

June 15, 2000

Hon. Russell P. Buscaglia, J.S.C.
Supreme Court
92 Franklin Street
Buffalo, New York 14202-

Re: **PEOPLE V. XXXXXXXXXXXX**
Indictment
Justice Russell Buscaglia:

Enclosed please find Defendant's **Notice of Omnibus Motion** with **Supporting Affirmation** and **Notice to Produce** for the above-referenced matter.

Thank you for your time and consideration in this regard.

Respectfully submitted,

RALPH C. MEGNA

RCM:km

Enclosures

cc: Amy J. Goldstein, A.D.A.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

<p>PEOPLE OF THE STATE OF NEW YORK</p> <p>vs.</p> <p>XXXXXXXXXX,</p> <p>Defendant.</p>	}	<p>NOTICE OF OMNIBUS MOTION</p> <p>Indictment No. 0000000</p>
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SIRS AND MADAMS:

PLEASE TAKE NOTICE that upon the annexed **Affirmation** of **RALPH C. MEGNA**, Esq., duly executed on the 15th of June, 2000 and upon all the papers and proceedings heretofore had herein, a **Motion** will be made in this Court on behalf of Defendant , at a Special Term thereof, to be held on the 12th day of July, 2000, at 9:30 A.M. o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an **Order** granting:

1. Inspection of the **Grand Jury Minutes** pursuant to CPL § 210.30;
2. Dismissal of the **Indictment** pursuant to CPL §§ 210.20(1)(b), (c), 210.30 *et seq.*;
3. Disclosure and Delivery of all *Brady* Material pursuant to CPL § 240.20(h);
4. A **Hearing** pursuant to *United States v. Wade*, 388 U.S. 218, and CPL § 710.60(4).
5. A **Hearing** pursuant to *People v. Sandoval*, 34 N.Y.2d 371, with **Notice** of Criminal, Immoral or Vicious Acts pursuant to CPL § 240.43;
6. **Notice to Produce** and other discovery demands

7. Leave to make further motions; and for such other and further relief as to the Court may seem just and proper.

Dated: June 16, 2000

Buffalo, New York

Yours very truly.,

RALPH C. MEGNA
Attorney for Defendant
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(716) 831-9191 / 831-9199 Fax

TO: Hon. **RUSSELL P. BUSCAGLIA**, J.S.C.
Supreme Court
92 Franklin Street, Buffalo, New York 14202-

FRANK J. CLARK III, D.A.
Attn: **AMY J. GOLDSTEIN**, A.D.A.
Erie County District Attorney's Office
25 Delaware Avenue
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WADE HEARING

(Admissibility of Prior Identification)

11. Defendant hereby requests a hearing pursuant to *United States v. Wade*, 388 U.S. 218, and CPL § 710.60(4), to determine whether Defendant was properly identified prior and subsequent to his arrest, together with an examination of all the facts and circumstances surrounding such identification procedures in order to ensure that said procedures were proper and not in violation of any of Defendant's constitutional rights.

12. Upon information and belief, the prior identification procedures used were impermissibly suggestive and that police authorities have no other independent source or basis for identification of the Defendant beyond said procedures.

13. In particular, upon information and belief, Defendant was indicted upon the Grand Jury testimony of the alleged victim, who did not, prior to such **Indictment**, know Defendant, and who further and more importantly did not identify Defendant to the police as having been in any manner involved in the instant crimes charged or in any other felony or misdemeanor.

14. Defendant shall accordingly pray for any **Orders** suppressing any and all improper identification testimony at the conclusion of the hearing sought herein pursuant to CPL §§ 710.20(6) and 710.60(1).

BRADY MATERIAL

(Exculpatory or Favorable Information or Evidence)

Defendant hereby requests that the People be ordered to disclose, produce, and deliver to the Defendant all information or evidence favorable to him, which information or evidence the People may have, or which, via the exercise of due diligence may so come within, either their control, possession or custody, pursuant to the authority of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), *People v. Vilardi*, 76 N.Y.2d 67, 556 N.Y.S.2d 518 (1990), and CPL § 240.20(h). In view of the broad mandates of *Brady* and *Vilardi*, it is respectfully requested that the prosecution be ordered to furnish to the Defendant, pre-trial, such exculpatory material including, but not limited to, that requested in Defendant's **Notice to Produce**.

If the Defendant is forced to wait until the time of trial, which time may be exceedingly short, there may be no time for Defendant's counsel to contact the witnesses, interview them, and arrange to have subpoenas served upon them in the Defendant's defense. It is therefore imperative that any evidence in the People's file that is favorable to the defense, be disclosed immediately so that arrangements can be made to provide for the availability of the witnesses aforesaid.

This rule would impose no undue hardship upon the People in that the Defendant seeks only evidence that is affordable to him, and consequently, if the witnesses are involved as is believed by the Defendant, it is expected that they would be friendly to the Defendant.

When a person is charged with a crime, the findings of law enforcement agencies involved ought be as readily available to the Defendant as to the prosecution. The People's responsibility to the Defendant is no less than the duty owed to any other member of the community in the investigation of a crime by police and should be designed not only to convict the guilty, but to free the innocent. For all these reasons, whether it be documentary, statements of witnesses, or in some form not clearly specified by the defense at this time, it should be delivered to the Defendant, so that he may make effective use of such evidence in his defense.

As the Court of Appeals recently held in *Vilardi*, at 74-75, 556 N.Y.2d at 521-22, failure by the People to disclose exculpatory material in response to specific discovery requests verges on prosecutorial misconduct, which is "seldom, if ever, excusable," and

which will entitle the defendant to a new trial if there is a reasonable possibility that said failure contributed to a defendant's conviction.

**SANDOVAL HEARING WITH
NOTICE OF IMMORAL, VICIOUS OR CRIMINAL ACTS**

Defendant requests that any cross-examination of the Defendant be conducted within the perimeters of *People v. Sandoval*, 34 N.Y.2d 371, and as such suppress the use of any acts or convictions of the Defendant, the use of which will be in violation of the Defendant's constitutional and statutory rights.

Pursuant to CPL § 240.43, the Defendant requests a hearing to determine whether the People intend to question the Defendant at trial about any uncharged immoral, vicious or criminal acts allegedly committed by the Defendant.

In particular, Defendant respectfully requests suppression of the arrests and/or convictions of the Defendant, including, without limitation, items appearing in the Defendant's NYSID (see attached).

DISMISSAL OF THE INDICTMENT AS INSUFFICIENT ON ITS FACE

Pursuant to CPL §§ 210.20(1)(b), (c), 210.30 *et seq.*, the **Indictment** herein must be dismissed because it fails to contain plain and concise factual statements which assert facts supporting every element of the offence charged and the Defendant's commission thereof with sufficient precision as to clearly apprise the Defendant of the conduct that is the subject of the accusation.

The **Indictment** herein is couched solely in terms of ultimate conclusions of law and fact, and thus, fails to assert facts that support each and every element of the crimes charged, and accordingly, said **Indictment** ought be dismissed.

**INSPECTION OF GRAND JURY MINUTES &
DISMISSAL OF THE INDICTMENT AS DEFECTIVE**

Defendant further moves to dismiss the **Indictment** on the ground that the Grand Jury proceedings were defective within the meaning of CPL § 210.35 in that the same failed to conform to the requirements of Article 190 to such a degree that the integrity thereof was impaired and the Defendant prejudiced.

In particular, it is believed the instructions before the Grand Jury were not legally proper, or for that matter, particular instructions enumerated below were not given at all in respect of:

- a. the burden of proof;
- b. the law of circumstantial evidence;
- c. Defendant's presumption of innocence.

Additionally, should it appear from review of the minutes that the People did not present evidence and proof that was legally sufficient to sustain the various charges in this **Indictment**, or that the instructions given to the Grand Jury were inaccurate or inadequate, then the **Indictment** herein should in all respects be dismissed pursuant to CPL § 210.20(1)(b), (c).

It is further submitted that, although under certain circumstances an indictment is presumed to be valid on its face, this presumption does not arise until certain predicate facts are established. Thus, in the instance, certain facts must be disclosed by the prosecution, including, for example, the number of persons constituting the grand jury, the number of persons voting to indict, etc. Accordingly, Defendant makes the following inquiries:

- a. Whether the **Indictment** in its final form was drafted by the District Attorney's Office before the Grand Jury voted to return it;
- b. Whether the **Indictment** in its final form was exhibited or read verbatim to each of the Grand Jurors who voted to return it before the vote was taken;

- c. Whether an agent of the State or of the Federal government or any other persons summarized testimonial evidence given before the Grand Jury in connection with the **Indictment** herein;
- d. Whether the Grand Jury was specifically advised, if the foregoing paragraph is applicable, that it was receiving summarized or hearsay evidence;
- e. Whether any of the Grand Jurors who voted to return the **Indictment** were not continuously present when all of the evidence underlying this **Indictment** was presented;
- f. With respect to the above requests, the Defendant respectfully requests disclosure of the Grand Jury attendance records for each of the Grand Jurors during the time the present charges were being considered by the Grand Jury, specifically designating each member's attendance when all the evidence was presented;
- g. Whether, and what, if any legal advice was given to the Grand Jury by the prosecution or the court, including, but not limited to, the significance, legal effect, or evaluation of the evidence or testimony heard ;
- h. Whether the entire Grand Jury process and proceedings were recorded, including the above-referenced legal advice.

LEAVE TO MAKE FURTHER MOTIONS

Defendant has endeavored to encompass within this **Motion** all pre-trial prayers for relief.

As the Court is aware, much of the relief herein requested is in the nature of discovery and has been previously unavailable to Defendant. That apart from these pre-trial **Motions**, the defense is engaged in an independent investigation into the circumstances surrounding this **Indictment**. In view of these dual avenues, it is possible that information not presently possessed by Defendant may come to light in the future, and that the receipt of such additional information may render further motions advisable.

This Court is respectfully requested to entertain such additional motions which, but for lack of specific information, could not be included in the instant **Motion**.

Dated: June 16, 2000
Buffalo, New York

RALPH C. MEGNA

STATE OF NEW YORK

SUPREME COURT: COUNTY OF ERIE

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<p>PEOPLE OF THE STATE OF NEW YORK</p> <p style="text-align: center;">vs.</p> <p>XXXXXXXXXXXXXXXXXX,</p> <p style="text-align: center;">Defendant.</p> <hr/>	} } } } } } } } }	<p style="text-align: center;">NOTICE TO PRODUCE</p> <p style="text-align: center;">Indictment No. 00000000</p>
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SIRS AND MADAMS:

PLEASE TAKE NOTICE that pursuant to Criminal Procedure Law § 240.20, demand is hereby made that you make a diligent, good faith effort to ascertain the existence of the following property or information, on or before the 12th day of July, 2000, at 9:30 A.M. o'clock in the forenoon of that day, and where such exists, to produce and permit inspection of same by the Defendant, or his attorney, or someone acting on his behalf, at 1131 Kensington Avenue, Buffalo, New York 14215-1611:

1. Identities, addresses and phone numbers of all present at time the Defendant allegedly confronted Complainant.
2. Any transcript or testimony relating to the criminal action or proceeding pending against the Defendant,
3. Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial, including, without limitation:

- d. Any evidence or information that any other person has admitted to having perpetrated, or otherwise having been involved in, the instant charges;
- e. Any evidence, information, transcripts or statements indicating that any prospective prosecution witness on any occasion gave false, misleading, or contradictory information regarding the present charges to persons involved in law enforcement, their agents, or informers. *See Brady*.
- f. Any evidence, information, transcripts, or statements indicating that a prospective prosecution witness has given statements contradictory to another prosecution witness. *See People v. Ambrose*, 52 A.D.2d 850, 382 N.Y.S.2d 566 (2d Dept 1976).
- g. Any information or evidence directly contradicting the prosecutorial theory of the People. *See People v. Porter*, 128 A.D.2d 248, 516 N.Y.S.2d 201 (1st Dept 1976), *leave denied*, 700 N.Y.2d 936, 524 N.Y.S.2d 687 (1987).
- h. The criminal records of any prospective prosecution witness and any information that the witness has in the past perpetrated immoral, vicious, or criminal acts. *See Giles v. Maryland*, 386 U.S. 66 (1977).
- i. Any information or evidence that would tend to impeach the credibility of any prosecution witness, or which would otherwise detract from the probative force of the evidence of the prosecution. *See United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Iverson*, 648 F.2d 737 (D.C. Cir. 1981); *United States v. Gleason*, 265 F.Supp. 880 (S.D.N.Y. 1967).
- j. Any and all consideration, or promises thereof, given to or on behalf of any witness or prospective witness, directly or indirectly, bargained for or not, including, but not limited to, anything of value or use; favorable or lenient treatment, immunity, recommendations, or assistance pertaining to any pending or potential proceeding before any criminal or civil court, parole,

probation, pardon, clemency, or administrative tribunal; as well as any threats or other coercion, express or implied, direct or indirect, made against any prosecution witness pertaining to any of the above actions or proceedings. *See People v. Cwikla*, 46 N.Y.2d 434, 414 N.Y.S.2d 102 (1979).

9. The approximate date, time, and place of the offences charged and of the Defendant's arrest, including, without limitation:
 - a. any and all police reports, arrest reports, investigation reports, memoranda, P-1191 and P-1192 reports, investigative reports pertaining to the crimes charged;
 - b. any and all internal radio police calls, audio- and video recordings of any **surveillance, search, stop, arrest, custody, interrogation, and/or identification** pertaining to the crimes charged;
 - c. the names of any and all public servants engaged in law enforcement activity who witnessed and/or participated in any **surveillance, search, stop, arrest, custody, interrogation, and/or identification** pertaining to the crimes charged.
10. Whether any or all of such people who may have been present at the time the Defendant allegedly confronted the Complainant, identified or failed to identify the Defendant.
11. Whether any arrests was made relative to the factual allegations of this indictment.

DEMAND is further made that production of the aforesaid information and materials shall be made within fifteen [15] days of the service of this **Demand** pursuant to CPL § 240.80(3), and no later than the 3rd day of May, 2000.

DEMAND is further made that if the prosecution should find, either before or during trial, additional information or material subject to the discovery demands set forth herein, it shall promptly comply therewith, or if the prosecution refuses to produce such information or material, it shall promptly convey such refusal, together with notice of the existence of the aforesaid information or material to the undersigned pursuant to CPL § 240.60.

Failure to comply with the demands contained herein shall result in an application to the Court to impose sanctions permitted by law, including, without limitation, preclusion of such information or materials into evidence and/or dismissal of all charges.

Dated: June 15, 2000
Buffalo, New York

Yours very truly,

RALPH C. MEGNA
Attorney for Defendant

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Buffalo, New York 14215-1611
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TO: **FRANK J. CLARK III, D.A.**
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