SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF MOTION

-against- Ind. No.: IND-72890-23

DANIEL PENNY,

Defendant.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmations of STEVEN M. RAISER, THOMAS A. KENNIFF and BARRY KAMINS, and upon all prior proceedings had herein, the undersigned will move this Court, pursuant to Criminal Procedure Law (hereinafter referred to as "CPL") Section (or "§") 255.20, to be held in and for the County of New York, Supreme Court, 100 Centre Street, New York, New York, Part 42, on the 6th day of December, 2023, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard for an Order:

A. DISMISSING THE INDICTMENT/INSPECTION BY THE COURT/DISCLOSURE TO COUNSEL.

B. DISMISSING THE INDICTMENT AS THE GOVERNMENT FAILED TO PROVE CAUSATION A NECESSARY COMPONENT FOR CRIMINAL LIABILITY.

C. DISMISSING THE INDICTMENT AS THE GOVERNMENT FAILED TO PROVE THE REQUISITE MENTAL STATE NEEDED TO SUBSTANTIATE THE CRIMES.

D. SUPPRESSING STATEMENTS MADE BY MR. PENNY.

E. ALLOWING MR. PENNY AN OPPORTUNITY AFTER ANY HEARINGS IN THIS MATTER, AND PRIOR TO THE COURT'S DECISION ON THE ISSUES ADDRESSED BY THOSE HEARINGS, TO SUBMIT A MEMORANDUM OF LAW FOR THE COURT'S CONSIDERATION.

F. CONTROVERTING THE SUBSEQUENTLY OBTAINED SEARCH WARRANTS AS LACKING IN PROBABLE CAUSE AND IN VIOLATION OF CPL § 690.30(1).

G. SUPPRESSING EVIDENCE OBTAINED FROM THE UNLAWFUL SEARCH OF MR. PENNY'S CELLPHONE AND ICLOUD ACCOUNT.

H. GRANTING DEFENDANT LEAVE TO SUBMIT SUBSEQUENT MOTIONS.

Dated: New York, New York
October 6th, 2023

Yours, etc.

Steven M. Raiser

Thomas A. Kenniff

Barry Kamins

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TO: Supreme Court, New York County – Criminal Term
Attn.: Part 42 – Judge Wiley
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New York, New York 10013

TO: District Attorney, New York County
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Attn: ADA Joshua Steinglass
ADA Jillian Shartrand

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATIONS
IN SUPPORT OF MOTION

-against-

Ind. No.: IND-72890-23

DANIEL PENNY,

Defendant

STATE OF NEW YORK)
S.S.:
COUNTY OF NEW YORK)

Steven M. Raiser and Thomas A. Kenniff, attorneys duly admitted to practice before the Courts of the State of New York, under penalty of perjury hereby affirm that the following factual statements herein are true, based upon information and belief[1], the sources of such information and belief are discussions with the defendant, Daniel Penny, discovery provided by the Government, and the undersigned's independent investigation.[2]

1. We are the founding partners of the law firm of Raiser & Kenniff, P.C., retained to represent the defendant, Daniel Penny, in the above-captioned matter.

2. We make this affirmation in support of the relief sought in the annexed Notice of Motion.

3. On or about June 14th, 2023, a Grand Jury returned a true bill charging the defendant with Manslaughter in the Second Degree, under PL §125.15(1) and Criminally Negligent

[1] Statements as to legal authority are upon information and belief, based upon legal research.
[2] CPL §710.60[1] states, "…The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated…" (emphasis added).

Homicide, under PL §125.10. The charges rest upon a May 1st, 2023, incident, wherein the defendant is alleged to have recklessly placed the decedent into a chokehold, causing his death.

4. On June 28th, 2023, the defendant was arraigned before this Court on the above indictment (Wiley, J.), wherein a plea of not guilty was entered and the case was adjourned for motions.[3]

Factual Background

On Monday May 1st, 2023, shortly before 2:00 p.m., the defendant, Daniel Penny (hereinafter, "Mr. Penny"), had boarded the Queens bound F train at the Jay Street-Metro Tech station, after finishing classes at Brooklyn Tech. He was headed to the Broadway-Lafayette stop, where he planned to swim at his local gym before returning home to his apartment.

Mr. Penny's train departed from the Second Avenue stop for Broadway-Lafayette at precisely 2:23 p.m. (Grand Jury Minutes Bates No. (hereinafter, "GJM") 360).[4] As the car doors were closing, an irate Jordan Neely (hereinafter, "Mr. Neely") entered the subway car and immediately made his presence felt. Multiple eyewitnesses recounted Mr. Neely forcefully throwing his jacket either across the train or to the ground (Person #2, GJM 541 – 542; Person #13, GJM 396 – 398), while complaining about his lack of food, money and homelessness (Person #9, GJM 688). Mr. Neely's behavior quickly escalated. Witnesses describe him taking on a fighting stance (Person #13, GJM 397 – 400; Person 7, GJM 504 – 506) while shouting threats such as: "someone is going to die today" (Person #9, GJM 688); he "would kill anyone" and "take a bullet" (Person #4, GJM 762 – 763); he was "ready to go to Rikers" and "ready to do life"

[3] Defendant had previously appeared in Criminal Court, following his arrest on or about May 12th, 2023, wherein he was released on a $100,000 bond. The defendant remains at liberty pending this matter.
[4] Number preceded by "GJM" refer to the transcript and corresponding Bates stamped pages of the grand jury minutes provided by the Government.

(Person #20, GJM 619 – 620). The subway car fell "silent" (Person #2, GJM 543 – 544) and passengers began scattering (Person #14, GJM 668 – 669; Person #13, GJM 397 – 399).

The Grand Jury witnesses told of their fear upon observing Mr. Neely's conduct. Person #16 described Neely's words as "insanely threatening," delivered with an affect that witness characterized as "sickening" and "satanic" (GJM 478 – 479). Person #16 believed he "was going to die" as Neely began approaching him (GJM 483). He described the moment as "absolutely traumatizing," beyond anything he had ever experienced in six years riding the subway (GJM 484). Person #18 was taking her son to his therapy appointment (GJM 367). She recounted Neely saying: "I want to hurt people. I want to go to Rikers. I want to go to prison," and her unnerved son asking her, "Mommy, why does he want to go to prison" (GJM 368 – 370). Mother and son took cover behind her son's stroller, shielding themselves from Neely, who was now making "half-lunge movements" and coming within a "half a foot of people" (GJM 370 – 372). Person #9, a student commuting from her high school, recalled the moment she heard Neely say "someone is going to die today." She put her hand on her classmate's (Person #15) chest and began "praying them [sic] doors would open" so she could leave (GJM 688 – 689). Whereas Person #4, a retiree who rode the subway daily during her 30-year career (GJM 761) described her reaction to Neely's words and demeanor as follows: "I have been riding the subway for many years. I have encountered many things, but nothing that put fear into me like that" (GJM 764).

Several of the same Grand Jury witnesses described the moment Mr. Penny sprung into action. "I remember, like, looking to my right, seeing the mom cover her kid, and then looking left, and in like the snap of a finger I saw Mr. Penny come up behind, put his hand on Mr. Neely, and then they were both down on the ground" (Person #16, GJM 486 – 487). Person #16 recounted Mr. Penny grabbing Mr. Neely "[a]cross his chest" and bringing him down from

behind, in what she perceived as a "very safe manner" with Mr. Penny taking most of the fall (*id,* GJM 487 – 488). She described "a sense of relief in the train that the threat was neutralized" once Mr. Penny acted but noted how Mr. Neely continued to "forcibly" resist while on the ground (*id,* GJM 488 – 489). Person #2 thought the movements on the ground "really just looked like a struggle... it didn't look like [] Daniel Penny, really had control of the situation. They were both very much fighting back and forth" (GJM 552). Several eyewitnesses confirmed that they did not see Mr. Penny appear to squeeze Jordan Neely's neck (Person #4, GJM 774; Person #18, GJM 378 and 381), and never heard Mr. Neely gasping, gagging or saying that he could not breathe (*id*). Many of these same witnesses recounted Mr. Penny asking for someone to call the police as he wrestled Mr. Neely on the ground (Person #4, GJM 774; Person #13, GJM 410 – 412).

Police officers responding to a radio run arrived on scene and observed Mr. Neely lying on the floor (P.O. Teodoro Tejada, GJM 644 – 645).[5] After several minutes the officers began to administer CPR until EMS arrived approximately 10 minutes later (*id*., GJM 647).[6] Mr. Neely was then transported to Lenox Hill Hospital where he later died (*id*.,GJM 648).

Mr. Penny was cooperative with the officers on scene, accompanying them to the 5th Precinct Detective Squad, where he was interviewed substantively about the incident (Detective

[5] MTA records confirmed the train arrived at Broadway-Lafayette at 2:23:30 p.m., thirty seconds after it departed Second Avenue (Grand Jury Minutes P. 21/Bates Stamped 361). The first police radio run was taken at 2:26:56 p.m. (Grand Jury Minutes P. 318/Bates Stamped 642- P. 319/Bates Stamped 643), with the first officers arriving on the scene at approximately 2:33 p.m.

[6] Tejada testified that Neely had a pulse when he arrived on scene and thus resuscitation efforts only begun minutes later when a pulse was no longer detected (Grand Jury Minutes P. 322/Bates Stamped 646, P. 328/Bates Stamped 652, P. 330-331/Bates Stamped 654-655). Tejada's partner, Officer Dennis Kang also testified to feeling a pulse when checked Mr. Neely (Grand Jury Minutes P. 341/Bates Stamped 661).

Brian McCarthy, GJM 821).[7] Following the interview, Mr. Penny was released without formal charges.

On the morning of May 12th, 2023, Mr. Penny, accompanied by Thomas Kenniff surrendered voluntarily at the 5th Precinct. That afternoon, Mr. Penny appeared with Mr. Kenniff before the Criminal Court (McGrath, J.), where he was charged by felony complaint with Manslaughter in the Second Degree (PL § 125.15) and released on a $100,000 insurance company bond.[8]

A. DISMISSAL OF INDICTMENT/INSPECTION BY THE COURT/DISCLOSE TO COUNSEL.

1. Mr. Penny requests that the Government produce the Grand Jury minutes and that the Court inspect said minutes that form the basis for the indictment and further requests that the Court disclose the minutes inspected to defense counsel, pursuant to CPL § 210.30 [3], so that the accuracy and sufficiency of the prosecutor's instructions to the Grand Jury might be evaluated and any appropriate motions might be made.

2. Mr. Penny respectfully requests to be advised by cover letter from the prosecutor or from the Court as to the date when the Grand Jury minutes are provided to the Court.

3. Mr. Penny moves that the Court should consider the following in this motion to dismiss the indictment, based on the factual basis and legal authority set forth below, namely:

a. Does the indictment fail to include the signature of the District Attorney (CPL § 200.50 [9]) or the foreperson of the Grand Jury (CPL § 200.50 [8])?

[7] The video recording of the interview was entered into evidence at the grand jury (GJM 823; Grand Jury Exhibits: 11A and B).

[8] The parties had been in contact in the days following this incident, but it was not until the day prior to the Criminal Court presentment that the Manhattan District Attorney's office indicated their intention to proceed with an arrest in this case. Once ADA Joshua Steinglass indicated these intentions to Mr. Kenniff, a surrender was scheduled for the next morning and a bail package was agreed upon prior to presentment.

b. Do the allegations demonstrate that this Court does not have jurisdiction of the offense(s) charged?

c. Was the Grand Jury proceeding defective within the meaning of CPL § 210.35?

d. Was a quorum of grand jurors present prior to both hearing evidence and voting (*People v. Collier*, 72 N.Y.2d 298, 528 N.E.2d 1191 (1988); CPL § 190.25)?

e. Was the indictment voted by an extended term of the Grand Jury (*People v. Williams*, 73 N.Y.2d 84, 535 N.E.2d 275 (1989)) (extended term may not consider new matters, which were not pending during original term)?

f. Were documents improperly subpoenaed (*People v. Warmus*, 148 Misc. 2d 374, 561 N.Y.S.2d 111 (Co. Ct. 1990); *People v. Natal*, 75 N.Y.2d 379, 553 N.E.2d 239 (1990); CPL § 610.25[1])?

g. Was the Grand Jury properly instructed regarding who decides the legal sufficiency of the evidence (*People v. Batashure*, 75 N.Y.2d 306, 552 N.E.2d 144 (1990) (improper for prosecutor to inform them that he has already determined enough evidence exists to warrant an indictment)?

h. Was the indictment based upon immunized testimony or testimony which was compelled under threats (*People v. Corrigan*, 80 N.Y.2d 326, 604 N.E.2d 723 (1992))?

i. Were the prosecutor's legal instructions too confusing or misleading (*People v. Caracciola*, 164 A.D.2d 755, 560 N.Y.S.2d 133 (1990), aff'd, 78 N.Y.2d 1021, 581 N.E.2d 1329 (1991)) (See, Justification Defenses, infra at n., sub a.)?

j. Did the Government inform the grand jurors that a prosecution witness testified under a grant of immunity or cooperation agreement, or that a private understanding

had been reached to the extent that such failure to inform materially influenced the Grand Jury (*People v. Corso*, 129 Misc.2d 590, *revd. On other grounds*, 135 A.D.2d 551 (1987); *People v. Bartolomeo*, 126 A.D.2d 375, 513 N.Y.S.2d 981 (1987))?

k. Did the prosecutor inject personal opinions or beliefs, vouch for the credibility of prosecution witnesses, or ask inflammatory questions (*People v. Huston*, 88 N.Y.2d 400, 668 N.E.2d 1362 (1996); *People v. Bartolomeo*, supra)?

l. Did the prosecutor inform the Grand Jury that the complainant had recanted his testimony inculpating Mr. Penny prior to the presentation, or that the witness told the prosecutor he could not identify him as a participant in the crime (*People v. Pelchat*, 62 N.Y.2d 97, 464 N.E.2d 447 (1984); *People v. Curry*, 153 Misc. 2d 61, 579 N.Y.S.2d 1000 (Sup. Ct. 1992))?

m. Was the Grand Jury correctly informed of the corroboration rule, CPL § 60.22 if accomplice testimony was given (*People v. Johnson*, 1 A.D.3d 891, 767 N.Y.S.2d 548 (2003))?

n. Was the Grand Jury properly instructed as to complete defenses such as alibi, justification or entrapment (*People v. Valles*, 62 N.Y.2d 36, 464 N.E.2d 418 (1984); *People v. Lancaster*, 69 N.Y.2d 20, 503 N.E.2d 990 (1986); *People v. Karp*, 76 N.Y.2d 1006, 566 N.E.2d 1156 (1990); *People v. Mitchell*, 82 N.Y.2d 509, 626 N.E.2d 630 (1993); *People v. Samuels*, 12 A.D.3d 695, 785 N.Y.S.2d 485 (2004))? The prosecution must inform the Grand Jury of exculpatory defenses that may have the potential for eliminating needless or unfounded prosecution (*People v. Goldstein*, 73 A.D.3d 946, 900 N.Y.S.2d 440 (2010)). This type of defense, if believed, would result in a finding of no criminal liability. The Grand Jury's

function is to protect citizens from having to defend against unfounded accusations. It is the possibility that criminal proceedings need not be undertaken at all, which underscores the importance of the Grand Jury's consideration of such defenses (*People v. Valles,* supra).

i. The Court of Appeals has held that "where evidence establishes a potential defense of justification, prosecution may be needless, and the Grand Jury should be charged on the law regarding that potential defense, because its consideration is properly within that body's province" (*People v. Lancaster*, No. 444, 69 N.Y.2d 20, 27-28, 503 N.E.2d 990, 511 N.Y.S.2d 559 (1986)). Thus, if the Grand Jury believed that the defendant's acts were justified, no indictment should be returned (*People v. Valles*, 62 N.Y.2d 36, 464 N.E.2d 418, 476 N.Y.S.2d 50 (1984). "The Court of Appeals has further stated, 'Justification does not make a criminal use of force lawful; if the use of force is justified, it cannot be criminal at all'" (*People v. Karp*, No. 37960, 158 A.D.2d 378, 384–85, 551 N.Y.S.2d 503, 507–08, 1990 WL 14582 (1st Dept. 1990) citing, *People v. McManus*, 67 N.Y.2d 541, 545, 505 N.Y.S.2d 43, 496 N.E.2d 202 (1986)). The Court of Appeals has also held that, in instructing the Grand Jury on the defense of justification, a prosecutor must provide enough information to enable that body to determine whether the defense, in light of the evidence, should preclude criminal prosecution. In other words, a prosecutor must sufficiently apprise the Grand Jury of the existence and requirements of that defense to allow it to intelligently decide whether there is sufficient evidence tending to

disprove the defense or whether the defendant was justified in his actions. (*People v. Goetz*, No. 217, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18, 1986 WL 1405146 (1986)). Under the doctrine of justification, in this case, the Government was required to prove beyond a reasonable doubt, not only that the defendant was not justified in using deadly force against another person, but that he was not justified in using non-deadly force against another person. The Defense asked that the Grand Jury be instructed on both defenses. In this case, the position of the Defense is that the force used was non-deadly. The position of the Government is that the force used by Mr. Penny was deadly force. The Grand Jury was tasked with deciding the level of force Mr. Neely was threatening to use, as well as the level of force that Mr. Penny used to repel that force and then applying the appropriate legal justification to the facts.

The Defense has not been provided with the prosecution's legal instructions to the Grand Jury, but we ask this Court to inspect the minutes to determine if their Office has sufficiently apprised the Grand Jury of the existence and requirements of that defense, to allow it to decide whether Mr. Penny was justified in his actions.

> [W]here the evidence suggests that a complete defense such as justification may be present, the prosecutor must charge the grand jurors on that defense, providing enough information to enable them to determine whether the defense, in light of the evidence, should preclude the criminal prosecution (*People v. Goetz*, No. 217, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18, 1986 WL 1405146 (1986))

"Generally, an improper charge or no charge on justification is considered prejudicial" (*People v. Karp*, 158 A.D.2d 378, 380–381, 551 N.Y.S.2d 503, rvs'd on other grounds, 76 N.Y.2d 1006, 565 N.Y.S.2d 751, 566 N.E.2d 1156 (1990); *People v. Caracciola*, 164 A.D.2d 755, 560 N.Y.S.2d 133 (1st Dept. 1990), appeal granted 76 N.Y.2d 898, 561 N.Y.S.2d 560, 562 N.E.2d 885, affirmed 78 N.Y.2d 1021, 576 N.Y.S.2d 74, 581 N.E.2d 1329 (1991); *People v. Melendez*, 155 Misc. 2d 196, 588 N.Y.S.2d 718 (Sup. Ct. 1992); CPL § 210.35[5]). If the District Attorney did not sufficiently apprise the Grand Jury of the existence and requirements of the justification defense to allow it to intelligently decide whether there was sufficient evidence tending to disprove the defense, or whether the defendant was justified in his actions, the indictment must be dismissed (*People v. Goetz*, No. 217, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18, 1986 WL 1405146 (1986)).

o. Was there an inordinate delay between the instructions at the beginning of the term and the instructions on the law at the close of the presentation of the evidence (*People v. Brown*, 176 A.D.2d 155, 574 N.Y.S.2d 40 (1991), aff'd, 81 N.Y.2d 798, 611 N.E.2d 271 (1993))?

p. If the Government introduced inculpatory portions of defendant's statement, were the exculpatory portions of that or another statement which were part of a continuous interrogation also presented (*People v. Rodriguez*, 188 A.D.2d 566, 591 N.Y.S.2d 463 (1992); *People v. Mitchell,* 82 N.Y.2d 509, 626 N.E.2d 630 (1993))?

q. Was the secrecy and confidentiality of the Grand Jury process potentially compromised, or were unauthorized persons present in the Grand Jury or during

videotaping testimony made elsewhere to be presented to a Grand Jury (CPL § 190.25[4]; *People v. Di Falco*, 44 N.Y.2d 482, 377 N.E.2d 732 (1978))?

r. Did the Government fail to inform the Grand Jury that defendant's witnesses were available (*People v. Montagnino*, 171 Misc. 2d 626, 655 N.Y.S.2d 255 (Co. Ct. 1997); CPL § 190.50[6])?

s. Did the prosecutor administer the oath to any witness (*People v. Rivers*, 145 A.D.2d 319, 534 N.Y.S.2d 986 (1988); CPL § 190.25 (oath may only be administered by Grand Jury foreman or other grand juror))?

t. Did the Government introduce evidence of defendant's pre-trial silence (*People v. Conyers*, 52 N.Y.2d 454, 420 N.E.2d 933 (1981); CPL § 190.30) or improperly comment on defendant's failure to testify before the Grand Jury (*People v. Colban*, 151 Misc. 2d 32, 571 N.Y.S.2d 873 (Sup. Ct. 1991), aff'd, 186 A.D.2d 8, 586 N.Y.S.2d 802 (1992))?

u. Was the presentation of evidence withdrawn prior to a vote being taken and then re-submitted (*People v. Wilkins*, 68 N.Y.2d 269, 501 N.E.2d 542 (1986))?

v. Did the prosecutor properly answer any questions raised by the grand jurors (CPL § 190.25[6])? GJM 837, lines (hereinafter, "ln.") 2-3).

w. Was the Grand Jury proceeding defective within the meaning of CPL § 190.50[5][a]?

6. In addition, it did the indictment fail to conform to the requirements of CPL Article 200 regarding:

a. Joinder of offenses and consolidation of indictments (See, CPL § 200.20).

b. Duplicitous counts (See, CPL § 220.30).

c. Joinder of defendants and consolidation of indictments against different defendants (See, CPL § 200.40).

d. Proper form and content (See, CPL § 220.50).

e. Improper allegations or improper introduction into evidence of previous convictions (See, CPL § 200.60).

7. The Grand Jury proceeding may also be defective for:

a. An illegally constituted Grand Jury (See CPL § 210.35).

b. Fewer than sixteen grand jurors hearing the case.

c. Failure to have the same grand jurors hear all the witnesses.

d. Fewer than twelve grand jurors voting to indict (See CPL § 210.35).

8. Mr. Penny further requests that the instructions to the Grand Jury be disclosed to defense counsel so that the accuracy and sufficiency of the prosecutor's instructions might be evaluated and so that any appropriate motions might be made by the defense.

9. In summary, Mr. Penny asks the Court to dismiss the indictment if it finds any impropriety listed above or otherwise under the law. Alternatively, Mr. Penny asks the Court to reduce the charges if the evidence was sufficient to support a lesser included offense only (See, CPL § 210.20).

B. DISMISSING THE INDICTMENT AS THE GOVERNMENT FAILED TO PROVE CAUSATION, A NECESSARY COMPONENT FOR CRIMINAL LIABILITY.

1. To dismiss an indictment based on insufficient evidence before a Grand Jury, a reviewing court must consider whether the evidence, viewed in the light most favorable to the Government, if unexplained and uncontradicted, would warrant conviction by a petit jury. (*People v. Gaworecki*, 37 N.Y.3d 225, 175 N.E.3d 915 (2021)). Thus, in the context of Grand Jury

proceedings, legal sufficiency means *prima facie* proof of the crimes charged, not proof beyond a reasonable doubt. In applying that standard, a reviewing court must determine whether the facts, if proven, and the inferences that logically flow from those facts, supply proof of each element of the charged crimes, and whether the Grand Jury could rationally have drawn a guilty inference. (*People v. Gaworecki*, *Id*., at 230).

2. To be held criminally responsible for a homicide, a defendant's conduct must actually contribute to the victim's death (*People v. Stewart*, 40 N.Y.2d 692, 697, 389 N.Y.S.2d 804, 358 N.E.2d 487 (1976)) by "set[ting] in motion" the events that result in the killing (*People v. Matos*, 83 N.Y.2d 509, 511, 611 N.Y.S.2d 785, 634 N.E.2d 157 (1994), citing *People v. Kibbe*, 35 N.Y.2d 407, 362 N.Y.S.2d 848, 321 N.E.2d 773 (1974)). Liability will attach even if the defendant's conduct is not the sole cause of death (*Matter of Anthony M.*, 63 N.Y.2d 270, 280, 481 N.Y.S.2d 675, 471 N.E.2d 447 (1984)) if the actions were a "'sufficiently direct cause of the ensuing death'" (*People v DaCosta*, No. 26, 4, 844 N.E.2d 762, 764, 811 N.Y.S.2d 308, 310, 2006 N.Y. Slip Op. 01196, 2006 WL 346193 (2006) citing, *People v. Stewart*, 40 N.Y.2d at 697, 389 N.Y.S.2d 804, 358 N.E.2d 487, quoting, *People v. Kibbe*, 35 N.Y.2d at 413, 362 N.Y.S.2d 848, 321 N.E.2d 773 [emphasis omitted]). However, *more* than an "'obscure or merely *probable* connection'" between the conduct and result is required (*People v. Stewart*, 40 N.Y.2d at 697, 389 N.Y.S.2d 804, 358 N.E.2d 487, emphasis added, quoting, *People v. Brengard*, 265 N.Y. 100, 108, 191 N.E. 850 (1934)).

3. In this case, the "evidence before the Grand Jury was not legally sufficient to establish the offense charged or any lesser included offense" (See, CPL § 210.20). The Government's medical examiner, Cynthia Harris (hereinafter, "M.E. Harris") articulated, in her opinion, what the cause of death was, yet *failed to substantiate the basis of her opinion*.

4. When asked at the Grand Jury, what caused the death of Mr. Neely, M.E. Harris stated, "Compression of neck, and on the death certificate, it reads compression of neck and in parenthesis chokehold" (GJM 567, ln. 15-19). She also testified, in performing an autopsy of Mr. Neely, she observed bleeding to his neck muscles, which indicated trauma involving, a "significant amount of force applied to his neck" (GJM 566, ln. 10-17). She opined that these injuries were consistent with a chokehold (GJM 567, ln. 1-4). However, she failed to indicate that the injuries were consistent with asphyxiation.

5. While M.E. Harris discussed asphyxiation *generally*, her testimony was void of any conclusion or explanation as to how the injuries sustained to *Mr. Neely's neck* proved he died *from* asphyxiation. Furthermore, M.E. Harris, failed to indicate *what* in Mr. Neely's neck was compressed, which ultimately, in her opinion, led to his death. She failed to offer an opinion as to whether the chokehold applied pressure to the carotid artery, or to the windpipe. Instead, she opined *generally* as to the significance of interfering with either one. This amounts to conjecture.

6. According to M.E. Harris, determining the amount of time necessary to render someone unconscious would normally depend on whether someone would "interfere with the *blood flow to the brain*," which could "render someone *unconscious* within a matter of seconds. *If* you interfere with the *airflow*, that can render someone *unconscious* on the order of minutes" (GJM 568, ln. 7-21, emphasis added). Without guidance on this point, the Grand Jury was left with no way to judge the significance of the length of the hold, i.e., should the time be measured in *seconds* (in the case of the carotid artery) or *minutes* (in the case of the windpipe).

7. It is worth noting, M.E. Harris failed to testify how long it would take to *kill* someone when either the airway or the carotid arteries are being compressed. She testified only as to the amount of time it should take to render someone *unconscious*. When asked whether it is

possible to "render someone unconscious without killing them," M.E. Harris stated, "Yeah." (GJM 580, ln. 8-11).

8. In addition, the Grand Jury was left without guidance as to when Mr. Neely died, so that the Grand Jury would know how close in time the hold was to the death. When asked if she could say when Mr. Neely died, M.E. Harris simply stated, "No…I can't do that" (GJM 573, ln. 11-20).

9. M.E. Harris opined on when she observed Mr. Neely's "purposeful movements" end. However, she testified as to her own uncertainty on this point, stating, "[B]ut again I don't have the benefit of electronic monitoring of the brain and you know, an EKG monitoring his heart and everything" (GJM 573, ln. 21 – 574, ln. 4).

10. Likewise, when asked if Mr. Neely would have survived if Mr. Penny released him the moment she saw purposeful movements stop, M.E. Harris indicated, "No, I can't say that. I don't know" (GJM 578, ln. 19-25). Therefore, her testimony on when Mr. Neely died left the Grand Jury without a reliable opinion as to whether the death occurred during the hold or sometime thereafter. It should be noted that while M.E. Harris stated her *opinion* as to the cause of death, she was never asked whether there were other *possible* causes of death. Mr. Neely was not pronounced dead until 3:39 PM, an hour after the CPR referenced in the video timeline was administered (GJM 834, ln. 15-18).

11. CPL § 210.20 (1)(c) provides that an indictment may be dismissed where the Grand Jury proceeding is defective within the meaning of CPL § 210.35.

> Subdivision five of CPL § 210.35 provides that a Grand Jury proceeding is defective where it fails to conform to the Grand Jury requirements of Article 190 of the CPL "to such degree that the integrity thereof is impaired and *prejudice* to the defendant *may* result" (*People v. Cantos*, No. 2565/96, 665 N.Y.S.2d 815, 818, 1997 N.Y. Slip Op. 97596, 1997 WL 713971 (Sup Ct. 1997), emphasis added, citing, *People v. DiFalco*, 44 N.Y.2d 482, 406 N.Y.S.2d 279, 377 N.E.2d 732 (1978)).

In this case there was, a "*possibility* of prejudice to him by the prosecutor's failure to ask him the [] questions at issue" (*People v. Cantos*, No. 2565/96, 665 N.Y.S.2d 815, 818, 1997 N.Y. Slip Op. 97596, 1997 WL 713971 (Sup Ct. 1997), emphasis added; also See, "Dismissal of indictments based on defective Grand Jury proceedings should be limited to those instances where prosecutorial wrongdoing, fraudulent conduct, or errors *potentially* prejudice the ultimate decision reached by the Grand Jury" (*People v. Nash*, 69 A.D.3d 1113, 891 N.Y.S.2d 763 (3rd Dept. 2010), leave to appeal denied 15 N.Y.3d 754, 906 N.Y.S.2d 827, 933 N.E.2d 226, emphasis added)). In *People v. Huston,* the Court opined that a "[p]rosecutor's discretion during Grand Jury proceedings *is not absolute* because, as legal advisor to Grand Jury, prosecutor performs dual functions of public officer and advocate; prosecutor is charged with duty not only to secure indictments, but also to see that justice is done" (*People v. Huston,* 88 N.Y.2d 400, 409, 646 N.Y.S.2d 69, 668 N.E.2d 1362 (1996), emphasis added).

12. In addition to the importance of determining the time of death, the length of the hold and what was being compressed, all discussed supra, M.E. Harris testified to the importance of *consistency* of the pressure applied in a chokehold. She noted that failing to apply consistent pressure acts like a reset, or a starting over; like coming up from water when one is swimming (GJM 568, ln. 22 – 569, ln. 10). She went on to explain:

> So if you were to put someone in a choke hold, where you obstruct the vessels that takes blood to and from the head, that person will be rendered unconscious within a matter of seconds. *If you then immediately release that hold and blood flow returns, then that person will wake up usually within a matter of seconds* (GJM 580, ln. 8-22, emphasis added).

What is worthy of note is that M.E. Harris made clear that Mr. Penny did *not* apply "consistent pressure that obstructed the vessels…" (GJM 578, ln. 3-11). Regarding the airway, she testified, "... I suspect, although I don't know, that *there is some air that's getting in at sometimes*" (GJM

578, ln. 12-18, emphasis added). Her admission that there was a lack of *consistent pressure* and as a consequence, a failure to find a sustained deprivation of oxygen, undermines the notion that Mr. Penny caused the death of Mr. Neely.

13. In addition, it should be considered that death is not necessarily the natural result of trauma to the neck. As such, M.E. Harris would had to have drawn the connection, that in her opinion, the neck trauma was evidence of asphyxiation, which ultimately led to Mr. Neely's death. She failed to do so. For a contrary example, while there was also trauma to the neck in *People v. Kenyon*, the expert referenced the *indicia of asphyxiation*, *which caused* the death *by* smothering:

> James Terzian, the forensic pathologist who performed the victim's autopsy, opined that *the victim died from "asphyxiation due to smothering*"—specifically, that someone "[m]ost probably" positioned himself or herself on top of the victim and applied pressure to the victim's neck (utilizing the necklace she was wearing) and torso, thereby restricting her ability to breathe. According to Terzian, such pressure "*would have [had] to continue for some period [of time] after [the victim became] unconscious ... [i]n order for her to die*." Terzian's opinion as to *the cause of death was based upon, among other things*, the *blanching of the skin on the victim's torso*, the *petechiae or micro hemorrhages* observed on the victim's face and lower extremities and the "very pronounced" *groove on the victim's neck* that corresponded with her necklace (*People v. Kenyon*, No. 104212, 970 N.Y.S.2d 638, 2013 N.Y. Slip Op. 05336, 2013 WL 3745860 (3rd Dept. 2013), emphasis added).

In this case, M.E. Harris failed to offer any evidence or opinion that the victim died from asphyxiation due to the chokehold. She merely testified that asphyxiation *could* happen by a chokehold and that she believed that Mr. Neely died from a chokehold. The fact that she did not testify that he did in fact die from asphyxiation, can only be explained by a lack of evidence to support such a conclusion (ex. "I can tell you that *consistent pressure* that obstructed the vessels was *not* consistently applied" (GJM 578, ln. 3-11, emphasis added).

> … as in this case, it is sought to establish, almost entirely by expert evidence, that such result actually followed, the connection between cause and effect should be made so clear that the conclusion can be said to be the reasonable result of the proof. In this case the proof falls far below that standard, and the verdict of the jury is left to rest too largely upon conjecture and speculation... (*Seifter v. Brooklyn Heights R. Co.*, 169 N.Y. 254, 264, 62 N.

> E. 349, 352 (1901) (To dismiss an indictment based on insufficient evidence before a Grand Jury, a reviewing court must consider whether the evidence, viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury (*People v. Gaworecki*, 37 N.Y.3d 225 (2021))).
>
> The testimony of expert witnesses must be considered in view of their general knowledge upon the subject as to which they testify, as well as of the particular case, and of their opportunity for examination of the *facts upon which opinions are based*, *and the sufficiency of the reasons given for such opinions*; and, *if it should appear that they are formed without the aid of facts necessary to enable the witnesses to come to a conclusion, the opinions must be disregarded*, no matter how confidently they are testified to by the witnesses. (*McQuade v. Metropolitan St. Ry. Co.*, 84 A.D. 637, 82 N.Y.S. 638, 720, 722 (1st Dept. 1903), cited by *Rizzo v. Mendelsohn*, 3 A.D.2d 916, 162 N.Y.S.2d 473, 474 (2nd Dept. 1957)).

While inferences are permitted to be drawn, they must be drawn from *specific facts* (*People v. Flores*, 2018, 62 Misc.3d 46, 90 N.Y.S.3d 803, leave to appeal denied 2019 WL 2080745, leave to appeal denied 33 N.Y.3d 976, 101 N.Y.S.3d 272, 124 N.E.3d 761; *People v. Raymond*, 56 A.D.3d 1306, 867 N.Y.S.2d 643 (4th Dept. 2008), leave to appeal denied 12 N.Y.3d 820, 881 N.Y.S.2d 28, 908 N.E.2d 936). In evaluating whether evidence presented to Grand Jury is legally sufficient to support indictment, reviewing court should only decide whether *facts*, if unexplained and uncontradicted, and inferences that can reasonably be *drawn from them*, support *every element* of crimes charged (*People v. Bello*, No. 62515, 245 A.D.2d 424, 668 N.Y.S.2d 176, 1998 N.Y. Slip Op., 00315, 1998 WL 16096 (N.Y.A.D. 1 Dept., Jan. 20, 1998) 246 A.D.2d 424, 668 N.Y.S.2d 175, appeal granted 91 N.Y.2d 939, 671 N.Y.S.2d 719, 694 N.E.2d 888, affirmed 92 N.Y.2d 523, 683 N.Y.S.2d 168, 705 N.E.2d 1209, emphasis added).

> To dismiss [or reduce] an indictment on the basis of insufficient evidence before a Grand Jury, a reviewing court must consider whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury" (citing, *People v. Grant*, 17 N.Y.3d 613, 616 [2011] [internal quotation marks omitted]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*id*. [internal quotation marks omitted]). The *standard, while deferential, is not meaningless*" (*People v. Gaworecki*, No. 40, 154 N.Y.S.3d 33, 2021 N.Y. Slip Op. 05392, 2021 WL 4596362 (2021), emphasis added).

14. In this case, the limited facts elicited were insufficient to support M.E. Harris' opinion that compression to Mr. Neely's neck was the cause of Mr. Neely's death. *More* than an "'obscure or merely *probable* connection'" between the *conduct* (chokehold) and *result* (death) is required (*People v. Stewart*, 40 N.Y.2d at 697, 389 N.Y.S.2d 804, 358 N.E.2d 487 (1976), emphasis added, quoting, *People v. Brengard*, 265 N.Y. 100, 108, 191 N.E. 850, 853 (1934)). As such, the indictment must be dismissed (CPL § 210.20 (1)[b]).

C. THE GOVERNMENT FAILED TO PROVE THE REQUISTE MENTAL STATE NEEDED TO SUBSTANTIATE THE CRIMES. AS SUCH, THE INDICTMENT MUST BE DISMISSED.

1. With respect to Manslaughter in the Second Degree, the Government was required to present competent evidence before a Grand Jury establishing that Mr. Penny recklessly caused the death of Jordan Neely (PL § 125.15 (1)). A defendant acts recklessly in this context if the defendant is "aware of and consciously disregards a substantial and unjustifiable risk" that death will result (PL § 15.05(3); *People v. Li*, 34 N.Y.3d 357, 140 N.E.3d 965 (2019)). "The risk must be of such nature and degree that disregarding that risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (PL § 15.05(3)). An act "qualifies as a sufficiently direct cause when the ultimate harm should have been reasonably foreseen" (*People v. Matos,* 83 N.Y.2d at 511, 611 N.Y.S.2d 785, 634 N.E.2d 157 (1994), citing *People v. Kibbe*, 35 N.Y.2d at 412, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974)).

2. With respect to the count of Criminally Negligent Homicide, the Government must demonstrate that Mr. Penny, acting with "criminal negligence," caused the death of Mr. Neely (PL § 125.10). A defendant acts with criminal negligence in this context when the defendant "fails to perceive a substantial and unjustifiable risk" that death will result (PL § 15.05(4)). Criminal negligence also requires the defendant's conduct to be "a *gross deviation* from the standard of care

that a reasonable person would observe in the situation" (*People v. Gaworecki*, 37 N.Y.3d 225, 175 N.E.3d 915 (2021), emphasis added).

3. Both recklessness, as the mental state required for second-degree manslaughter, and criminal negligence, as the mental state required for criminally negligent homicide, require that there be a *substantial and unjustifiable risk that death or injury will occur*, that the defendant engage in some blameworthy conduct contributing to that risk, and that the defendant's conduct amount to a *gross deviation* from how a reasonable person would act (N.Y. Penal Law §§ 15.05, 125.15(1); *People v. Gaworecki*, supra, emphasis added). The only distinction between the two mental states of recklessness, as required for conviction for second-degree manslaughter, and criminal negligence, as required for conviction for criminally negligence homicide, is that recklessness requires the defendant be aware of and consciously disregard the risk while criminal negligence is met when the defendant negligently fails to perceive the risk (citing, N.Y. Penal Law §§ 15.05, 125.15(1)). In cases without evidence of requisite *mens rea*, the defendant may *not* be prosecuted for homicide offense (*People v. Gaworecki*, supra, emphasis added).

4. M.E. Harris in her testimony conceded *not* every chokehold should be lethal (GJM 580, ln. 8-22). According to the Government's expert witness, Sergeant (or "SGT") Caballer, the hold Mr. Penny was *trained* to use, was a *non-lethal* tool, utilized to subdue *an aggressor* by rendering him *unconscious, or to gain control* of a situation, using *less* than lethal force (GJM 795, ln. 4-10).

5. SGT Caballer, in his testimony noted that a hold *can* be fatal when it is applied "to the full extent" (GJM 799, ln. 12-23). Yet, he is clear, in his analysis of the hold Mr. Penny used, that he did *not* apply it to the "full extent." In other words, Mr. Penny did not apply it with intended

lethality, because his intention was consistent with his training: to gain control of the situation, in a *non-lethal* manner.

6. Furthermore, SGT Caballer testified that if one's intention in applying the hold was to increase lethality by placing pressure on the arteries, one would push the head forward. He went on to clarify that Mr. Penny did *not* push Mr. Neely's head forward. Instead, Mr. Penny had his hand *on the top* of Mr. Neely's head so that "[h]e *wouldn't* be able to apply more pressure" (GJM 803, ln. 11-15, emphasis added).

7. He also testified, if one's intent *was* to increase lethality, he would apply pressure to the carotid arteries through a precise placement of the arm and elbow. He went on to testify that the positioning of Mr. Penny's arm *did not allow him* to "apply a lot of pressure to those carotid arteries" (GJM 803, ln. 20 – 804, ln. 2). He went on to testify that Mr. Penny placed pressure, less on the neck, and more on the "upper part of the jaw" (GJM 804, ln. 6-17). Likewise, the placement of Mr. Penny's elbow was not centered on Mr. Neely's chest. As such, he "*wouldn't* be able to apply a lot of pressure to the carotid arteries" (GJM 803, ln. 20 – 804, ln. 2). He went on to testify, "... all things considered of where his hand placement is and arm placement, it looks as though he's just holding him" (GJM 805, ln. 22 – 806, ln. 11).

8. Mr. Penny, based on the testimony of the Government's expert, SGT Caballer, applied the chokehold in a *non-lethal* manner. M.E. Harris echoed this sentiment when she testified, Mr. Penny did *not* apply "*consistent pressure* that obstructed the vessels" and she suspected "that *there is some air that's getting in at sometimes*" (GJM 578, ln. 3-18, emphasis added). SGT Caballer's testimony, in conjunction with M.E. Harris, proves that Mr. Penny *could not and should not have foreseen* any *lethal* consequences of his actions, because he applied the hold, in, what he reasonably believed to be, a *non-lethal* manner.

9. Proof of the "potency" of a chokehold *generally* when applied "to the full extent" alone, does not equate to proof of a substantial and unjustifiable risk that death would have occurred *in this case*. The mere fact that, in M.E. Harris' opinion, the hold in some way ended up being lethal in this case, does *not* mean that the alleged lethality of *this* hold was, or should have been, foreseeable to Mr. Penny. The fact that Mr. Neely's death is a tragedy "does not convert [Mr. Penny's] actions into criminal recklessness, except by hindsight. Thus, this case [] fails to satisfy the foreseeability element of criminal liability..." (*People v. Reagan*, 256 A.D.2d 487, 683 N.Y.S.2d 543 (1998), aff'd, 94 N.Y.2d 804, 723 N.E.2d 55 (2nd Dept. 1999)).

Furthermore, the Government failed to present any evidence that Mr. Penny possessed knowledge that other people had died after the application of this hold, which Mr. Penny applied to Mr. Neely (*People v. Gaworecki*, 37 N.Y.3d 225, 175 N.E.3d 915 (2021)). In fact, according to SGT Caballer's testimony, Marines, with the same training as Mr. Penny, having this type of chokehold applied, have never been injured, much less killed.

> Q. Sergeant, a grand juror wants to know, during the time that you were instructing other Marines, have you ever seen incidental injuries or deaths, excuse me, happen during the training for chokes?
>
> A. Fortunately, not (GJM 813, ln. 1-6).

10. The facts in *People v. Gaworsecki* are instructive here. In *Gaworecki,*

> The defendant knew heroin he sold to victim was potent, but *potency alone did not equate to substantial and unjustifiable risk of death*, several others who used heroin from same sample as victim, survived their encounters, and *the People presented no evidence that defendant possessed knowledge that other people had overdosed or died* after using heroin *he sold them*" [citing, N.Y. Penal Law §§ 15.05, 125.15 (1)]… More importantly, the People presented *insufficient evidence that defendant was aware of, or failed to perceive, a substantial and unjustifiable risk of death* from the heroin *he was selling* before July 20, when he sold heroin to the decedent. The People presented *no* evidence *that defendant had been told that other people had overdosed or died* after using the heroin *he had sold them* (*People v. Gaworecki*, 37 N.Y.3d 225, 175 N.E.3d 915 (2021), emphasis added).

Likewise, the evidence presented in this case demonstrates that Mr. Penny knew, or should have known, the potential injuriousness of a chokehold generally. However, the Government *failed* to present evidence that Mr. Penny was aware of and ignored, or negligently failed to perceive, its lethality *in the manner in which he applied it* to Mr. Neely (*id.*, citing, *People v. Cruciani:* "…although the People presented evidence that defendant sold heroin to the decedent, they failed to present prima facie proof, '*beyond the general knowledge of the injuriousness* of drug-taking'" (*People v. Cruciani*, 36 N.Y.2d at 305, 367 N.Y.S.2d 758, 327 N.E.2d 803 (1975)), emphasis added).

11. As noted above, throughout SGT Caballer's testimony, Mr. Penny took every precaution to ensure he applied the hold to Mr. Neely in a *non-lethal* manner. According to SGT Caballer, Mr. Penny's intention was consistent *with his training* in applying a *non-lethal* hold. Mr. Penny believed his,

> prescribed approach to be both appropriate and officially approved. All of this not only fails to support, but *negates,* the element of recklessness that the defendant[] [was] aware of and "consciously disregard[ed]" a "substantial and unjustifiable risk". Considering that the defendants' conduct did not amount to a conscious disregard of a known risk, the additional statutory element--that the disregard be so extreme as to be a gross deviation from a reasonable person's standard of conduct--is, a fortiori, not met (*People v. Reagan*, 256 A.D.2d 487, 683 N.Y.S.2d 543 (2nd Dept. 1998), aff'd, 94 N.Y.2d 804, 723 N.E.2d 55 (1999), emphasis added, citing*, People v. Warner–Lambert Co*., 51 N.Y.2d 295, 414 N.E.2d 660 (1980); *People v. Roth*, 176 A.D.2d 1186, 576 N.Y.S.2d 968 (1991), aff'd as modified, 80 N.Y.2d 239, 604 N.E.2d 92 (1992)).

12. In addition, according to statements made by Mr. Penny to Detectives Brian McCarthy and Michael Medina (Grand Jury Exhibits 11a, 11b: Detectives' Interrogation of Daniel Penny (hereinafter, the "Interrogation")), Mr. Penny was not trying to kill or hurt Mr. Neely. His intention was to keep *Mr. Neely* from hurting *other people* on that train. (See, 16:39 of the Interrogation: "… I wasn't trying to [] injure him. I'm just trying to keep him from hurting anybody else.").

Based on the Government's failure to prove Mr. Penny was aware of and consciously disregarded the risk of death, or that he negligently failed to perceive the risk, the indictment on both counts, must be dismissed. (See, N.Y. Penal Law §§ 15.05, 125.15[1]; *People v. Grant*, 17 N.Y.3d 613, 935 N.Y.S.2d 542, 959 N.E.2d 479 (2011); *People v. Reyes*, 75 N.Y.2d 590, 555 N.Y.S.2d 30, 554 N.E.2d 67 (1990); *People v. Williams*, 20 A.D.3d 72, 795 N.Y.S.2d 561 (1st Dept. 2005); *People v. Pease*, 8 A.D.3d 692, 777 N.Y.S.2d 570 (3rd Dept. 2004); *People v. Rattenni*, 179 A.D.2d 691, 578 N.Y.S.2d 257 (2nd Dept. 1992), order aff'd, 81 N.Y.2d 166, 597 N.Y.S.2d 280, 613 N.E.2d 155 (1993); *People v. Calderon*, 1997, 173 Misc.2d 435, 662 N.Y.S.2d 227; CPL § 210.20 [1][b]).

F. SUPPRESSION OF STATEMENTS IMPROPERLY OBTAINED AND PRECLUSION OF UNNOTICED STATEMENTS.

1. The Government must, within fifteen days of arraignment, serve notice of their intention to offer at trial evidence of defendant's statements (See, CPL § 710.30 (1)). The notice must specify the evidence intended to be offered.

2. Mr. Penny moves to preclude from use, directly or indirectly, as evidence against him at trial, all statements, whether verbal or written, attributed to him that are not set forth in any CPL § 710.30 notice served on him within fifteen days of arraignment, on the grounds that there is no good cause for the late service of notice of any additional statements (See, CPL § 710.30(3); *People v. O'Doherty*, 70 N.Y.2d 479, 517 N.E.2d 213 (1987)).

3. As to any timely noticed statements, these were taken involuntarily or otherwise in violation of the rights of Mr. Penny under the New York and United States Constitutions.

4. Due to the improper conduct on the part of law enforcement officials, the alleged statements were:

a. Taken involuntarily, within the meaning of CPL § 60.45;

b. Taken in violation of the right of the defendant against self-incrimination;

c. Taken in violation of the defendant's right to counsel under the New York State and United States Constitutions and taken without the effective assistance of counsel;

d. Taken while the defendant was detained without probable cause to arrest;

e. Taken without adequately advising the defendant of his *Miranda* rights prior to questioning.

f. Taken in the absence of a knowing, voluntary, or intelligent waiver by the defendant of his rights prior to questioning.

5. Any and all questioning occurred after an illegal arrest, and any noticed statements made were in violation of the Fourth Amendment, as the illegal arrest would taint the questioning and responses thereto, not dissipated by a *Miranda* warning. The fact that any alleged statements may have been made or given to law enforcement officers during an investigatory phase, even if spontaneous, does not relieve the government of its statutory burden (*People v. Chase*, 85 N.Y.2d 493, 650 N.E.2d 379 (1995))

6. Mr. Penny respectfully urges this Court to order that all statements made by him subsequent to the illegal arrest be suppressed as evidence in the prosecution against him. In the alternative, he requests a hearing to determine pertinent facts (*Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 (1965)).

H. THE DEFENSE REQUESTS THE FILING OF A MEMORANDUM OF LAW.

1. It is our belief that we are currently unaware of many of the relevant facts necessary to our preparation of the defense in this matter. We expect to discover many of these essential facts from the written response to this motion as well as from any hearings that are held as a result of this motion. Consequently, at this time, we are unable to prepare legal briefs or memoranda concerning many of the issues relevant to the defense case.

2. We request that the Court allow us an opportunity after the hearings in this matter and prior to the Court's decision on the issues addressed by those hearings, to submit a memorandum of law for the Court's consideration so that we might more effectively represent the interests of our client.

I. THE DEFENSE REQUESTS THE FILING OF SUBSEQUENT MOTIONS.

1. We have endeavored to encompass within this omnibus motion all possible pre-trial requests for relief based on the information that is now available to us. We request that the Court grant us leave to submit subsequent motions, should facts discovered through this motion or hearings related to this motion, indicate that additional relief may be warranted.

2. CPL § 255.20(1) provides that "all pre-trial motions shall be served or filed within forty-five days after arraignment and before commencement of trial *or within such additional time as the court may fix upon application of the defendant*…" (emphasis added; cited by *People v. Amadeo*, 188 Misc. 2d 187, 727 N.Y.S.2d 290 (Sup. Ct. 2001)).

WHEREFORE, your deponents respectfully move for this Court to grant the relief requested in our Notice of Motion, as well as any other relief this Court deems just and proper.

Affirmed under penalty of perjury pursuant to CPLR 2106.

Dated: New York, New York
October 6th, 2023

Yours, etc.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION
IN SUPPORT OF MOTION

-against-

Ind. No.: IND-72890-23

DANIEL PENNY,

Defendant.

STATE OF NEW YORK)
S.S.:
COUNTY OF NEW YORK)

1. I, Barry Kamins, am an attorney at law and of counsel to the firm of Raiser and Kenniff, P.C., attorneys for the defendant, Daniel Penny, in the above-entitled action.

2. This affirmation is made in support of the relief requested in the defendant's notice of motion.

3. The allegations herein are based on a review of the search warrants issued post-indictment, discovery provided by the prosecutor, and conversations with attorneys Thomas Kenniff and Steven Raiser, who, in turn, have spoken with the defendant.

4. The defendant was indicted in this action for Manslaughter in the Second Degree and Criminally Negligent Homicide.

5. After the arraignment, the prosecution sought and obtained numerous search warrants and two orders authorizing the installation and use of a pen register and trap device relating to a cell phone.

6. This motion to controvert will address one search warrant (August 2nd, 2023) authorizing a search of the defendant's cell phone and a search warrant authorizing a search of the defendant's iCloud account.

The iCloud Search Warrant

7. On May 30th, 2023, Judge Michelle Rodney signed a search warrant authorizing a search of the defendant's iCloud account for the time period from November 2022 through May 20th, 2023, for the purpose of searching for and seizing: all subscriber information; all payment history; IP login history; connection logs and transactional activity records; product and device serial numbers; Apple ID logs relating to the user of the iCloud account; all metadata preserved for the iCloud account; all stored content of the iCloud account including deleted messages, email attachments, photographs, internet history, voicemail, videos, text messages, etc.

8. The search warrant stated the following with respect to execution of the warrant: "Notwithstanding this authorization, the warrant/order is deemed 'executed' when it is served upon Apple, Inc. and subsequent review is deemed analysis." (iCloud Search Warrant (hereinafter, "SW") Issued by Judge Rodney, Bates No. 13671) In addition, it stated: "Apple is ordered to provide the results of the execution of this warrant to the New York County District Attorney's Office no later than June 13th, 2023" (*id.* at Bates No. 13672).

9. The affidavit in support of the warrant was signed by Detective Brian McCarthy of the Detective Bureau Manhattan South Homicide Squad on May 30th, 2023.

10. In paragraphs 18 through 34 of his affidavit, Detective McCarthy lists the reasons why, in his opinion, there was reasonable cause to believe that the defendant's iCloud account contains evidence relating to the crimes of Manslaughter in the Second Degree and Criminally Negligent Homicide.

11. The defendant moves to controvert the iCloud search warrant on two grounds: (1) the search warrant violates CPL § 690.30(1) in that its terms allow for its execution beyond the

CPL's ten-day limit on the execution of search warrants; (2) the affidavit in support of the warrant was not based upon probable cause.

12. As the accompanying memorandum of law explains, the Criminal Procedure Law imposes clear requirements concerning when a search warrant must be executed. CPL § 690.30(1) requires that "[a] search warrant must be executed not more than ten days after the date of issuance."

13. The search warrant states that the warrant is deemed "executed" when it is served upon Apple, Inc. Thus, the Court was indulging in a legal fiction "deeming" a warrant "executed" on the date it was served on Apple rather than on the date of actual execution, i.e., the date a forensic examination was commenced or completed.

14. It is unclear when the warrant was served on Apple, Inc. If, however, a forensic examination of the iCloud account was not commenced within ten days of the issuance of the warrant, i.e., June 9, 2023, the warrant would be in violation of CPL § 690.30(1).

15. In addition, Detective McCarthy's affidavit does not establish probable cause to believe that evidence of the crimes of Manslaughter in the Second Degree or Criminally Negligent Homicide would be found in the iCloud account.

16. Much of Detective McCarthy's allegations are speculative, i.e., he states only that there "may" be evidence relating to the crimes of Manslaughter and Criminally Negligent Homicide contained in the iCloud account. See, e.g., *para 20*: …"there *may* be evidence of, including but not limited to text messages, voice messages, photographs, and videos from the night of the homicide and after the homicide…" (emphasis added); *para 25*: "…cellular telephone users utilize their phones to talk about their own thoughts, feelings, and beliefs via text messages and other messenger applications that *may* be on an individual's cellphone…." (emphasis added); *para*

31: "…I believe that Daniel Penny's iCloud account *may* contain evidence relevant to the crime…" (emphasis added); *para 33*: "I believe that a search of the target iCloud account *may* reveal information that was backed up on the iCloud from his cellular telephone that *may* shed light on what lead to the incident…" (emphasis added); *para 34*: "I believe that the iCloud contains evidence of communication relating to the crime and evidence of the crime, specifically, there *may* be evidence of, including but not limited to, text messages, voice messages, photographs, and videos from the day of the homicide and after the homicide, and/or communications relating to the homicide to other individuals" (emphasis added).

17. As the memorandum of law explains, such language has been found to be lacking in the requisite degree of certainty required for probable cause to believe that evidence of a crime will be found.

18. For the above reasons, the search warrant for the defendant's iCloud account must be controverted and any evidence obtained as a result must be suppressed.

The Trap and Trace/Pen Registry Warrant

19. The tap and trace warrant was requested by Assistant District Attorney Jillian Shartrand and signed by Hon. Michele Rodney. The application requested for a cell site simulator device to "collect and examine radio frequency signals" (SW Application and Affidavit in Support of the Trap and Trace Order submitted by ADA Jillian Shartrand, Bates No. 21504) emitted by Mr. Penny's cell phone "for the purpose of communicating with cellular infrastructure, including towers that route and connect individual communications" (*id.* at Bates No. 21513) (communications including, but not limited to, text messages, MMS messages, post-cut-through dialed digits, and point-to-point calls, on incoming and outgoing calls) and "radio frequency signals" by sending radio frequency signals to the device from the New York City Police

Department and/or their authorized agents (Affidavit in Support of SW and Pen Register/Trap and Trace Application submitted by Detective Brian McCarthy, Bates No. 21497). In the application, the Government requested to track from June 13, 2023 *until Mr. Penny's "cellular device is located and seized"* (SW Application and Affidavit in Support of the Pen Register/Trap and Trace Order, Bates No. 21515). This is overbroad and lacks particularity as it authorized law enforcement to track Mr. Penny potentially, *indefinitely* (see infra, section particularity: P. 46-51). Furthermore, the requested information, could include texts, iMessages, SMS messages, etc, that even "go back in time," predating the incident (see discussion regarding lack of probable cause, infra, at P. 36-37; section probable cause: P. 42-46).

20. For the above reasons, the Pen Register/Trap and Trace SW for the defendant's cellular device, communications and frequency signals must be controverted and any evidence obtained as a result must be suppressed.

The Cell Phone Search Warrant

21. On August 2nd, 2023, Judge Laura Ward signed a search warrant authorizing the seizure of the defendant's cell phone and the search of the phone for specified information sent or received between November 1st, 2022, and August 2nd, 2023, including communication whether by phone, text, email, the sharing or posting of documents, instant messages, mobile apps, images or screenshots of communications.[9]

22. The warrant stated that it must be executed within ten days of its issuance and that "this warrant shall be deemed executed upon the delivery of the TARGET DEVICE to a forensic

[9] The warrant was issued pursuant to a Supplemental Affidavit in support of a second application to search the subject phone, after law enforcement were unsuccessful in securing the phone within the period allotted by the prior warrant issued by Judge Rodney on June 12th, 2023. In support of this second application the Government relied on the affidavit of Detective McCarthy submitted in support of the June 12th iPhone warrant. The supplemental affidavit also attached a prior Pen Register and Trap and Trace application and ordered that had been signed by Judge Rodney simultaneously with the iPhone warrant.

laboratory or facility for analysis" (Seize and Search Warrant Issued by Judge Ward, Bates No. 21447).

23. The affidavit in support of the warrant was signed by Detective Brian McCarthy as part of the original application for a search warrant that was signed by Judge Rodney. The original affidavit was incorporated into the application before Judge Ward.

24. In paragraph 16, subparagraphs "u" through "ii," McCarthy lists the reasons why, in his opinion, there is reasonable cause to believe that the cell phone contains evidence relating to the crime of Manslaughter in the Second Degree and Criminally Negligent Homicide.

25. The defendant moves to controvert the cell phone warrant on two grounds: (1) the search warrant violates CPL § 690.30 (1) in that its terms allow for its execution beyond the CPL's ten-day limit on the execution of search warrants; (2) the affidavit in support of the warrant was not based upon probable cause.

26. As the accompanying memorandum of law explains, the Criminal Procedure Law imposes clear requirements concerning when a search warrant must be executed. CPL § 690.30 (1) requires that "[a] search warrant must be executed not more than ten days after the date of issuance."

27. The search warrant states that "this warrant shall be deemed executed upon the delivery of the Target Device to a forensic laboratory or facility for analysis" (Seize and Search Warrant Issued by Judge Ward, Bates No. 21447). In addition, the warrant states that, "This warrant must be executed within ten days of the date of issuance" (*Id.* at 21449). Thus, if the warrant was delivered to a forensic laboratory or facility within ten days, it was deemed "executed."

28. It is unclear when the warrant was delivered to a forensic facility. However, if a forensic examination on the cell phone did not commence within ten days of the issuance of the warrant, i.e., August 12th, 2023, the warrant would be in violation of CPL § 690.30(1).

29. In addition, Detective McCarthy's affidavit does not establish probable cause to believe that evidence of the crime of Manslaughter or Criminally Negligent Homicide in the cell phone.

30. Many of his allegations are speculative, i.e., he states only that there "may" be such evidence relating to these crimes. See, e.g., *para 16(u)*: "…I believe that Daniel Penny's cell phone contains communications constituting potential evidence of the crime, specifically there *may* be evidence of, including but not limited to, text messages, voice messages, photographs, and videos from the day of the homicide and after the homicide, or communications or other media relating to his involvement in the crime" (emphasis added); *para 16(z)*: "Daniel Penny's own thoughts, feelings, and beliefs are relevant to this investigation as such communication *may* elucidate Daniel Penny's state of mind and/or motive and intent, on the date of the crime" (emphasis added); *para 16(bb)*: "For the following reasons, I have reason to believe the defendant's cell phone *may* contain information relating to his military experience and training…" (emphasis added); *para 16(dd)*: "…it is reasonable to believe that the defendant *may* have communicated via text message, audio message, photographs, or video about his military experience and training on his cellphone" (emphasis added); also in *para 16(dd):* "…it is more than reasonable to believe that the defendant's messages and photographs that he has posted to his Facebook account about his military training and experience *may* be stored in his cellphone" (emphasis added); *para 16(ff)*: "Therefore, I believe that Daniel Penny's cellphone *may* contain evidence relevant to the crime…" (emphasis added); *para 16(hh)*: "I believe that a search of the target device will reveal information that *may*

shed light on what led to the incident and information regarding the defendant's mindset and participation in the subject crimes" (emphasis added); *para 16(ii)*: "I believe that the target device contains evidence of communications relating to the crime and evidence of the crime, specifically, there *may* be evidence of, including but not limited to, text messages, voice messages, photographs, and videos from the day of the homicide and after the homicide, and/or communications relating to the homicide to other individuals" (emphasis added).

31. As the memorandum of law explains, such language has been found to be lacking in the requisite degree of certainty required for probable cause to believe that evidence of a crime will be found.

32. For the above reasons, the search warrant for the defendant's cell phone must be controverted, and any evidence obtained as a result must be suppressed.

Dated: New York, New York,
October 6th, 2023

Barry Kamins
Barry Kamins
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DANIEL PENNY,

Indictment No.: 72890/23

Defendant.

----------X

MEMORANDUM OF LAW

Introduction

This memorandum of law is submitted in support of the motion to controvert the search warrants (for the defendant's iCloud account and for the defendant's cell phone) as lacking in probable cause and violating the parameters of CPL § 690.30(1).

Warrants Were Executed in Violation of CPL § 690.30(1).

The Criminal Procedure Law imposes clear requirements concerning when a search warrant must be executed. CPL § 690.30(1) requires "[a] search warrant *must* be executed not more than ten days after the date of issuance" (emphasis added). This section, along with its predecessor statute, Code of Criminal Procedure § 802, "act[s] as a statute of limitation regarding the execution and return of search warrants" so "[i]f the warrant is not executed within that [ten-day] period, the warrant automatically falls" (*People v. Santora*, 233 N.Y.S.2d 711, 712 (Sup. Ct. 1962); See also, *Preiser, Practice Commentary, McKenney's*, CPL § 690.30 ("Obviously, a search conducted pursuant to a warrant that has expired is not conducted pursuant to the warrant.")).

While a search warrant for physical property, e.g., a gun, stolen property, or drugs, is a one-step process, and the warrant is executed when the physical property is seized, a search for digital evidence is a two-step process.

The first step occurs when the police either enter a location to be searched and seize the electronic storage device, e.g., computer or cell phone, implicated by the warrant or serve the warrant on a service provider. The second stage occurs when law enforcement conducts a forensic examination of the seized digital storage device or a defendant's email or iCloud account. The second stage is normally conducted at a forensic laboratory or facility.

Over the last few years, an issue has arisen as to the meaning of "execution" with respect to the two-step process of examining digital evidence. In this content, "execution" is an ambiguous term. It could refer to (1) the initial service of the warrant; (2) the seizure of a digital device; (3) the commencement of a forensic examination; or (4) the completion of a forensic examination.

Thus, in this case, the question arises *when* the warrants for the defendant's iCloud account and cell phone were "executed" and whether the execution complied with the ten-day requirement of CPL § 690.30(1).

The search warrant authorizing a search of the defendant's iCloud account was signed on May 30th, 2023, authorizing a search of that account from November 1st, 2022, through May 20th, 2023, for various information. The warrant stated that it was deemed "executed" when it was served upon Apple, Inc. and that subsequent review was deemed "analysis" (iCloud Search Warrant Issued by Judge Rodney, Bates No. 13671). In addition, the warrant stated that the results of the warrant were to be provided to the Manhattan District Attorney's Office no later than June 13th, 2023.

The search warrant authorizing a search of the defendant's cell phone was signed on August 2nd, 2023, authorizing a search for certain communication contained within the phone from November 1st, 2022, through August 2nd, 2023. The warrant stated that it shall be "deemed" executed upon the delivery of the cell phone to a forensic laboratory or facility for analysis (Seize and Search Warrant Issued by Judge Ward, Bates No. 21447). Thus, if the warrant was delivered to a forensic facility or laboratory within ten days, it was deemed "executed" (*id.* at Bates No. 21447).

It is the defendant's position that each warrant was in violation of CPL § 690.30 (1) because the warrants were deemed "executed" when they were either served on a provider, i.e., the iCloud warrant, or delivered for forensic examination, i.e., the cell phone warrant.

Although the term "executed" is not defined in the Criminal Procedure Law, nor does it state when a warrant is to be considered "executed," the term has been defined to mean "performed" or "completed" (*Black's Law Dictionary*, *11th Ed*., 2019). Thus, it would be a legal fiction to "deem" a warrant executed on the date that it is initially issued. The terms "issuance" and "execution" are separate and distinct terms; the argument that a warrant can be "deemed" executed at the same time is it issued renders the term "executed" meaningless. One court has rejected that interpretation, and instead, has "adhered to the statutory language contained in CPL § 690.30(1)" (*People v. Nurse*, 190 N.Y.S3d 601, 2023 N.Y. Slip Op. 23167 (Sup. Ct. 2023)).

It is unclear when the iCloud warrant was served on Apple, Inc. While the cell phone was seized on August 2nd, 2023, it is also unclear when the cell phone warrant was delivered to the forensic facility. However, it is the defendant's position that if a forensic examination of the iCloud account was not, at least, commenced within ten days (June 9th, 2023), that warrant would be in violation of CPL § 690.30(1). In addition, if a forensic examination of the cell phone did not

commence within ten days (August 12th, 2023), that warrant would be in violation of CPL § 690.30(1).

At present, there is a conflict between appellate courts on the definition of "execution" with respect to search warrants involving digital evidence. With respect to such warrants, the First Department has upheld warrants containing the phrase "the warrant is deemed executed at the time of its issuance" (*People v. Ruffin*, 178 A.D.3d 455, 115 N.Y.S.3d 310 (1st Dept. 2019) (phone was already in custody at the time the warrant was issued); *People v. Blue*, 202 A.D.3d 546, 161 N.Y.S.3d 89, leave to appeal granted, 39 N.Y.3d 984, 201 N.E.3d 807 (1st Dept. 2022) (phone was already in custody at the time the warrant was issued)).

The Third Department, however, has interpreted the term "execution" differently. In *People v. Kiah*, a search warrant was issued authorizing a search of a cell phone. The Government disclosed that the examination of the phone was completed nineteen days after the warrant was issued. The Court suppressed information obtained from the phone, holding that "the warrant was not executed within the ten-day limit for execution of a search warrant that is plainly imposed by statute" (*People v. Kiah*, 156 A.D.3d 1054, 67 N.Y.S.3d 337 (3rd Dept. 2017)).

In *People v. Nurse*, the electronic devices were brought to the forensic laboratory within ten days of the issuance of the warrants, but the information was extracted more than ten days after the issuance of the warrant. The court held that the warrant was not executed within the ten-day limit in CPL § 690.30(1) (*People v. Nurse*, 80 Misc. 3d 286, 190 N.Y.S.3d 601 (N.Y. Sup. Ct. 2023, Sciarrino, J.)).

In a subsequent, unreported decision by the same court, the judge denied a motion for re-argument holding that "a search of digital material authorized by a search warrant can be deemed 'executed' at the *earliest*, once the search of the relevant electronic device(s) has commenced"

(*People v. Nurse*, 80 Misc. 3d 286, 190 N.Y.S.3d 601 (N.Y. Sup. Ct. 2023, Sciarrino, J.), emphasis added).

The New York Court of Appeals has granted leave in a case that has raised this specific issue. In *People v. Blue*, the defendant was arrested on August 27th, 2012, and his cell phone was seized incident to the arrest. On September 5th, 2012, a search warrant was issued authorizing the police to conduct a forensic examination and search of the phone. The warrant stated that it was "deemed executed at the time of issuance." Although the forensic examination of the phone occurred more than ten days after issuance of the warrant, the Appellate Division upheld the warrant noting that (1) the warrant was deemed executed at the time it was issued and (2) that the phone had already been in police custody. The court cited a prior case in which a similar warrant was upheld when the defendant's phone was also previously in police custody (*People v. Ruffin*, 178 A.D.3d 455, 115 N.Y.S.3d 310 (1st Dept., 2019)). The Court of Appeals granted leave in *Blue* (*People v. Blue*, 202 A.D.3d 546, 161 N.Y.S.3d 89 (1st Dept., 2022)).

Unlike *Ruffin* and *Blue*, the phone in this case had not been seized before the warrant was issued and, in fact, the warrant was issued *after* the defendant was indicted. This Court should not indulge the legal fiction that a warrant can be "deemed" executed on the date that it was issued. Therefore, the defendant's motion to exclude/suppress any evidence seized as a result of the iCloud warrant and cell phone warrant should be granted.

The Allegations in the Affidavit in Support of Warrants Did Not Establish Probable Cause.

No search warrant[10] may be issued unless it is supported by probable cause that an offense has been or is being committed and that evidence of criminality may be found in a certain location (*People v. Bigelow*, 66 N.Y.2d 417, 488 N.E.2d 451 (1985); U.S. Const., Amend. IV). The United States Supreme Court has noted that the probable cause standard is "incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances" (*Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003)). A court will controvert a search warrant, however, when the affidavit in support of a warrant raises allegations that, at best, are "equivocal and suspicious"; this proof is insufficient to support probable cause (*People v. Dantzig*, 40 A.D.2d 576, 334 N.Y.S.2d 451 (4th Dept. 1972)). The Supreme Court has placed particular emphasis on the significant privacy interest that an individual has in information stored in their cellular phones (*Carpenter v. United States,* 138 S.Ct. 2206, 201 L. Ed. 2d 507 (2018); *Riley v. California,* 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)).

In his affidavit in support of both a warrant to search the defendant's iCloud account and a warrant to search the defendant's cell phone, Det. McCarthy repeatedly states his belief that evidence of the crimes of Manslaughter and Criminally Negligent Homicide *may* be found in both the iCloud account and in the cell phone (See *para. 16, 28*, affirmation). This speculative nature

[10] In particular, the Supreme Court has cautioned against the excessive use of Trap and Trace/Pen Registry warrants, as the utilization of this technology is highly intrusive, "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations' (citing, *Riley*, 573 U.S., at 2495, 134 S.Ct., at 2494–2495 (quoting *Boyd*, 116 U.S., at 630, 6 S.Ct. 524)…With access to CSLI, the Government can now travel *back in time* to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years (*Carpenter v. U.S.*, 138 S.Ct. 2206, 2217–19 (U.S., 2018), emphasis added).

of McCarthy's statement – that there *may* be evidence of crimes – is a type of factual allegation that does not rise to the level of probable cause.

In *United States v. Dyer*, a statement by the victim that there *may* be drugs in the defendant's house was held to be lacking in probable cause and the type of allegation upon which the police cannot rely (*United States v. Dyer*, No. 1:17-CR-226, 2019 WL 6218899 (M.D. Pa. Nov. 21, 2019), aff'd, 54 F.4th 155 (3rd Cir. 2022)). In *United States v. Griffith*, the court similarly rejected an officer's affidavit in which he stated that: the defendant *might* own a cell phone; the phone *might* be found in his residence; and if so, the phone *might* retain incriminating communication or other information about a crime committed more than a year earlier (*United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017)). In *Commonwealth v. Broom*, the court rejected an affidavit in support of a search warrant which contained general, conclusory statements that, in the officer's opinion, the defendant's cell phone would "likely" contain information pertinent to an investigation (*Com. v. Broom*, 474 Mass. 486, 52 N.E.3d 81 (2016); See also, *People v. Corrado*, 22 N.Y.2d 308, 239 N.E.2d 526 (1968); *People v. Vassallo*, 46 A.D.2d 781, 360 N.Y.S.2d 450 (1974)).

The affidavits in support of the warrants are also premised on the notion that Mr. Penny was using his cell phone at the time of the crime. To support this belief, Detective McCarthy offers a potpourri of conclusory assertions and questionable inferences. He begins by asserting that: "Based on the defendant's statement to me on May 1st, 2023, I know that the suspect was using his cellphone immediately prior to placing Jordan Neely" in a chokehold (Detective Brian McCarthy's Affidavit in Support of SW for Cellular Device, Exhibit 1, Bates No. 21456, para. 16(h)). Despite his surefootedness, the detective inexplicably fails to explain the statement he purports to be referring to. He goes on to recount his review of body-worn camera footage showing

Mr. Penny "holding his cellphone in his left hand" in the aftermath of this ordeal (*id.* at Bates No. 21456, para. 16(i)). Although he observed that the phone was powered on and "the keyboard appears to be displayed," he does not claim to see Mr. Penny typing or manipulating the phone's features in anyway (*id.* at Bates No. 21457, para. 16(i)). McCarthy goes on to recount Mr. Penny "holding his phone in his hand" upon exiting the patrol car at the 5th Precinct, and later requesting to make a phone call (*id.* at Bates No. 21457, para 16(j)); an unextraordinary request for someone who finds themselves in police custody following a fatal encounter. Moreover, there is no assertion that a call was ever actually attempted. Finally, McCarthy cites to evidence that Mr. Penny *received* incoming calls and messages at unspecified times "on the date of the crime," sent messages "approximately an hour and half after the crime occurred," and made two outgoing calls around 9 P.M., "six to seven hours after the crime occurred" (*id*. at Bates no. 21457, para. 16(l)).[11]

As McCarthy himself opined: "What is clear from [the] records is that Daniel Penny was using his cellular device on the date of the crime" (*id*. at Bates no. 21457, para. 16(l)). Certainly, this point is uncontested. What is lacking, however, is any suggestion that Mr. Penny was using his phone in furtherance of the commission of the alleged crime, or that evidence relevant to the crime itself would be found on the phone. Separating the wheat from the chaff, the precedent the Government advocates for with these warrants is one where the 4th Amendment rights of anyone accused of a crime, who also possesses a cell phone i.e., everyone, would be sacrificed at the altar of unchecked government inquisitiveness.

Probable cause that evidence of the subject crime may be uncovered in the place to be searched may also not be based on speculation. In this regard, the affidavit in support of the

[11] In a later paragraph, Detective McCarthy sites to evidence obtained via the iCloud warrant indicating that the defendant was using iMessage on his cell phone in the aftermath of this incident (*id.* at Bates No. 21458, para. 16(t)). There is no indication of whether Mr. Penny was the sender of any of these messages.

iPhone search is further lacking. First, in his affidavit, Detective McCarthy spells out his lack of success in retrieving Mr. Penny's iMessages from his iCloud:

> I am informed by Ryan Strick, a Digital Evidence Analyst employed by the New York County District Attorney's Office, that, while Apple, Inc. provided an iMessage log, which is a record that contains information about when an iMessage was created, Apple, Inc., did not provide the substance of the messages, indicating to Mr. Strick that Daniel Penny did not "backup" his iMessages to his iCloud account (*id.* at Bates no. 21458, para. 16(s)).

Yet, Detective McCarthy still sought to obtain the iMessages from Mr. Penny's replacement phone, hoping that Mr. Penny may have transferred information from the old phone to his new phone.[12] As the 4th Amendment requires that warrants be informed by facts, not hopeful speculation, this aspect of the supporting affidavit is further lacking in probable cause.

The affidavits and the allegations contained therein seeking to establish probable cause to believe Mr. Penny's iCloud account and iPhone contain evidence of a crime are lacking in probable cause. While the allegations profess a level of suspicion, they fail to raise "the level of inference from suspicion to probable cause" (*People v. Corrado*, 22 N.Y.2d 308, 239 N.E.2d 526 (1968)).

Affidavits in Support of Warrants Lack Particularity.

A warrant may not be issued unless the information submitted in support there of establishes probable cause *and* sets out the scope of the authorized search with "*particularity*" (*Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 1856, 179 L. Ed. 2d 865 (2011), emphasis added). The particularity requirement requires that the warrant specify: the offense for which

[12] In his affidavit in support of the Pen Register/Trap and Trace warrant, attached as "Exhibit 1" to the Seize and Search iPhone warrant issued by Judge Ward, Detective McCarthy avers:

> I am further informed by Mr. Strick that the substance of the iMessages may still be obtainable if the physical device is seized. Specifically, because Daniel Penny did not use the iCloud to backup his messages, *there is reason to believe* Daniel Penny used a different method to transfer his iMessages from his old device to his new device by physically "pairing" the two devices (Affidavit in Support of SW and Pen Register/Trap and Trace Application submitted by Detective Brian McCarthy, Bates No. 21489, para. 16(u), emphasis added).

probable cause exists; describe the place(s) to be searched; and specify the "items to be seized by their relation to [the] designated crimes (*United States v. Galpin*, 720 F.3d 436 (2nd Cir. 2013), quoting *United States v. Williams*, 592 F.3d 411 (4th Cir. 2010)). Courts have warned of the need for "heightened sensitivity to the particularity requirement" in the context of digital searches (*Galpin*, supra).

> The chief evil that prompted the framing and adoption of the Fourth Amendment was the indiscriminate searches and seizures conducted by the British under the authority of general warrants; to prevent such general, exploratory rummaging in a person's belongings and the attendant privacy violations, the Fourth Amendment provides that a warrant may not be issued unless probable cause is properly established and *the scope of the authorized search is set out with particularity* (*id.*, emphasis added).

The iCloud warrant specifies a search period of November 1st, 2022, 12:00 AM EST, through May 20th, 2023, 11:59 PM EST (iCloud SW Issued by Judge Rodney, Bates No. 13669), whereas the cell phone warrant extends this period through August 2nd , 2023 (iPhone Seize and Search Warrant Issued by Judge Ward, Bates No. 21446, para. b(2)); and the trap and trace warrant, indefinitely (Pen Register/Trap and Trace Warrant Issued by Judge Rodney, Bates No. 21522). The incident occurred on May 1st, 2023. Therefore, the timeframe provided is well before and after this incident involving Mr. Penny.

"The pivotal question here is whether there was probable cause that evidence of the crimes specified in the warrant would be found in the broad areas specified" (*People v. Thompson*, 178 A.D.3d 457, 116 N.Y.S.3d 2 (2nd Dept. 2019)). It is beyond question that in this case, a search for evidence *preceding* the incident cannot contain evidence of the incident in question. Conversely, a search encompassing the weeks and months after the incident (or indefinitely in the case of the trap and trace) is too remote to allow for an intrusion so vast as the rummaging through every aspect of Mr. Penny's life in the hopes of finding something incriminating.

The sort of protracted timeframe authorized by the instant warrants was soundly rejected in *People v. Thompson* (*id.*). In *Thompson,* the warrant had authorized a six-to-seven-month search of defendant's browsing history, and a search of his emails unconstrained by any time limitation. The First Department held that "[t]he information available to the warrant-issuing court did not support a reasonable belief that evidence of the crimes specified in the warrant would be found" in the various locations of defendant's cell phone that the warrant authorized police to search (*Id.* at 458, citing *United States v. Rosa*: warrant lacking requisite specificity for tailored search of defendant's electronic media implicated "Fourth Amendment's core protection against general searches" (*United States v. Rosa*, 626 F.3d 56 (2nd Cir. 2010)). "While it was of course *possible* that defendant's phone contained evidence of the specified offenses that predated [the offense], there *were no specific allegations to that effect*" (*People v. Thompson*, 178 A.D.3d 457, 116 N.Y.S.3d 2 (2nd Dept. 2019), emphasis added).

Here, Detective McCarthy's attempts to justify the excessive length and scope of the search, an over six-month timeframe, as necessary to uncover any extremist associations that might speak to Mr. Penny's *motive* in committing alleged crimes (iPhone Seize and Search Warrant Issued by Judge Ward, Bates No. 21459, para. 16(x)). Putting aside the fact that the Detective cites no evidence suggesting Mr. Penny has any extremist beliefs or associations, the crimes charged sound in recklessness and negligence. In other words, they involve no intentional component where motive could, with any likelihood, be an issue. There is no relevance to anything that occurred on Mr. Penny's cell phone before the incident, as there are no suggestions of premeditation, and no suggestion that Mr. Penny could have anticipated a chance encounter with the deceased.

In this context, the warrant applications should be taken for what they are: flawed attempts to upend Mr. Penny's 4th Amendment rights, in the hope of uncovering unflattering information about his communications, dealings and associations. Certainly, the Government would be in a more enviable position if they could unearth some tawdriness undermining Mr. Penny's character. The problem is the affidavits supporting the Government's overly broad search authorization are devoid of any facts suggesting that Mr. Penny was anything but an ordinary college student hoping to endure his afternoon commute unhindered by the volatile Mr. Neely. Instead, the Government sought, and the issuing court improperly endorsed, a fishing expedition designed to find *anything* that might undermine Mr. Penny's *credibility generally.*

For example, the Detective indicated in his affidavit as follows,

> Further, Daniel Penny has put his state of mind on the date of the crime into question. I reviewed a New York Post article, published on May 20th, 2023, in which Daniel Penny stated "*This had nothing to do with race... I'm not a white supremacist*." Therefore, any such images or videos from groups promoting violence or extremist ideals, or Daniel Penny's membership in, or communications with a member of, or his affiliation with, any group promoting violence or extremist ideals, or searches on the internet, or bookmarking of any such groups or subscription to any such ideals or bookmarking of any such websites needs to be investigated *in order to refute or corroborate Daniel Penny's claims* (iPhone Seize and Search Warrant Issued by Judge Ward, Exhibit 1, Bates No. 21459, para. 16(y), emphasis added). [13]

This is a far cry from uncovering evidence of an alleged crime. Nonetheless, the Detective continued:

> In order to further the investigation, it is necessary to gather information pertaining to Daniel Penny's state of mind and/or motive and intent during the commission of the above-described crime. Whether Daniel Penny saved any images or videos from groups promoting violence or extremist ideals, or was a member of, or communicated with a member of, or affiliated with, any group promoting violence or extremist ideals, or

[13] The *NY Post* interview referenced in Detective McCarthy's affidavit occurred following the deceased's widely publicized Harlem funeral, wherein the Rev. Al Sharpton, delivering the eulogy, remarked, referring to Mr. Penny, "when they choked Jordan Neely, they put their arm around all of us." Craner, Maria and Meko, Hurubie, "At Harlem Funeral for Jordan Neely, an Outpouring of Grief" (*New York Times*, May 19th, 2023). Elsewhere in the same article, the word "lynching" is repeatedly used to describe the killing of Neely by Mr. Penny. Such aspersions against Mr. Penny's character were widespread by the time he issued the public denial cited by Detective McCarthy.

> searched on the internet, or bookmarked any such groups or subscribed to any such ideals or bookmarked any such websites, would help elucidate Daniel Penny's motive and/or intent on the date of the crime. Based on my personal and professional experience, I know that cellular telephones are capable of and often utilized to capture and save images, take photographs and videos, send and receive communications via text message, Whatsapp [sic], and iMessage, conduct internet searches, and bookmark websites. I know that such data can be accessed pursuant to a search warrant of a cellular device (iPhone Seize and Search Warrant Issued by Judge Ward, Exhibit 1, Bates No. 21459, para. 16(x)).

As Judge Dwyer wrote in *People v. Musha*:

> [N]othing in the detective's application provides probable cause to believe that the phone contained such material. Common experience indicates that photographs of family members will be found on a cell phone. *But it cannot be said that common experience supports a* conclusion that the cell phone of one who committed sex crimes against a family member would contain proof of internet searches *showing a motive to commit such crimes* (*People v. Musha,* 69 Misc.3d 673 (N.Y. Sup. Ct. 2020), emphasis added).

While *Musha* involves facts starkly different from those here, perhaps even the Government would concede that the probability of recovering evidence of a criminality from a cell phone search is generally more likely in a case such as *Musha*, involving predatory sex crimes, than one arising from a chance encounter on the transit system. Nonetheless, the court in *Musha* was *unwilling* to endorse the sort of carte blanche intrusion the Government have sought in Mr. Penny's case.

The lack of warrant particularity is further underscored by those portions of the application incorporating unspecific references to "at or around the time of the" alleged crimes (iPhone Seize and Search Warrant Issued by Judge Ward, Bates No. 21464, para. 24(b); Bates No. 21465, para. 24(b)(2) and 24(b)(4); Bates No. 21465, para. 24(c); Bates No. 21465, para. 24(d)(1)). In other portions, no date or time is referenced at all (iPhone Seize and Search Warrant Issued by Judge Ward, Bates No. 21464, para. 24(b)(1); Bates No. 21465, para. 24(b)(3) and para. 24(b)(5); Bates No. 21465, para. 24(d)(2) and para. 24(d)(3); the trap and trace, indefinitely (Pen Register/Trap and Trace Warrant issued by Judge Rodney, Bates No. 21522)). "The particularity requirement of the Fourth Amendment protects the magistrate's determination regarding the permissible scope of

the search; thus, to be valid, a search warrant must be specific enough to leave *no discretion* to the executing officer" (*People v. Williams*, 79 Misc. 3d 809, 188 N.Y.S.3d 417 (N.Y. Sup. Ct. 2023), emphasis added).

In this instance, the incident date and time are known precisely. As such, the application of how far to look *after* the incident occurred must be pled with *specificity*. The word "about" by definition lacks such specificity. Furthermore, "*at or around*" can be construed as including the hours, and perhaps day, both *preceding* and following this incident. The lack of particularity in the affidavits is more troubling since the facts of the case, and the ensuing charges, obviate the element of intent, and render moot any concern over motive. It is thus difficult to conceive of what information could be recovered from Mr. Penny's phone before the incident that would shed light on his alleged recklessness or negligence in subduing the volatile Mr. Neely ("[A] search warrant does not satisfy Fourth Amendment particularity rule if the text of a search warrant fails to accomplish ends of being sufficiently definite, when viewed with common sense, to limit a search to its intended area and to identify what items may be seized" (*People v. Musha,* 69 Misc.3d 673 (N.Y. Sup. Ct. 2020)).

Furthermore, the cell phone search warrant was not sufficiently particularized as it authorized the Government to "enter, access, download, extract, retrieve… and otherwise seize the electronically stored information ('ESI') contained in the TARGET DEVICE…" (iPhone Seize and Search Warrant, Issued by Judge Ward, Bates No. 21445, emphasis added (see, *People v. Covlin*, 58 Misc. 3d 996, 70 N.Y.S.3d 342 (N.Y. Sup. Ct. 2018).

Based on the failure to show a likely motive may exist, or that information contained in a broad search of over six months will likely uncover evidence, the Court should find this warrant application overbroad and lacking particularity. Consequently, any evidence obtained based on this unlawful search should be suppressed.

Conclusion

For the reasons stated above, the motion to controvert the warrants should be granted and any evidence obtained from their execution must be suppressed.

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