

COUNTY COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY: CRIMINAL TERM

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THE PEOPLE OF THE STATE OF NEW YORK

**ATTORNEY AFFIRMATION IN
SUPPORT OF MOTION**

Docket No.: 6293-2018

- against -

MARC FISHMAN,

Defendant(s).

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CANER DEMIRAYAK, ESQ., affirms the truth of the following:

1. I am the attorney for Marc Fishman, and as such, I am fully familiar with the facts and circumstances of this matter. The source of my knowledge is the files and records maintained by my office and discussions with defendant.

2. I submit the following Affirmation in support of this motion which seeks an Order (1) Granting permission to file the subject motion upon good cause shown and a strong likelihood of success on the merits of the motion; (2) Upon granting permission to file the subject motion, Striking the People's Certificate of Compliance and Statement of Readiness for failure to timely provide all discovery mandated by C.P.L. 245, including but not limited to the phone call by the complaining witness to the police and the video and audio recordings at the police station in which the arresting officer is heard stating three times he did not feel defendant had any intent to violate an order of protection, which was not received by defendant until October 2023 in a separate federal lawsuit or more than 3 ½ years after the illusory COC and SOR was filed; (3) Upon striking the People's COC and SOR dismissing this case for violation of the defendant's right under C.P.L. 30.30 for a speedy trial; or, in the alternative (4) Pursuant to C.P.L. 330.30, dismissing this matter due to the content of the phone call and video and audio recordings as wrongfully withheld exculpatory evidence, establishing a lack of any probable cause to arrest, prosecute or for any

reasonable jury to find defendant guilty beyond a reasonable doubt; or, in the alternative (5) Ordering a new trial as the content of the phone call and video and audio recordings is exculpatory and, if given to a jury could result in a different outcome; (6) in any new trial prohibiting the People from calling a law enforcement witness other than the arresting officer, Lane Schlesinger to establish its case should he fail to cooperate as his employment with the police department ended on July 19, 2024 as such would violate defendant's right to confrontation of witnesses against him (7) Staying enforcement of the pending bench warrant pending determination of this motion; (8) permitting defense counsel and defendant to attend any proceedings on this motion virtually (9) Upon granting the relief set forth in this motion issuing an order directing the People to dismiss their pending case for bail jumping as against defendant as there would be no underlying basis for such charges as the bench warrant it is based upon should never have been issued in light of the above; and (10) for such other and further relief that this court may deem proper and just.

3. The motion must be granted as the recorded phone call of the complaining witness Jennifer Solomon containing inconsistent statements and the video and audio of the police encounter during which time the arresting officer admits on film that he did not feel the plaintiff had the requisite intent were never provided in discovery and such evidence could have resulted in a different verdict had it been available at trial.

I. Background

4. On December 14, 2018 defendant Marc Fishman's supervised visitation with his children was confirmed for the morning of December 15, 2018. As during other visits, Mr. Fishman would be driven by his disability aide, Isabel Bolivar and pick up the supervisor for visitation, Ann Elliot.

5. As authorized by the Family Court, the defendant with his aide and supervisor drove towards the children's mother's house and parked several houses away. Ms. Elliot then exited the vehicle to walk to the house to obtain the children and bring them back to the parked car for supervised visitation.

6. However, Ms. Solomon became upset and demanded that the visit be canceled. Ms. Elliot as a supervisor could have forced the visit but thought it was best to cancel as Ms. Solomon was upset.

7. Mr. Fishman never interacted with Ms. Solomon. He did not set foot on her property. He merely was driven past the house in the vehicle as the block was a cul-de-sac to which a turnaround was required. That day Mr. Fishman strictly followed the terms of the visitation order and order of protection and did not commit any crimes. He certainly lacked any *mens rea*.

8. Mr. Fishman, knowing he had followed the rules of these orders voluntarily had his aide drive him and the supervisor to the New Rochelle Police Department to make a complaint about Ms. Solomon's violation of his right to supervised visitation. As such Mr. Fishman along with Ms. Bolivar and Ms. Elliot went to the police station voluntarily.

9. On or about October 23, 2023 the defendant and the undersigned learned for the first time that the entire police encounter at the station was captured on video. **Exhibit A for the Video and Audio on a USB Drive.** The videos were never turned over in the criminal case and the prosecutor submitted an illusory certificate of compliance and statement of readiness. Mr. Fishman's assigned 18-b defense attorney has submitted a sworn affirmation confirming the videos and audio were never turned over. **Exhibit B for the Affirmation of Joe Goubeaud, Esq.**

10. The video is exculpatory for many reasons, including but not limited to the arresting officer being recorded stating three times that he did not feel Mr. Fishman had the requisite *mens rea*, the intent, to violate the order of protection. Had the jury received this video and audio in evidence it may have reached a different verdict. As such it was wrongful for the prosecutor to refuse to disclose it during discovery.

11. Also, on or about October 23, 2023 the defendant and the undersigned learned for the first time that Ms. Solomon's phone call to the police was recorded. In the phone call Ms. Solomon confirms Mr. Fishman never came closer than 2 houses from her house, did not interact with her and that she was not upset or fearful. In fact, she did not want to press charges, likely because she knew there were no valid charges. She also fabricated the contents of the order of protection and omitting that Mr. Fishman was permitted supervised visitation. Had the jury received this phone call in evidence it may have reached a different verdict. As such it was wrongful for the prosecutor to refuse to disclose it during discovery.

12. Furthermore, also on or about October 23, 2023 the defendant and the undersigned learned for the first time that the radio run was recorded. This was also on the same audio file as Ms. Solomon's police station call.

13. The original misdemeanor complaint would then be dismissed for insufficiency by the court only for the People to file a superseding misdemeanor information on or about November 7, 2019 for one count of criminal contempt in the second degree.

14. During the jury trial the assigned judge wrongfully permitted the People to reference prior bad acts against Mr. Fishman, which, in light of recent caselaw, was reversible error.

15. During the jury trial the assigned judge questioned whether the People sufficiently proved criminal contempt in the second degree. However, the judge sent the case to the jury to determine both criminal contempt in the second degree and attempted criminal contempt in the second degree. The judge also did not submit the charges to the jury in the alternative.

16. The jury came back with a legally defective verdict of guilty on both completed and attempted criminal contempt in the second degree.

17. In response to Mr. Fishman's most recent motion to set aside the verdict, the People conceded the verdict was legally defective and requested dismissal of the verdict on attempted criminal contempt in the second degree. The trial judge denied the motion entirely.

18. Ms. Elliot provided deposition testimony upon subpoena by attorneys for the City of New Rochelle in a federal disability discrimination lawsuit arising from this arrest which was completely inconsistent with her trial testimony. **Exhibit C for Deposition Transcript of Ann Elliot.** Ms. Elliot testified that she did not feel Mr. Fishman committed any crimes. And, she testified she never had knowledge of any order of protection, rendering her trial testimony insufficient.

19. The arresting officer also provided deposition testimony in the above referenced federal disability discrimination lawsuit. **Exhibit D for Deposition Transcript of Lane Schlesinger.** He did not deny making the statements that he did not believe Mr. Fishman violated the order of protection intentionally. He also did not deny Mr. Fishman was disabled. The arresting officer was later terminated from the police department on or about July 19, 2024 or 7 months after his deposition testimony. **Exhibit E for the FOIL Response Letter Confirming Termination of Lane Schlesinger.**

20. Mr. Fishman now moves for permission to file this motion and upon such permission to strike the People's COC and SOR and dismiss this case for violation of CPL 30.30 or in the alternative dismiss this case for violation of the *Brady* and *Rosario* rules or to order a new trial.

II. The Certificate of Compliance and Statement of Readiness Filed by the People on or About January 15, 2020 was Improper as The People Did not Turn Over the 911/Police Station Call, Radio Run and Video and Audio of the Police Encounter and as Such the People Were not Ready for Trial Within 90 Days of Arraignment and Still Have Not Been Ready for Trial as of The Date of This Motion, Charging 1,680 Days Against the People

21. It is well settled that a prosecutor's "filing of the certificate of compliance pursuant to CPL 30.30(5) could not be deemed complete until all of the material and information identified in the certificate as subject to discovery and electronically shared with the defendant was actually produced to the defendant, pursuant to CPL 245.50(1) and (3)." *People ex rel. Ferro v. Brann*, 197 A.D.3d 787 (2d Dep't. 2021). In *Brann* the Second Department also held that the substitution of different prosecutors is not an excuse for timeliness of such disclosures. *See id.*

22. For example in *People v. Aquino*, 72 Misc. 3d 518 (NY. Crim. Ct. May 7, 2021), the trial court found a COC and SOR invalid where the people filed same while not turning over the 911 call and radio run. In *Aquino* the court found that the People exceeded the 90 days allowable for trial readiness by not exchanging the 911 call and radio run timely.

23. In *People v. Audino*, 75 Misc. 3d 969 (N.Y. Crim. Ct. Jun. 7, 2022), the trial court found that “the certificate of compliance filed in this case was not proper pursuant to CPL 245.50(1), as the prosecution failed to comply with the court’s automatic discovery order pursuant to CPL 245.20(1)(h); (2) and (5) by filing a certificate of compliance without having produced those certain radio runs, 911 call audio, memo books, and video of the incident, all of which the prosecution either actually possessed or constructively possessed...”

24. Additionally, in *People v. Higgins*, 2022 NYLJ LEXIS 1083 (N.Y. City Ct., Aug. 19, 2022), the trial court found that the People’s filing of a certificate of compliance without the audio and video materials did not stop the calculation of the speedy trial clock.

25. Further, in *People v. Chung*, 2023 N.Y. Misc. LEXIS 23102 (N.Y. Crim. Ct. May 16, 2023) the Court granted a motion to strike the COC/SOR and dismiss for 30.30 where the People, in part, failed to turn over video and audio recordings.

26. It matters not that this motion to strike the COC/SOR and to dismiss for violation of 30.30 is made after trial commenced. For example in *People v. Linardso (Pericles)*, 2017 N.Y. Misc. LEXIS 1340 (App. Term 2d Dep’t. Apr. 7, 2017), held that a motion to dismiss pursuant to CPL 30.30 should still be considered after trial testimony was concluded. In at least two other reported Appellate Term cases, a motion to dismiss for violation of 30.30 was considered after trial. See *People v. Galindo*, 70 Misc. 3d 16 (App. Term 2d Dep’t. Jun. 12, 2020); *People v. Harvey (Calvin)*, 2020 N.Y. Misc LEXIS 4994 (App. Term 2d Dep’t. Sept. 23, 2022).

27. And, in *People v. Abisid*, 208 N.Y.S.3d 460 (N.Y. Crim. Ct. Mar. 28, 2024), the trial court held that if a COC is invalidated the defendant's motion to dismiss pursuant to CPL 30.30 would have to be considered and granted regardless as to the timing of the motion.

28. Here, there is no question that the People's January 15, 2020 COC and SOR was invalid for not disclosing the 911 call/station house call, radio run and video and audio of the police encounter. The People never served a supplemental COC/SOR and it was not until nearly 3 ½ years later in a federal lawsuit that defendant received the audio and video in a lawsuit by lawyers for the City of New Rochelle. It is now 1,680 days since the filing of the invalid COC/SOR requiring dismissal.

29. The defendant did not know of this and could not file the motion prior to trial and the motion should be granted now.

III. The Jury's Verdict Should be Set Aside and the Matter Dismissed or a New Trial Ordered as the People Violated the *Brady* and *Rosario* Rules by Suppressing and Failing to Disclose the Police Station Call by the Complaining Witness, Radio Run and Video and Audio of the Police Station Encounter

30. In *People v. Rosas*, 297 A.D.2d 390 (2d Dep't. 2002), the Second Department reversed the denial of a 330.30 motion and ordered a new trial where the prosecutor failed to turn over the pretrial statements made by a prosecution witness relating to the subject matter of the witness's testimony. The Second Department explained that the failure to disclose the statements reasonably could have affected the verdict.

31. The Second Department also has held that "The People are charged with knowledge of exculpatory information in the possession of the local police, notwithstanding the trial prosecutor's own lack of knowledge." *People v. Pleasant*, 146 A.D.3d 985 (2d Dep't. 2017).

32. Also in *Pleasant* the Second Department reiterated the standard for establishing a *Brady* violation as follows: the "defendant must show that (1) the evidence is favorable to the

defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material. *Id* (quoting *Strickler v. Greene*, 527 U.S. 263 (U.S. 1999)).

33. In the present case the recorded police station call by the complaining witness is favorable to Mr. Fishman as it is exculpatory and impeaching in nature. In the recorded call the complaining witness states Mr. Fishman is two houses away from her house and denies any fear or harm and requests not to file charges. This is exculpatory and could lead to reasonable doubt to believe the defendant violated the order of protection. It is also impeaching in nature as the complaining witness provided a different statement in the supporting deposition and at trial. The prosecutor suppressed this evidence by not providing it to the defendant despite falsely certifying all discovery was turned over. Defendant was prejudiced as the complaining witness' inconsistent statements and statement of no criminal violation is material. Furthermore, failing to turn over this recorded statement of the prosecution's witness violates the *Rosario* rule.

34. Specifically, Ms. Solomon states that Mr. Fishman drove and stayed 2 houses down. 911 call at 0:00:00-0:00:22. Additionally, Ms. Solomon states falsely that Mr. Fishman is not supposed to come by my house whatsoever omitting the lawful supervised visitation. *Id* at 0:00:40-0:00:52. Ms. Solomon made clear she just wanted to make a report and did not request an officer to respond.

35. The radio run is likewise impeaching in nature as it provides information that the arresting officer knew Mr. Fishman voluntarily went to the police station. The prosecutor suppressed this evidence by not providing it to the defendant despite falsely certifying all discovery was turned over. Defendant was prejudiced as the radio run is material as it shows Mr. Fishman

voluntarily went to the station. Failing to turn over this recorded statement of another prosecution witness, the arresting officer, violates the *Rosario* rule.

36. The video and audio from the police station includes statements by the defendant, Mr. Fishman, Ms. Bolivar, and two prosecution witnesses: the arresting officer and Ms. Elliot. The audio captures the arresting officer stating three times that he did not believe that Mr. Fishman had intent to violate the order of protection. Inasmuch as intent is a necessary element of criminal contempt in the second degree there is no question that these recorded statements were exculpatory and impeaching in nature. The prosecutor suppressed this evidence by not providing it to the defendant despite falsely certifying all discovery was turned over. Defendant was prejudiced as the inability to introduce the exculpatory statements of the arresting officer himself which are also impeaching in nature was material. Failing to turn over these recorded statements of prosecution witnesses, the arresting officer and Ms. Elliot violates the *Rosario* rule.

37. Specifically, Officer Schlesinger knew there was no probable cause to charge plaintiff with criminal contempt as he admitted on the recorded station video as follows when describing Mr. Fishman's actions at Ms. Solomon's home: "I don't think its intentional or malicious" 11:59:25, "I don't think he did it on purpose," *Id* at 12:00:36, and it was "Not intentional or malicious." *Id* at 12:01. These statements of Officer Schlesinger's determination of a lack of intent defeat any probable cause determination as criminal contempt in the second degree requires "Intentional disobedience or resistance to the lawful...mandate of a court when, with knowledge of such...mandate, he...disobeys...such mandate, and his...conscious objective or purpose is to do so."

38. These violations not only establish a violation of defendant's entitlement to statutory discovery they create a denial of due process of law and denied defendant a fair trial.

39. This is in addition to the People's improper reliance on bad acts for reasons other than to impugn the defendant's credibility as held by the Court of Appeals recently in *People v. Weinstein*, 2024 N.Y. LEXIS 590 (N.Y. Apr. 25, 2024). In the only Appellate Division case decided after *Weinstein*, the Fourth Department held it was error to admit evidence that the defendant allegedly threatened the same victim one month prior to the incident as not establishing motive. The Fourth Department explained it had nothing to do with credibility, merely showed propensity and would cause prejudice to the defendant. *See People v. Gamble*, 2024 N.Y. App. Div. LEXIS 4066.

40. As such the People's admission of evidence that Mr. Fishman had a prior incident with the complaining witness at trial was wrongful and prejudicial and the other evidence was not overwhelming rendering this error significant, i.e., not harmless error.

41. As such the defendant's motion to set aside the jury's verdict must be granted and the matter dismissed or a new trial ordered.

IV. Exhibits

42. Annexed hereto as Exhibit A is a USB Drive containing the recorded phone call by Jennifer Solomon to the New Rochelle Police Department, radio run and videos of police station encounter.

43. Annexed hereto as Exhibit B is the Affirmation of Joe Goubeaud.

44. Annexed hereto as Exhibit C is the Deposition Transcript of Ann Elliot.

45. Annexed hereto as Exhibit D is the Deposition Transcript of Lane Schlesinger.

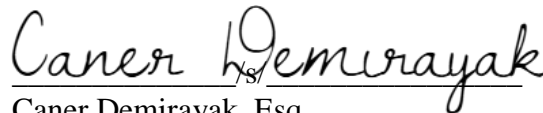
46. Annexed hereto as Exhibit E is the FOIL Response Confirming Termination of Lane Schlesinger.

WHEREFORE, the Court should grant the motion in all respects.

I affirm this 21st day of August, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

LAW OFFICE OF CANER DEMIRAYAK, ESQ., P.C.

Dated: Bronx, New York
August 21, 2024

A handwritten signature in cursive script that reads "Caner Demirayak". The signature is written in black ink and is positioned above a horizontal line.

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