Y.2d 825, 666 N.Y.S.2d 555, 689 N.E.2d 525 (1997); *People v. Valentin*, 1 A.D.3d 982, 767 N.Y.S.2d 343 (4th Dep't 2003).
- (b) Any statements known to be false or erroneous made to a public servant engaged in law enforcement activity or a grand jury or a court by persons intended to be called as witnesses;
- (c) Any evidence, testimony, transcript, statement or information indicating that any prospective prosecution witness on any occasion gave false, misleading or contradictory information regarding the charge at bar or any related matters, to persons involved in law enforcement or to their agents or informers;
- (d) Any evidence, testimony, transcript, statement or information indicating that any prospective prosecution witnesses have given statements that are or may be contradictory to each other;
- (e) Any information recounting a misidentification of the defendant as a perpetrator of the crime(s) charged or indicating a failure on the part of any potential witness to identify the defendant as the perpetrator of the crime(s) charged;
- (f) Any information indicating that any prospective prosecution witness has or had a history of mental or emotional disturbance;
- (g) Full disclosure of any consideration, promise of consideration, or expectation of consideration offered to any prospective prosecution witness, including but not limited to, leniency, favorable treatment, assistance with respect to any pending legal proceeding, or any reward or other benefit whatsoever that will or could be realized by the witness as a result of the witness's testimony;
- (h) Any threats, express or implied, direct or indirect, made to any prosecution witness, including criminal prosecution or investigation, any change in the probationary, parole, or custodial status of the witness, or any

other pending or potential legal disputes between the witness and the prosecution or over which the prosecution has a real, apparent, or perceived influence;

(i) Complete information of each occasion when each witness who was or is an informer, accomplice, or co-conspirator has testified before any court or grand jury, including date, caption, and indictment number of the case;

(j) Any malfunction of any instrumentality used for any scientific test for a period of 24 hours immediately prior to the test or analysis involving the defendant until 24 hours thereafter;

(k) Any repetition of any scientific test and any differing results obtained;

(l) Any lack of qualification by any person performing any scientific test in connection with this matter;

(m) Any information to the effect that all or some of the evidence that may be utilized by the People at trial was illegally or improperly obtained or was obtained even partially as the result of the improper acquisition of some other evidence or information;

(n) All evidence in the possession, custody or control of the District Attorney or any police agency, the existence of which is known to the District Attorney, or which by due diligence may become known to the District Attorney, which may be, or may tend to be favorable or exculpatory to the defendant, and which is or may be material to the issue of guilt or punishment.

ROSARIO MATERIAL

135. Upon information and belief the prosecution has possession of various statements of witnesses regarding this case. Under Rosario defendant is entitled to statements and reports of witnesses created by law enforcement officers or prosecutors. In the interest of judicial economy and in order to effectively prepare a defense, pre-trial disclosure of Rosario material is justified.

SANDOVAL/MOLINEUX/VENTIMIGLIA/CPL 240.43 MOTION

136. The defendant requests an Order prohibiting the prosecution from presenting at trial any evidence that he committed any other crime or engaged in any other vicious, immoral or otherwise unscrupulous conduct, or directing a hearing on the issue.

137. The defendant requests an Order prohibiting the prosecution from questioning him should he choose to testify at trial, regarding any alleged prior bad acts, arrests or convictions with which he may have been involved, solely for the purpose of impeaching his credibility; or that the Court direct a hearing upon the issue.

138. The defendant requests that the court order the prosecutor to provide him with notifications regarding all specific instances of his uncharged criminal, vicious or immoral conduct which the prosecutor will seek to offer against him at trial upon its direct case. The defendant also requests notification as to what specific relevant purpose(s) such evidence will be offered.

139. The defendant requests the prosecutor to notify him of all specific instances of his uncharged criminal, vicious or immoral conduct, which the prosecutor intends to use at trial for purposes of impeaching his credibility.

140. The defendant also requests the Court to make its determination as to any Sandoval Molineux issue at a hearing prior to the commencement of jury selection.

RENEWAL OF MOTIONS AND HEARINGS 20 DAYS BEFORE TRIAL

141. The defendant requests an Order providing that requested hearings be held at least 20 days prior to trial so as to provide for effective representation.

142. The defendant requests an Order that these motions be renewable if portions of them produce, or the district attorney on his/her own divulges, information not previously known to the defense which necessitates further hearings or requests.

WHEREFORE, for the reasons stated above, your affirmant respectfully requests that the Court grant the relief set forth herein; together with such other and further relief as to the Court may seem just and proper.

Dated: May 28, 2015

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