

Yours, etc.

JANET E. SABEL
Attorney for the Defendant
The Legal Aid Society
Criminal Defense Practice

#####, ##### Floor
#####, New York #####

Of Counsel

Phone: #####
Email: #####

To: Hon. #####
District Attorney
County

#####, New York #####
Attn: ADA #####

Clerk of the Court
County

#####, New York #####

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY: CRIMINAL TERM, PART

-----X

THE PEOPLE OF THE STATE OF NEW YORK, :

-against- : AFFIRMATION

##, :
Ind./Dkt. No. #####

Defendant. :
-----X

##, an attorney admitted to practice law in the courts of this State, hereby affirms under penalty of perjury that the following statements are true, except for those made upon information and belief, which I believe to be true:

1. I am associated with JANET E. SABEL, the attorney of record for the defendant. I am familiar with the facts of this case and make this affirmation in support of defendant's motion. Unless otherwise specified, all allegations of fact are based upon information and belief, the sources of which include inspection of the record of the case, conversations with Assistant District Attorneys, the defendant, and counsel's own investigations.
2. The defendant respectfully requests an order for access to premises pursuant to C.P.L. §245.30(2). That statute provides:

Without prejudice to its ability to issue a subpoena pursuant to this chapter and after an accusatory instrument has been filed, the defendant may move, upon notice to the prosecution and any impacted individual, agency, or entity, for a court order to access a crime scene or other premises relevant to the subject matter of the case, requiring that counsel for the defendant be granted reasonable access to inspect, photograph, or measure such crime scene or premises, and that the condition of the crime scene or premises remain unchanged in the interim. The court shall consider defendant's expressed need for access to the premises including the risk that defendant will be deprived of evidence or information relevant to the case, the position of any individual or entity with possessory or ownership rights to

the premises, the nature of the privacy interest and any perceived or actual hardship of the individual or entity with possessory or ownership rights, and the position of the prosecution with respect to any application for access to the premises. The court may deny access to the premises when the probative value of access to such location has been or will be preserved by specified alternative means. If the court grants access to the premises, the individual or entity with ownership or possessory rights to the premises may request law enforcement presence at the premises while defense counsel or a representative thereof is present.

3. The defendant is charged with violating Penal Law §[##### CURRENT TOP CHARGE] and various other charges.
4. The defendant was arraigned in Criminal Court on [##### ARRAIGNMENT DATE].
5. The defendant requests an order directed to [##### SPECIFY INDIVIDUAL, AGENCY OR ENTITY IN POSSESSION OR CONTROL], requiring that counsel for the defendant and a defense investigator be granted reasonable access to inspect, photograph or measure the premises at [##### SPECIFY LOCATION], on or before [##### SPECIFY DATE, OR OCCURRENCE OF SOME EVENT IN CASE].
6. Notice of this motion has been provided to the prosecution and to the impacted individual, agency, or entity. [##### SPECIFY EACH INDIVIDUAL AND/OR ENTITY SERVED AND DATE(S) OF SERVICE OF MOTION.]
7. These premises are relevant to the subject matter of the case insofar as [##### EXPLAIN CONNECTION OF LOCATION TO CASE].
8. The defense has attempted to obtain voluntary access to the premises without success. Specifically, [##### EXPLAIN PRIOR EFFORTS TO OBTAIN VOLUNTARY ACCESS, WHY THEY FAILED, OTHER PERTINENT CIRCUMSTANCES, ETC.].
9. Police investigators have already had full access to the premises and completed their evidence collection. Likewise, the prosecution will likely avail itself of the unimpeded

access that is normally given to law enforcement representatives. The Legislature has enacted this statutory provision to ensure that there will be fairness and parity of access.

10. Defense counsel and a defense investigator need access to these premises in order to properly represent the defendant and to seek information relevant to the case. [##### HIGHLIGHT ANY CASE-SPECIFIC REASONS WHY ACCESS IS ESPECIALLY IMPORTANT – BUT, OBVIOUSLY, ASSESS STRATEGIC RISKS OF FACTUAL STATEMENTS, COMMITTING TO A DEFENSE, ETC.] In enacting C.P.L. §245.30(2), the Legislature has recognized the fundamental necessity for crime-scene investigations in criminal cases. *See, e.g., Williams v. Washington*, 59 F.3d 673 (7th Cir. 1995)(finding ineffective assistance of counsel in part based upon the failure to investigate “the layout of the home and the relatively crowded conditions”); *Thomas v. Kuhlman*, 255 F.Supp.2d 99 (EDNY 2003); *People v. Donovan*, 184 A.D.2d 654 (2d Dept. 1992); *see also* C.P.L.R. §3120(1)(ii) (inspection right available in civil cases in New York); *State in the Interest of A.B.*, 99 A.3d 782 (NJ 2014) (constitutional right to court-ordered access to investigate); *Henshaw v. Commonwealth*, 451 S.E.2d 415 (Va. App. 1994); *State v. Lee*, 461 N.W.2d 245 (Minn. App. 1990). The defendant hereby contends that court-ordered assistance in obtaining access for these essential purposes is also required in this case under the New York and United States constitutions.

11. Court-ordered access will not result in undue hardship on the individual or entity with possessory or ownership rights. [##### COULD ELABORATE ON WHY IT IS NOT BURDENSOME, BASED ON THE NATURE OF THE LOCATION OR CASE, ETC.] Defense counsel and the defense investigator will act professionally and respectfully at all times and the inspection will be carried out as promptly as possible. Moreover, the statute states that, upon request, the Court may also grant law enforcement presence during the inspection.

12. Under the circumstances of this case, the Court should reject any contention that might be raised that an access order be denied because the probative value of access will be adequately “preserved by specified alternative means.” Substituted viewing through photographs, video recordings, or measurements taken by police or property owners would

be insufficient. It is vital that defense counsel and the defense investigator personally see the location, since firsthand observations are required to fully understand the circumstances of the case and to assess and prepare potential defenses. Photographs are an inadequate substitute. As the court decisions cited above confirm, personal access by counsel can often be essential to competent and effective representation. Police or property owners may omit to photograph important features, specific matters/features to be inspected may be based on privileged client information, and there is no substitute for firsthand observations of the layouts and surrounding context. As noted, counsel and the defense investigator will exercise the utmost respect, professionalism and consideration at all times.

13. Defendant therefore moves for an order requiring preservation of this evidence. We also respectfully draw the Court's attention to the statutory directive in C.P.L. §245.30(2) that an order should specify that "premises remain unchanged in the interim."

14. Defendant also asks the Court to order such other and further relief as it may deem proper.

WHEREFORE, the affiant respectfully requests this Court to grant the relief sought herein and reserve to defendant the right to amend or supplement this motion and to grant such other and further relief as the Court may deem just and proper.

Dated: #####
#####, New York

Yours, etc.

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