CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS : PART DWI
----------X Docket # 2016KN037399
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

NOTICE OF MOTION

RICHARD CANIZARES,

Defendant.
----------X

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 DWI**, on **March 20, 2017** at 9:30 a.m., or as soon thereafter as counsel can be heard, for Orders:

1. Dismissal of this action 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: February 3, 2017

Yours, etc.

_____

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New York Address:

To:
ADA Michael Solomon, Esq.
Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201

Clerk, Criminal Court, Part DWI

120 Schermerhorn Street
Brooklyn, New York 11201

118-35 Queens Boulevard, # 400
Forest Hills, New York 11375

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS : PART DWI

----------X Docket # 2016KN037399

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

RICHARD CANIZARES,

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS

Defendant.

----------X

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 # 2016KN037399 with Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs, VTL § 1192.3, a misdemeanor punishable by up to one year in prison, and Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs, VTL § 1192.1, a traffic infraction.

4. The Defendant was arraigned in Part AR3 in this Court on June 23, 2016,

represented by an attorney from The Legal Aid Society. At the arraignment, the People lacked a corroborating affidavit from Police Officer Jorge Pocasangre, and the case was adjourned to Part DWI to July 15, 2016 for conversion, and Defendant was released on his own recognizance.

5. In the interim, I was retained, and went to the courthouse on July 11, 2016 to the Clerk's Office and copied the court file. On that date I filed a Notice of Appearance.

6. The following day, July 12, 2016, I mailed a copy of the Notice of Appearance with a cover letter to the District Attorney's Office. **(Exhibit A).**

7. On July 15, 2016, I appeared in Part DWI with the Defendant before Judge Gerstein. On that date, I notified the District Attorney that I was retained, and provided the Assistant District Attorney with a business card (which was stapled into the interior of their file). The People again did not have the corroborating affidavit, and the case was adjourned to September 19, 2016 for conversion.

8. A review of the court file indicates that on July 22, 2016, a certificate of readiness and corroborating affidavit of Police Officer Pocosangre was filed. There is no affidavit of service attached to the certificate, but a stamp on the face of the document indicates it was stamped in at The Legal Aid Society on July 22, 2016.

9. The certificate of readiness and corroborating affidavit were never served upon me.

10. On September 19, 2016, Defendant appeared in Part DWI, and the People informed the Court that a certificate of readiness had been filed along with a corroborating affidavit, and the case was adjourned to November 1, 2016 for open file

discovery.

11. On November 1, 2016, I appeared in Part DWI with the Defendant and the District Attorney provided the defense with discovery. The People answered ready for trial, even though trial was not scheduled on that date, and the case was adjourned to December 15, 2016 for suppression hearing and trial.

12. On December 15, 2016, the People answered not ready and requested 6 days, and the case was adjourned to January 27, 2017 for hearing and trial.

13. On January 27, 2017, the People again answered not ready for hearing and trial, and requested 7 days. The case was adjourned to March 20, 2017 for hearing and trial.

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

15. 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) 6/24/2016 – 7/15/2016 = 21 days

(B) 7/16/2016 – 9/19/2016 = 65 days

(C) 12/15/2016 – 1/27/2016 = 6 days

(D) 1/27/2017 – 3/20/2017 = 7 days

As of February 3, 2017, a total of 99 days of chargeable time have elapsed.

12. For the foregoing reasons and the reasons set forth in the Memorandum of Law, this case 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: February 3, 2017

_____

PATRICK MICHAEL MEGARO

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS : PART DWI
----------X Docket # 2016KN037399
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

RICHARD CANIZARES,

Defendant.
----------X

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

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TO:

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Clerk, Criminal Court, Part DWI
120 Schermerhorn Street
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I. VIOLATION OF CPL § 30.30

To satisfy his initial burden under 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 Dep't 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 prosecution must identify the statutory exclusions on which it is relying to bring it within the statutory time limit for declaring readiness. Id. at 349. 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). 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).

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.

A. The Entire Adjournment from 7/15/2016 to 9/19/2016 Is Chargeable Against the People

Here, the central issue for a CPL § 30.30 determination is the period between July 15, 2016 and September 19, 2016. Pursuant to People v. Telemaque, 43 Misc.3d 138(a), 992 N.Y.S.2d 160 (App. Term. 2014), the entire time period must be charged against the People.

The facts of Telemaque are virtually identical to the facts of the case at bar. In Telemaque, the defendant was charged with Class A misdemeanors and arraigned in the Kings County Criminal Court by a lawyer from The Legal Aid Society, and the case was adjourned for a supporting deposition. On the adjourned date, Defendant appeared with retained counsel, who filed a notice of appearance and provided the Assistant District Attorney with a business card. The case was again adjourned for a supporting deposition. In between court dates, the People filed a certificate of readiness with the supporting deposition and served only the certificate of readiness upon The Legal Aid Society; the People did not serve retained counsel with either the certificate of readiness or the supporting deposition. This Court dismissed the case pursuant to CPL §30.30, and the

People appealed.

The Appellate Term, Second Department affirmed this Court's order, specifically held that the certificate of readiness was invalid because it was not served on the defendant's counsel, and service upon his prior counsel was invalid, rendering the entire time period chargeable against the People.

Here, as illustrated in the Affirmation in Support of the Motion to Dismiss, the same facts are present here, with the exception that in addition to appearing in court on July 15, 2016, defense counsel mailed the District Attorney a copy of the Notice of Appearance with a cover letter several days prior to the court appearance. Thus, here, the People had twice as much notice that Legal Aid no longer represented the Defendant, yet still served the certificate of readiness on the wrong attorney. Thus, the certificate of readiness was invalid, and the entire time period must be charged against the People.

Because this Court is bound by People v. Telemaque, 43 Misc.3d 138(a), 992 N.Y.S.2d 160 (App. Term. 2014), this Court must find that more than 90 days of chargeable time have elapsed, this Court must dismiss this case.

B. The Statements of Readiness Were Illusory

Pursuant to People v. Sibblies, 22 N.Y.3d 1174 (2014), this Court should find that the statements of readiness were illusory, and charge the entire time period from arraignment to the present day against the People.

Here, there were two statements of readiness – one filed off calendar, described above, and one made on the record on November 1, 2016, a date on which the case was not scheduled for trial. Thereafter, each time the case was on the trial calendar, the

People answered not ready and requested short adjournments in order to limit their 30.30 exposure. On December 15, 2016, the People requested 6 days, knowing full well that there was virtually no chance that the case would actually be tried on December 21, 2016, days before the Christmas holiday when there is little court activity, the court is understaffed, witnesses are unavailable, and the court would likely never honor such a request (nor did it).

For these reasons, this Court should find the statements of readiness illusory and dismiss the case.

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 the most common offense: drunk driving. This case has been pending for over 7 months, during which time the People have never actually been ready for trial.

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 7 months. Since this criminal action was commenced, the Defendant has labored under the sanction of a suspended license. 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. He has never failed to appear in court. Accordingly, the ultimate responsibility for the 7-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 his arraignment, 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.

It is reasonable to infer that the extensive delay because this case has now been pending for almost 7 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 action because the Defendant's right to a speedy trial has been violated.

Respectfully Submitted,

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PATRICK MICHAEL MEGARO

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS : PART DWI
----------X Docket # 2016KN037399
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

AFFIRMATION OF SERVICE

RICHARD CANIZARES,

Defendant.
----------X

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 over the age of 18 and am not a party to this action

2. On February 3, 2017, I served a copy of the foregoing Notice of Motion, Affirmation in Support, Memorandum of Law, and Exhibits by mailing a copy using First Class mail through the United States Postal Service upon

ADA Michael Solomon, Esq.
Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201
VIA REGULAR MAIL AND EMAIL solomonm@brooklynda.org

Dated: February 3, 2017

_____
PATRICK MICHAEL MEGARO

Docket # 2016KN037399

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS : PART DWI

THE PEOPLE OF THE STATE OF NEW YORK,

-against -

RICHARD CANIZARES,

Defendant.

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

PATRICK MICHAEL MEGARO, ESQ.
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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:_____ Signature:_____

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

Dated:_____ Signature:_____
