DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT : CRIMINAL TERM, PART 3

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

NOTICE OF MOTION

DUCAMEL DENIS,

Docket # 2008NA033184

Defendant.

----------X

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of PATRICK MICHAEL MEGARO, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, the annexed exhibits and the prior proceedings herein, the undersigned will move this Court at **Part 3**, on **January 13, 2010** at 9:30 a.m., or as soon thereafter as counsel can be heard, for Orders:

1. Dismissal of both actions pursuant to CPL §§ 170.30(e), 210.20(1)(g) and 30.30(1)(a), (1)(b), and (1)(c), the Sixth Amendment of the United States Constitution, Article I, § 6 of the New York State Constitution, and New York Civil Rights Law § 10.

2. For such other and further relief as this Court may deem just and proper.

Dated: Uniondale, New York
December 12, 2009

Yours, etc.

PATRICK MICHAEL MEGARO
Attorney for Plaintiff
626 RXR Plaza
6th Floor, West Tower
Uniondale, New York 11556
(o) 516-317-6660
(f) 866-617-7442
KC2QBN@yahoo.com

TO:
ADA Richard Martell, Esq.
Nassau County District Attorney's Office
99 Main Street
Hempstead, New York 11550

Clerk of the Court
Nassau District Court, First District
99 Main Street
Hempstead, New York 11550

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT : CRIMINAL TERM, PART 3
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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DUCAMEL DENIS,

Defendant.
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AFFIRMATION IN SUPPORT OF MOTION TO DISMISS

Docket # 2008NA033184

PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms as follows:

1. I am counsel of record for the Defendant in the above-entitled action, and as such, I am fully familiar with the facts and circumstances of this case.

2. Unless otherwise specified, all allegations of fact are based upon inspection of the record of this case or upon conversations with Assistant District Attorneys, the defendant, and counsel's own investigation. The court is respectfully referred to the attached Memorandum of Law for all legal arguments.

3. The Defendant was originally charged in Docket # 2008NA033184 with one count of Penal Law § 120.05(3), a Class D Felony, one count of Penal Law § 195.05, a Class A Misdemeanor, one count of Penal Law § 205.30, a Class A Misdemeanor, and one count of Penal Law § 195.06, a Class A Misdemeanor. Defendant was originally charged in Docket # 2008NA033185 with one count of Penal Law § 140.10, a Class B Misdemeanor.

4. The Defendant was arraigned in Part Arraignment A in this Court on both dockets on December 22, 2008, and ordered committed to the custody of the Nassau County Sheriff to be held in lieu of bail on both dockets. On that date, both cases were

adjourned to December 24, 2008 for further proceedings.

5. On December 24, 2008, I was assigned by the Court to represent the Defendant on both matters. Thereafter followed several adjournments during which time the Defendant attempted to negotiate a favorable plea agreement with the People.

6. After plea negotiations broke down, on April 7, 2009, the Defendant withdrew his consent to any adjournments and demanded that the People present the matter to the Grand Jury or in the alternative, hold a preliminary hearing. Both dockets were adjourned to April 13, 2009, the CPL § 180.80 date. Defendant did not consent to this adjournment.

7. On April 13, 2009, because the People failed to present the case to the Grand Jury, the Defendant was released on his own recognizance pursuant to CPL § 180.80. Both dockets were thereafter adjourned to May 22, 2009 for Grand Jury action and further proceedings on the complaints. Defendant did not consent to this adjournment.

8. On May 22, 2009, there was no Grand Jury action and the matter was adjourned to June 3, 2009 for Grand Jury action and further proceedings on the complaints. Defendant did not consent to this adjournment.

9. On June 3, 2009, upon the People's application, this Court reduced the sole felony charge, Penal Law § 120.05(3), to Penal Law § 120.00(1), a Class A Misdemeanor, and both matters were adjourned to June 29, 2009 for the District Attorney to file supporting depositions to convert the complaint to an information. Defendant did not consent to this adjournment.

10. On June 29, 2009, the People filed and served supporting depositions and this Court deemed the complaint converted to an information. Both cases were adjourned at

the defense request to August 25, 2009 for Voluntary Disclosure Forms to be filed and served by the People.

11. On August 25, 2009, both cases were adjourned on "slips" to October 2, 2009 for the purpose of trial

12. On October 2, 2009, the People answered Not Ready for trial. Both cases were adjourned to October 23, 2009 for trial. Defendant did not consent to this adjournment.

13. On October 23, 2009, the People again answered Not Ready for trial. Both cases were adjourned to November 30, 2009 for trial. Defendant did not consent to this adjournment.

14. On November 30, 2009, the People answered Not Ready for trial. Both cases were adjourned to January 13, 2010, for trial. Defendant did not consent to this adjournment.

15. On December 8, 2009, the People filed and served a Certificate of Readiness.

10. In this case, more than 90 days includable time have thus far elapsed since the commencement of the action.

11. Although the foregoing satisfies the defendant's pleading burden at this stage, the defense directs the Court's attention to the aforementioned adjournments which are chargeable to the People:

(A) 12/22/2008 – 12/24/2008 (2 days)

(B) 4/7/09 – 4/13/09 (6 days)

(C) 4/13/09 – 5/22/09 (39 days)

(D) 5/22/09 – 6/3/09 (12 days)

(E) 6/3/09 – 6/29/09 (26 days)

(F) 10/2/09 – 10/23/09 (21 days)

(G) 10/23/09 – 11/30/09 (38 days)

(H) 11/30/09 – 12/8/09 (8 days)

As of December 8, 2009, a total of 152 days of chargeable time have elapsed, including 93 days from the date that the case was reduced from to a misdemeanor.

12. For the foregoing reasons, this indictment should be dismissed pursuant to CPL § 30.30, the Sixth Amendment of the United States Constitution, Article I, § 6 of the New York State Constitution, and New York Civil Rights Law § 10. The defendant reserves the right to reply to the prosecution's response.

Dated: Uniondale, New York
December 12, 2009

PATRICK MICHAEL MEGARO

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT : CRIMINAL TERM, PART 3
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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DUCAMEL DENIS,

Docket # 2008NA033184

Defendant.
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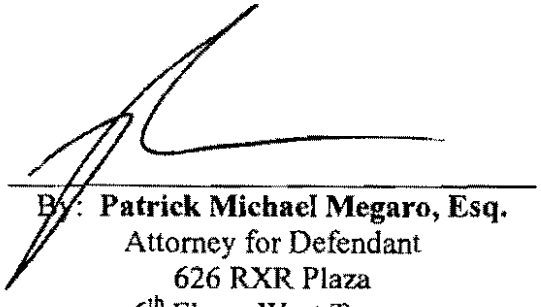
DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS PURSUANT TO CRIMINAL PROCEDURE LAW § 30.30(1)(a), (b), (c) AND THE SPEEDY TRIAL GUARANTEES OF THE UNITED STATES CONSTITUTION AND THE NEW YORK STATE CONSTITUTION



By: **Patrick Michael Megaro, Esq.**
Attorney for Defendant
626 RXR Plaza
6th Floor, West Tower
Uniondale, New York 11556
(o) 516-317-6660
(f) 866-617-7442
KC2QBN@yahoo.com

TO:
ADA Richard Martell, Esq.
Nassau County District Attorney's Office

Clerk of the Court
Nassau County District Court

I. VIOLATION OF CPL § 30.30

CPL § 30.30(1)(a) mandates that an accusatory instrument must be dismissed if the People are not ready for trial within "six months of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a felony." Likewise, CPL § 30.30(1)(b)and (1)(c) mandate dismissal if the People are not for trial within 90 days of the commencement of a criminal action where the defendant is charged with a Class A Misdemeanor, and within 60 days of the commencement of a criminal action where the defendant is charged with a Class B Misdemeanor.

Where a defendant is initially charged with a felony in a complaint, and the People subsequently move to reduce the felony charge to a non-felony offense, the People are afforded either 6 months of speedy trial time from the commencement of the criminal action, or 90 days from the date of reduction, whichever is shorter. CPL § 30.30(5)(c), People v. Cooper, 98 N.Y.2d 541 (2002).

To satisfy his initial burden in a motion made pursuant to CPL § 30.30, the defendant need allege "only that the prosecution failed to declare readiness within the statutorily prescribed time period." People v. Luperon, 85 N.Y.2d 71, 77-78 (1995); see also People v. Drummond, 627 N.Y.S.2d 55, 57 (2d Dept 1995). Once the defendant has alleged that more than the statutorily prescribed time period has elapsed since the commencement of the action without a declaration of readiness by the People, the People bear the burden of establishing sufficient excludable delay. People v. Berkowitz, 50 N.Y.2d 333, 349 (1980). The time within which the prosecution must be ready is computed by subtracting any periods of delay that are excludable under the statute. People v. Cortes, 80 N.Y.2d 201, 208 (1992).

Further, the People have the burden of establishing excludable delay and of making a sufficient record with respect to adjournments. "It is the People's burden to ensure, in the first instance, that the record of the proceedings at which the adjournment was actually granted is sufficiently clear to enable the court considering the subsequent CPL § 30.30 motion to make an informed decision as to whether the People should be charged." Id. at 215-216. The court's calendar notations are, in themselves, insufficient to meet the prosecution's burden. Berkowitz, supra at 349.

The "right to a speedy trial guaranteed by CPL 30.30, which relates to prosecutorial readiness, is not dependent in any way on whether the defendant has expressed his readiness for trial or whether the defendant can demonstrate prejudice from the delay." People v. Hamilton, 46 N.Y.2d 932, 933-934 (1979). "The People's contention that a defendant consents to an adjournment either by failing to object to the adjournment, or defense counsel's failure to appear is meritless...Thus, consent to an adjournment must be clearly expressed by the defendant or defense counsel to relieve the People of the responsibility for that portion of the delay." People v. Liotta, 79 N.Y.2d 841, 843 (1992)

In the instant case, the People have neither presented the case to the Grand Jury within the statutory time period allowed, nor converted the complaints to an information, nor answered ready for trial within the time allowed by law.

LACK OF CONSENT/WAIVER OF SPEEDY TRIAL TIME

Adjournments consented to by the defense must be clearly expressed to relieve the People of the responsibility for the delay. Defense counsel's failure to object to the adjournment or failure to appear does not constitute consent within the meaning of CPL

30.30(4)(b). People v. Smith, 82 N.Y.2d 676, 678 (1993), see also People v. Liotta, 79 N.Y.2d 841 (1992); People v. Cortes, 80 N.Y.2d 201, 216 (1992).

In the instant case, this case was reduced from a felony to a misdemeanor on June 3, 2009. With the exception of one adjournment for Voluntary Disclosure in the interim, the defense did not consent to any adjournments. Therefore, none of the delay is excluded. Since this case was originally schedule for trial on October 2, 2009, the People have NEVER answered ready for trial, nor have any of the adjournments since then been on consent.

II. VIOLATION OF CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

The Speedy Trial Clause of the Sixth Amendment states that "[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial····"

"The evils at which the [Speedy Trial] Clause is directed are readily identified. It is intended to spare an accused those penalties and disabilities - incompatible with the presumption of innocence - that may spring from delay in the criminal process. The Court recognized in U.S. v. Ewell, 383 U.S. 116, 120, (1966), that the speedy-trial right 'is an important safeguard to prevent undue and oppressive incarceration prior to trial.' We also recognized in Ewell that a speedy trial is intended 'to minimize anxiety and concern accompanying public accusation.'" Dickey v. Florida, 398 U.S. 30, 41 (1970) (Brennan, J., concurring).

In Barker v. Wingo, 407 U.S. 514 (1972), the Supreme Court adopted a four-part balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated in a pending criminal prosecution: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the

defendant. Id. at 530. The Court further held that "none of the four factors identified above [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Id. at 533.

A. Length of the Delay

"[B]ecause of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, **the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge**. Barker, supra at 530-531. (emphasis added).

In both of the instant cases, the Defendant is charged with common street-crime offenses: trespass, assault, resisting arrest, and obstructing governmental administration.

After the reduction of the felony charges to misdemeanor offenses and the completion of discovery, both cases were scheduled for trial on October 2, 009. Since that date, virtually every time this case was on the Court's calendar, the People were not ready to proceed with trial. While the People have filed a Certificate of Readiness off calendar, they have consistently failed to actually move this case forward to trial since April, 2009.

B. Reason for the Delay

The second prong of the Barker test is the reason the government assigns to the delay. Reasons such as negligence, overcrowded courts, or engagement of the prosecutor on other cases "nevertheless should be consisted since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Barker,

supra at 531. Unavailability of prosecution witnesses may justify only "appropriate delay." Ibid.

While the Court has not defined "appropriate delay," the District Attorney in this case has delayed the instant case for approximately 8 months. In that time, the Nassau County Police Department has conducted an internal investigation of the arresting officers for police brutality due to injuries sustained by the Defendant in the course of his arrest. Likewise, the Public Integrity Unit of the Nassau County District Attorney's Office has conducted an internal investigation of the police officers and the circumstances surrounding this arrest, which resulted in the reduction of the felony charge to a misdemeanor. Since this criminal action was commenced, the Defendant incarcerated continuously from the date of his arrest until his 180.80 release on April 13, 2009. He bears no responsibility for the unavailability of the District Attorney's witnesses, nor does he bear any responsibility for the District Attorney's caseload, or compromising of the People's witnesses. He has never refused to be produced in court for an appearance. Accordingly, the ultimate responsibility for the 8-month delay should rest upon the District Attorney alone.

C. Defendant's Assertion of the Right

"The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker, at 531-532.

Since April 7, 2009, Defendant's assertion of his speedy trial right has been constant. With the exception of one adjournment for discovery, Defendant has not consented to any adjournments.

D. Prejudice to the Defendant

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration, (ii) to minimize anxiety and concern of the accused, and (iii) to limit the possibility that the defense will be impaired." Barker, at 532.

Here, the Defendant was incarcerated in lieu of very high bail for approximately 4 months before he was released pursuant to CPL § 180.80. Keeping in mind Barker's mandate that "**delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge**" this Court should find that the defendant has suffered actual prejudice.

Thus, it is reasonable to infer that the extensive delay because this case has now been pending for almost 12 months, the Defendant has experienced much anxiety and concern which would have been abated had this case proceeded to trial in due time or had been otherwise resolved speedily. Based upon the foregoing, the Defendant has suffered substantial prejudice as a result of the prosecution's delay.

CONCLUSION

Based upon the foregoing reasons, this Court should dismiss the instant indictment because the Defendant's right to a speedy trial has been violated.

Respectfully Submitted,

PATRICK MICHAEL MEGARO

Docket/Indictment # **2008NA033184**

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT : CRIMINAL TERM, PART 3

THE PEOPLE OF THE STATE OF NEW YORK,

-against -

DUCAMEL DENIS,

Defendant.

NOTICE OF MOTION, AFFIRMATION IN SUPPORT, MEMORANDUM OF LAW IN SUPPORT

PATRICK MICHAEL MEGARO, ESQ.
Attorney for : Defendant
626 RXR Plaza
6th Floor, West Tower
Uniondale, New York 11556
Tel: (516) 317-6660
Fax: (866) 617-7442
KC2QBN@yahoo.com

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: 12/12/09 Signature: _____

Service of a copy of the within: _____ is hereby admitted.

Dated: _____ Signature: _____
