BUFFALO CITY COURT : COUNTY OF ERIE
STATE OF NEW YORK
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THE PEOPLE OF THE STATE OF NEW YORK,

v.

REPLY AFFIRMATION
Docket No. CR XXX

XXX, Defendant.
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XXX, ESQ., being duly admitted to practice before the courts of the State of New York, hereby affirms under the penalties of perjury the following:

1. I am an attorney in the Legal Aid Bureau of Buffalo's Criminal Defense Unit. I am the attorney for the above-named individual, and as such am fully familiar with the facts and circumstances surrounding this case.

2. The information contained herein is based on information and belief. The source of the information and the basis for the belief being conversations with the defendant, communications with the prosecutor, review of the paperwork in this case, and independent case investigation.

3. Defense filed a C.P.L. § 30.30 motion to dismiss on XXX with the People and the Court.

4. The People's reply was served on Defense Counsel on XXX.

5. In reviewing the People's contentions relevant to their request for denial of the Defendant's CPL § 30.30 dismissal motion, it is clear that same are unfounded, specious, and/or irrelevant. The Court must therefore disregard same and proceed with dismissal for failure to declare ready for trial within the statutorily mandated time. When a criminal action is commenced in New York State, the prosecution is required to be ready for trial within statutorily prescribed time limits based on the most serious charge.[1] When the prosecution fails to meet this obligation, the defendant has

[1] *See* CPL § 30.30-1.

been denied the right to a speedy trial and a motion to dismiss, unless certain exclusions apply, "must be granted."[2] CPL § 30.30-1. The Court of Appeals has stated that the "principal underlying purpose" animating this speedy-trial structure is "to discourage prosecutorial inaction." *People v. Price*, 14 N.Y.3d 61, 64 (2010).

6. To escape mandatory dismissal of a criminal action for denying a defendant's right to a speedy trial, the prosecution must "demonstrate that certain time periods should be excluded." *Id*. at 63. Here, without addressing any specifics of this individual case, the prosecution is asking the Court to find that all time from October 4, 2020, to the present be excluded solely because of the general environment created by COVID-19. Respectfully, the Court should reject this wholly unreasonable suggestion.

7. To begin, it is paramount to note that on March 20, 2020, Governor Cuomo tolled all CPL § 30.30 time by Executive Order 202.8.[3] On October 4, 2020—199 days later—Governor Cuomo reinstated the time limits in CPL § 30.30.[4] Thus, the prosecution had more than 6 months to establish procedures to take into account the changes brought about by COVID-19.

8. In the Answering Affidavit, it is unclear whether the prosecution is moving under the very specific CPL § 30.30-4(g)(ii) or the more general CPL § 30.30-4(g). In several places throughout the prosecution's Answering Affidavit CPL § 30.30-4(g)(ii) is cited. That subsection excludes from calculation "the period of delay resulting from a continuance granted at the request of a district attorney if the continuance is granted to allow the district attorney additional time to prepare the people's case and additional time is justified by the exceptional circumstances of the

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[2] *See* CPL §§ 170.30-1(e) and 210.20-1(g).

[3] https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency

[4] https://www.governor.ny.gov/news/no-20267-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency

case." CPL § 30.30-4(g)(ii). Because this subsection requires a court-granted continuance, the natural conclusion is that this exclusion must be requested proactively by the prosecution prior to the prescribed deadline to declare ready. The only Court of Appeals case referencing CPL § 30.30-4(g)(ii) supports this natural conclusion.

9. In *People v. Sibblies*, the concurrence, written by Chief Judge Lippman states, "[i]n an appropriate case the People may avail themselves of the statutory mechanism for ensuring an adjournment be excluded from the speedy trial period. They may seek a continuance under CPL 30.30-4(g)(ii), which allows a court to grant the People an excluded continuance . . . ." 22 N.Y.3d 1174, 1179 (2014) (Lippman, J., concurring) (emphasis added). In this case, the prosecution is not arguing for an exclusion of time based on this Court previously granting an excluded continuance under CPL § 30.30-4(g)(ii). Instead, the prosecution is arguing for a retroactive exclusion of time. CPL § 30.30-4(g)(ii) is therefore inapplicable to the instant case.

10. The Answering Affidavit also references the broader CPL § 30.30-4(g). That statute excludes periods of "delay occasioned by exceptional circumstances." CPL § 30.30-4(g). Due to the vagueness of the term "exceptional circumstances," the Court of Appeals has had several occasions to interpret what circumstances are legally exceptional and what the prosecution must demonstrate to obtain such a finding. Those cases foreclose the prosecution's efforts in this case.

11. While "there is no precise definition of what constitutes an exceptional circumstance under CPL 30.30(4)(g) . . . . the term's application is limited by the dominant legislative intent informing CPL 30.30, namely, to discourage prosecutorial inaction." *People v. Price,* 14 N.Y.3d 61, 64 (2010). Thus, "[t]o invoke the exclusion provided in CPL 30.30(4)(g), . . . the People must exercise due diligence in obtaining the evidence." *People v. Clarke,* 28 N.Y.3d 48, 52 (2016). This requires the prosecution to demonstrate to the court "credible, vigorous activity in pursuing [their

investigation].” *Id*. The prosecution’s Answering Affidavit is completely devoid of any assertions demonstrating “credible, vigorous activity” (or any activity) in pursuing their obligations.

12. Here, the prosecution requests that the Court rely on the general environment created by the response to COVID-19 to find exceptional circumstances in this case. This effort falls woefully short of the proof required to make a finding of exceptional circumstances.

13. First, the prosecution details how appearances in Buffalo City Court have been limited since CPL § 30.30 was reinstated by the Governor on October 4, 2020. According to the Answering Affidavit, this has resulted in the “People [being] unable to interview victims and witnesses with the regularity” they are accustomed to when Buffalo City Court is operating normally.[5] Importantly, the prosecution never alleges they were unable to interview someone in this particular case. Additionally, there is nothing in the CPL which requires the prosecutor to meet with victims or witnesses in person. Of course several options are available to communicate with people while COVID-19 restrictions are in place: telephone calls, U.S. mail, Zoom meetings, Teams meetings, FaceTime, text messaging, investigator visits, meeting inside while social distancing, meeting outside, etc… While the lack of in-person court appearances may have necessitated a change in where and how prosecutors communicate with victims and witnesses, it did not, in any way shape or form, prevent communication.

14. Furthermore, not having to staff up to twelve courtrooms on a daily basis inevitably resulted in a substantial surplus of available hours for ADAs to investigate and prepare cases to be ready for trial. On top of that, the number of files that were opened in Buffalo City Court declined significantly during the pandemic. In 2019 Legal Aid Bureau of Buffalo opened 10,993 files. In 2020 that number fell to 8,227, a 25% decrease. Contrary to the prosecution’s assertions, court

[5] People’s Answering Affidavit ¶¶ 12 and 13.

closures should have resulted in more cases being ready for trial, not fewer. Consequently, the limited appearances permitted in Buffalo City Court is not an exceptional circumstance requiring exclusion of time under CPL § 30.30-4(g).

15. Second, the prosecution asserts that "several victims have suffered financial challenges and do not have working phones or other technology that would allow us to communicate with them."[6] However true it may be that people lack the financial resources to afford phones, again, there is no assertion that it is relevant to this case. Additionally, even if it true, lack of communication devices does not exclude the prosecution from contacting alleged victims. Surely the prosecution has had victims in the past who did not have phones. The time limits prescribed in CPL § 30.30 are lengthy enough to communicate via U.S. mail. Furthermore, the additional 199 days of suspended CPL § 30.30 time should have allowed the prosecution to establish a process with law enforcement to ensure victim contact was possible. Accordingly, not being able to make contact with people using the most convenient method for the prosecution is an ordinary, not an extraordinary, circumstance.

16. Third, the prosecution asserts that COVID-19 has severely affected daily staffing in law enforcement agencies.[7] Again, there is no specific claim detailing how this impacted the prosecution here. There is nothing submitted demonstrating how the prosecution worked diligently during the 199-day pause to mitigate the issue. "[L]ack of effort . . . caused by [] work load and shortage of personnel . . . do[es] not constitute 'exceptional circumstances'" *People v. Warren*, 85 A.D.2d 747, 748 (2nd Dept. 1981).

17. Next, the prosecution posits several largely irrelevant or untrue objections. Whether the prosecution can arraign defendants in a timely manner[8] or whether a defendant has been prejudiced

[6] People's Answering Affidavit ¶ 13.
[7] People's Answering Affidavit ¶ 16.
[8] People's Answering Affidavit ¶ 14.

by the prosecution's failure to meet trial readiness deadlines[9] is completely irrelevant when deciding a motion to dismiss for violating the speedy-trial statute.

18. The contention that COVID-19 has resulted in the inability of the People to conduct meaningful plea discussions, be heard on motions, place plea offers on the record in open court, or complete discovery obligations is belied by the fact that all of these things have been done by Assistant District Attorneys in numerous other cases during this same period.[10] Perhaps most telling, as the deadline to declare ready on "A" misdemeanors arraigned during the CPL 30.30 pause approached, a flood of Certificates of Compliance were served upon this office. The People cannot in one breath tell this Court that investigation of cases, service of discovery, and readiness declaration was impossible during the pandemic and in the next prove this assertion false through performing exactly those acts on numerous cases and remain credible.

19. Finally, the prosecution requests an opportunity to be "heard in-person" and have the "defendant be present" at this in-person proceeding.[11] The prosecution nowhere explains the need for granting either request. Without an expressly stated reason, these requests can only be implicitly explained as a cynical stall tactic. While the defendant has a right to be present at a hearing on a motion to dismiss it is not required, and the defendant may waive that right. See CPL § 210.45-6. Both requests should be denied.

20. In sum, the People's Answering Affidavit provides this Court a fairly comprehensive list describing how COVID-19 has upset what was the status quo. However, it does not demonstrate what specific, credible, vigorous activity the prosecution has undertaken to adapt to the changes, despite having more than six months to prepare. The logical conclusion to draw from this silence

[9] People's Answering Affidavit ¶ 17.
[10] People's Answering Affidavit ¶¶ 14 and 15.
[11] People's Answering Affidavit ¶ 20.

is that the delay in this case was caused by prosecutorial inaction. Because "[i]t is the People alone who have the burden of proof of showing that they exercised due diligence sufficient to exclude the delay," this Court must reject an exclusion of time for exceptional circumstances under CPL § 30.30-4(g). *People v. Clarke*, 28 N.Y.3d 48, 53 (2016).

PLEASE TAKE NOTICE, that pursuant to CPLR §2214(b), Answering Affidavits, if any, are requested to be served on the undersigned at least seven (7) days before the return date of the motion, and the defendant reserves the right pursuant to CPL §255.20(2), to make all further motions predicated upon the answer to the instant motion or receipt of additional information. Oral argument is requested.

DATED: January 26, 2021
BUFFALO, NEW YORK

Respectfully submitted,

XXX, Esq., Staff Attorney
Criminal Defense Unit-Buffalo City Court
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