COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF MOTION

Docket.#

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S I R S :

PLEASE TAKE NOTICE that upon the annexed Affidavit of MICHAELANGELO MATERA, Esq., duly sworn to on the 7th day of July, 2003, the attorney of record for the defendant herein, and upon all pleadings and proceedings had heretofore, the undersigned will move this Court to be held in and for the County of Nassau, at the Courthouse located at 262 Old Country Road, Mineola, New York, on the 18th day of July, 2003, at 9:30 in the forenoon of that day, or as soon thereafter as counsel may be heard:

I. For an Order directing the District Attorney to furnish the defendant with a Bill of Particulars, pursuant to CPL §200.95, and otherwise disclose all such items of information to the defendant's attorney, or for an Order precluding the District Attorney from offering any evidence from any witness, report, or any other source, for which a requested particular was insufficiently complied with or refused, or in the alternative dismissing any count of the indictment for which a requested particular was insufficiently complied with or refused, or in the alternative, directing that a hearing be held as to ordering disclosure of any item of information, as to preclusion or as to dismissal;

II. For an Order granting Discovery and Disclosure, pursuant to CPL §240.20, 240.40 and 240.70, directing the District Attorney to furnish the defendant with all items of discovery

demanded by the defendant and to produce and otherwise disclose all such items to the defendant's attorney; and/or for an Order pursuant to C.PL. Sec. 240.90(3) directing the District Attorney to submit all property as defined by C.P.L. Sec. 240.10(4), and 240.20 and anything else required to be disclosed as defined by CP.L Sec 240-20(1) (G), for in camera inspection by the Court, directing the District Attorney to make available any person which the Court may require to answer questions, and or a sealed transcribed record of such proceedings; or for an order to preclude the District Attorney from offering any evidence from any witness, report, or any other source, for which discovery was demanded; or for an order directing that a hearing be held as to ordering discovery and disclosure or as to preclusion;

III. For an Order, pursuant to C.P.L. §210.20(1) (A) (B) (C) (H) (I) and (1-A), 210.30, 210.35, 190.25 (1) and (6), and l90.30 granting defendant permission to inspect the Grand Jury minutes of the testimony upon which the indictment herein was founded; or the release of the Grand Jury minutes to the defendant's attorney; for an order dismissing or reducing the indictment against the defendant, and/or dismissing or reducing any count therein, upon the grounds, that the evidence before the Grand Jury upon which said indictment was based was insufficient in law to warrant the finding of same, that the Grand Jury may not have been properly charged as to applicable law, that exculpatory evidence may not have been submitted to the Grand Jury: and that the presentation to the Grand Jury may have otherwise been improper; and for such further relief as to the Court may seem just and proper;

IV. For an Order, pursuant to C.P.L. §710.20(6) and 710.40 suppressing any testimony regarding identification to be offered as evidence at trial, or in the alternative, directing that a hearing be held as to the admissibility of such identification testimony;

V. For an Order, pursuant to C.P.L. § 710.20(3), 710.40 and 60.45(1) and (2) suppressing any testimony regarding a statement allegedly made by the defendant if it is to be offered as inculpatory evidence at trial, or in the alternative, directing that a hearing be held as to the admissibility of such statement;

VI. For an Order pursuant to the Fourth., Fifth and Sixth Amendments of the United States Constitution, (Wong Sun v. United States, 371 US 475), and pursuant to C.P.L. §710.20(1), (3), (4) and (6), and 710.40, suppressing any testimony regarding any identification, property, or statement to be offered as evidence at trial or in the alternative, directing that a hearing be held as to the admissibility of such testimony, and property;

VII. For an Order precluding the People from introducing at trial any evidence of Mr. Loango's prior convictions or bad acts, if any, or in the alternative, that a hearing be held to determine the admissibility of such convictions or acts; and

VIII. Granting reasonable time for the defendant to make such additional motions as are predicated upon the People's responses to this Omnibus Motion, the Court's Decision on this Motion, or any further developments that should arise in this case.

DATED: Mineola, New York
July 11, 2004

Yours, etc.,

MATERA & BRATKOVSKY, LLP

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MICHAELANGELO MATERA
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TO: Hon. Denis Dillon
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Attn: ADA Christine Sullivan

County Court, Nassau County
262 Old Country Road
Mineola, NY 11501
Attn: Hon. Judge Wexner

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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THE PEOPLE OF THE STATE OF NEW YORK AFFIRMATION

Docket.# - against -

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STATE OF NEW YORK)
)SS. :
COUNTY OF BRONX)

MICHAELANGELO MATERA, an attorney duly admitted to practice in the Courts of the State of New York, and a member of the firm of MATERA & BRATKOVSKY, LLP, the attorneys of record for the defendant herein, does hereby affirm under penalty of perjury and pursuant to CPLR §2lO, that the following, upon information and belief, is true:

That this Affirmation is submitted in support of the within Motion, which seeks the aforementioned relief;

That the sources of your affirmant's information and belief are the Court records, the records on file in my office, official reports and records, discussions with the Assistant District Attorney and Police Department, and conversations had with the defendant.

Defendant was arrested on January 23, 2003, and was arraigned on the next day and charged with one count of Robbery in the Second Degree. The case was thereafter presented to a Grand Jury which returned an indictment on March 10, 2003. The defendant was arraigned in County Court before Your Honor on March 20, 2003 and pled not guilty.

I. BILL OF PARTICULARS

I have conferred with the defendant in an effort to obtain information necessary for the preparation of his defense. The accusatory instrument itself contains none of the particulars requested, and does not contain the specificity required for the defendant to be informed of the exact nature of the charges against which he must defend himself.

It has become apparent that the defendant and defense counsel have no independent means of obtaining precise information as to the factual claims to be advanced against him by the District Attorney in the prosecution of this case other than the general allegations contained in the indictment and complaint. To date, I have not even received any police reports other than an arrest report.

This information, furthermore, is within the knowledge and control of the District Attorney and his witnesses, and is not adequately available to the defendant from any other source. There was no preliminary hearing in this case, and neither defendant nor defense counsel has confronted the People's witnesses in any other proceeding. Thus, the allegations contained within the indictment, a copy of which is annexed hereto as Exhibit "A", remain essentially skeletal.

All of the information requested by the defense is necessary for the proper preparation for trial, for the proper preparation for any pretrial motion hearings in this case, and or the avoidance of surprise and of delay once such proceedings begin. Without such information the defendant cannot adequately prepare or conduct a defense.

On March 11, 2003, the People did provide their "Voluntary Disclosure, Notices and Demands" form. However, this form was grossly insufficient in that it did not provide, as previously mentioned, any police report other than an arrest report. Additionally, we have not as of yet received the entire transcript of the defendant's testimony before the Grand Jury which we are entitled to under CPL §240.20(b).

With respect to each particular requested, which the prosecutor has insufficiently complied with or refused the defense moves that, the Court pursuant to C.P.L. §200.95(5), and 240.70(1), direct the District Attorney to furnish the, defense with the information requested therein, or preclude the District Attorney from offering any evidence from any witness, report, or any other source, for which a requested particular was insufficiently complied with or refused, or dismiss any count of the indictment for which a requested particular was insufficiently complied with or refused, or in the alternative direct that a hearing be held as to ordering disclosure of any item of information, as to preclusion, or as to dismissal .

II. DISCOVERY AND DISCLOSURE

I have conferred with the defendant in an effort to obtain information necessary for the preparation of his defense. As previously mentioned, the accusatory instrument, all other documents, records, and remarks by any assistant district attorney contain very little information, and do not reveal the additional information required for the defendant to be sufficiently informed of the nature of the allegations and evidence against which he must prepare to defend himself. The information disclosed to the defense thus far remains essentially skeletal. It has

become apparent that the defendant and defense counsel have either no independent means, severely limited means, and/or ineffective means, of obtaining this information.

In addition to the previously mentioned police paperwork not being turned over, defense counsel has not as of yet received information regarding the whereabouts of any 911 recordings or police communication recordings. In their disclosure, the People indicate that they will make such information and evidence available, "when they come into [their] possession." This incident allegedly occurred on January 9, 2003 making this case six months old now and still we have not received any further information of the availability of the recordings.

Nor has the defendant received any medical records pertaining to the alleged victim. Obviously the defendant has no other means of obtaining such records which are so very essential to preparing the defense. In this matter, the defendant was not arrested until two weeks after the alleged offense. In fact, the complainant did not participate in any identification procedure until three days later. Without such information, the defense is left to speculate as to exactly if or when the complainant received treatment for what he claims to be severe injuries.

More important on the issue of medical records is the fact of the complainant's extreme intoxication. Upon information and belief, the complainant was so intoxicated that he could not even stand on his own. The fact of intoxication would clearly be stated in the medical records. Obviously the level of intoxication would go directly to whether or not the complainant could adequately recall anything about the alleged incident, let alone who committed it as it appears that in the instant matter, he is relying only the fact that he knew the defendant from the past having seen each other on numerous occasions. Such a situation renders this information Brady material and as such, the People should make every effort to obtain the same. (Brady v. Maryland, 373 US 83, 87, 83 S.Ct. 1194)

Under Brady v. Maryland, the Government has a Constitutional duty to disclose favorable evidence to the accused where such evidence is "material" either to guilt or punishment. Evidence is deemed to be material whenever there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (United States v. Gambino, 59 F.3d 353, 365) This evidence, however, is not only limited to exculpatory evidence, but also applies to impeachment evidence. (United States v. Bagley, 473 US 667, 676, 682, 105 S.Ct. 3375, 3380; United States v. Agurs, 427 US 97, 107, 96 S.Ct. 2392, 2399) As such, the medical records clearly constitute Brady material and must be turned over.

Therefore, the defense moves that the Court direct the District Attorney to acquire all property and anything else concerning this case though it may not as of this moment be in their possession but capable of being obtained by them for inspection. The defendant also requests that this Court order the People to turn over any written or recorded statement of any prosecution witness which relates to the subject matter of said witness and any other material required to be disclosed to the defendant pursuant to People v. Rosario, 9 N.Y.2d 286, which the prosecutor has not yet produced.

III. INSPECT AND DISMISS

The defense moves that the Court inspect the Grand Jury minutes and that the Court dismiss or reduce the instant indictment, and/or dismiss or reduce any insufficient count therein. It is believed that the People repeatedly asked the defendant the same questions over and over again until they got the answer they wanted. This was clearly improper. It is also believed that

the People failed to give an alibi witness a fair opportunity to tell his version of what occurred at his home on the night of the alleged incident and instead twisted his words and repeatedly asked the same questions, thereby confusing the witness.

Because of the prosecution's conduct, the indictment returned against the defendant was infirm, since the grand jury failed to give the case against the defendant a complete and impartial investigation, and the defendant was deprived of the full hearing of the matter by the grand jurors. (People v. Dykes, 86 A.D.2d 191 (2 Dept., 1982).

Although, in general, the District Attorney need only present evidence necessary to establish a prima facie case, and he is under no duty to present all of his evidence, the District Attorney's discretion is limited by his role of legal advisor to the grand jury pursuant to C.P.L. § l90.25(6) and 190.30(6). The People are also obligated to present evidence which is favorable to the defendant in an unbiased manner. (People v Dumas, 51 Misc.2d 929)

It is, therefore submitted that the prosecution's conduct with respect to their questioning of the defendant and the alibi witness was improper which potentially prejudiced the ultimate decision reached by the Grand Jury. (People v. Huston, 88 N.Y.2d 400 (1996)) As a result, the indictment is defective and should be dismissed.

The defendant further moves to dismiss all counts of this indictment on grounds of insufficiency, and on grounds of any evidence which was presented to the Grand Jury in contravention of any rule of law, or admissibility. The defense also moves to dismiss on grounds of the conduct of the examination of witnesses called by the prosecution in that any testimony given by a witness who testified before the Grand Jury who answered in response to leading questions or otherwise answered in the affirmative to information contained in questions, is violative of the basic evidentiary standards contained in C.P.L. §190.30(1). An indictment based

upon such testimony is defective pursuant to C.P.L. §210.35(5) and dismissible pursuant to C.P.L. §210 (1)(c).

IV. SUPPRESSION OF IDENTIFICATION

The defendant moves for a suppression of, or a hearing upon, any out-of-court identifications of the defendant and any in-court identifications, on the grounds that any show-up procedures were impermissibly suggestive, and that such procedures were coupled with an inadequate opportunity to observe, which would render any in-court identifications constitutionally unreliable. According to the Voluntary Disclosure Form provided by the People, the defendant was allegedly identified by means of photographs to a police officer three days after the alleged commission of the crime.

It is the position of the defense that this was unduly suggestive as the book and/or page containing a photograph of the defendant was placed before the alleged complainant suggesting to him that the defendant was the alleged attacker.

The People also served notice of a post-indictment lineup conducted on June 10, 2003. Your Affirmant was present at said lineup and concedes that the arrangement of the lineup and fillers was not in and of itself problematic. However, it is contended that the complainant was made to understand that the person that he claimed committed this alleged attack would be in the lineup and this is clearly suggestive and as such, the People should be precluded from using this as evidence at the time of trial. In the alternative, the defendant requests that the Court hold a hearing to determine the admissibility of the line-up pursuant to United States v. Wade.

V. SUPPRESSION OF STATEMENTS

The defendant moves to suppress any statement allegedly made by the defendant, wheresoever any such statement was taken in violation of his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. (Miranda v. Arizona, 384 US 436; People v. Huntley, 15 NY2d 72) The alleged statements were obtained without obtaining intelligent and knowing waivers of the defendant's Miranda rights as there was no valid waiver of his right to remain silent or there was no valid indication that he actually understood his rights.

In the alternative, the defendant requests a Huntley hearing.

VI. SUPPRESSION OF IDENTIFICATION AND STATEMENTS AS FRUITS OF AN ILLEGAL SEARCH AND SEIZUREOF DEFENDANT

The defendant moves to suppress any identification of him and any statement allegedly made by him as the result of the unlawful seizure of his person by police officers, in that, the defendant was forcibly detained by police officers without probable cause to arrest him and in violation of the Fourth and Fourteenth Amendments to the United States Constitution, in that the identifications were the result of the seizure of his person as were the statements, none of which occurred after a lawful arrest.

The Detective placed the defendant under arrest based upon information received from an individual who the medical records will show was extremely intoxicated at the time of the alleged incident and therefore was incapable of remembering anything of the incident, let alone who committed it three days earlier. In fact, the complainant has, upon information and belief,

since told several other people that he does not really remember exactly what happened. Once the Detective was provided with an alibi by the defendant, it was incumbent upon him to check the information given about the complainant's intoxication which he clearly never did.

Instead, the Detective chose to place the defendant under arrest without having any probable cause and as a result, allegedly obtained a statement from him as well as a subsequent identification. Clearly it is the case that without this unlawful arrest, there would never have been an alleged statement or identification. As a result, both the statement and identification should be suppressed. (Dunaway v. New York, 442 US 200, 99 S.Ct. 2248, 60 L.Ed.2d 824; Wong Sun v. United States, 371 US 475, 83 S.Ct. 407, 9 L.Ed.2d 441)

Should this Court decide against suppression at this time, then the defendant would, in the alternative, request a hearing pursuant to Dunaway v. New York.

VII. PRIOR CONVICTIONS OR BAD ACTS

Mr. Loango may wish to testify on his own behalf. The People should be precluded from entering into evidence, either on their direct case or during cross examination, any prior arrests, convictions or prior bad acts of Mr. Loango, should any exist, as the prejudicial effect of introducing such material far outweighs the probative value it might have. (People v. Sandoval, 34 NY2d 371, 314 NE2d 413, 357 NYS2d 849; People v. Ventimiglia, 52 NY2d 350) Additionally, it is requested that the People notify the defendant of all instances, if any, of prior uncharged bad acts which they intend to use at trial.

Should this Court decide against suppression at this time, then the defendant would, in the alternative, request a hearing pursuant to People v. Sandoval and People v. Ventimiglia.

VIII. RESERVATION OF RIGHTS

Pursuant to C.P.L. §255.20(3), defendant reserves the right to make additional pretrial motions should such be necessary. He further reserves the right to amend or supplement this motion if that becomes necessary or appropriate in light of any disclosures by the People. Mr. Loango further reserves the right to request an adjournment after pre-trial hearings and to investigate information developed at said hearings. (*See*, People v. Peacock, 31 NY2d 907, 340 NYS2d 642)

The Defendant further submits that no prior application has been made for the relief requested herein.

WHEREFORE, it is requested that the foregoing Motions be granted, together with such other and further relief which, as to this Court, may seem just and proper.

DATED: July 11, 2004
Mineola, New York

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MICHAELANGELO MATERA