

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

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THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

##, :

Defendant. :

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NOTICE OF MOTION FOR
DISCOVERY UNDER
C.P.L. §245.30(3)

Ind./Dkt. No. #####

PLEASE TAKE NOTICE that, upon the annexed affirmation of ##### and upon the accusatory instrument and all prior proceedings, the undersigned will move this Court at Part ##### at the courthouse located at #####, New York, on #####, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order pursuant to C.P.L. §245.30(3):

1. Requiring [##### SPECIFY THE PROSECUTION OR ANOTHER INDIVIDUAL, AGENCY OR ENTITY IN POSSESSION OR CONTROL] to make available for disclosure to the defendant [##### SPECIFY THE MATERIAL OR INFORMATION SOUGHT]; and
2. Granting such other relief as this Court may deem proper.

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

[IMPORTANT NOTE TO DEFENSE ATTORNEY – DELETE BEFORE FILING:
Filing a *written motion* for discretionary discovery likely will stop the C.P.L. §30.30 clock [see §§30.30(4)(a), 255.10(1)(c)]. ▪ Also, the motion must be upon notice to any person or entity affected by the order. ▪ Discretionary discovery orders would apply in a few situations where subpoenaing would not work, such as: (1.) where the defense does not know the specifics of what we are subpoenaing (e.g., prior testimony by the DA’s expert in other unrelated cases that we may not know about specifically; or

records of stops/arrests in unrelated cases by the same officer or team, where we do not know the specifics of those cases, etc.). Or (2.) where the information has to be generated by the DA, such as by creating a list of witnesses to an event, etc. Or (3.) to get around the Stored Communications Act which prevents the defense from obtaining online “content” – *i.e.*, the court could order a witness to provide their online account “contents” or to sign an authorization for releasing them. Those things could not usually be done by subpoena.]

Yours, etc.

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

#####, 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 discretionary discovery pursuant to C.P.L. §245.30(3). That statute provides:

The court in its discretion may, upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, order the prosecution, or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the defendant any material or information which relates to the subject matter of the case and is reasonably likely to be material. A motion under this subdivision must be on notice to any person or entity affected by the order. The court may, on its own, upon request of any person or entity affected by the order, modify or vacate the order if compliance would be unreasonable or will create significant hardship. For good cause shown, the court may

permit a party seeking or opposing a discretionary order of discovery under this subdivision, or another affected person or entity, to submit papers or testify on the record *ex parte* or *in camera*. For good cause shown, any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal.

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 THE PROSECUTION OR ANOTHER INDIVIDUAL, AGENCY OR ENTITY IN POSSESSION OR CONTROL], requiring that [##### SPECIFY THE MATERIAL OR INFORMATION SOUGHT] be made available for disclosure to the defendant.
6. Notice of this motion has been provided to [##### SPECIFY EACH PERSON OR ENTITY AFFECTED AND DATE(S) OF SERVICE OF MOTION.]
7. The requested material relates to the subject matter of the case and is reasonably likely to be material, insofar as [##### EXPLAIN CONNECTION OF THE MATERIAL OR INFORMATION TO CASE AND WHY IT COULD BE IMPORTANT – BUT, OBVIOUSLY, ASSESS STRATEGIC RISKS OF FACTUAL STATEMENTS, COMMITTING TO A DEFENSE, ETC.].
8. The request for court-ordered discovery is reasonable and the defendant is unable without undue hardship to obtain the substantial equivalent by other means. Specifically, [##### EXPLAIN WHY EQUIVALENT EVIDENCE IS UNAVAILABLE, OR PRIOR EFFORTS TO OBTAIN ITEMS, OR OTHER PERTINENT CIRCUMSTANCES, ETC.].
9. The requested court-ordered discovery will not create significant hardship to any person or entity affected by the order. [##### COULD ELABORATE ON WHY IT IS NOT BURDENSOME, BASED ON THE NATURE OF THE EVIDENCE SOUGHT, THE NATURE OF AGENCY OR INDIVIDUAL, ETC.]

10. [##### IF THE INFORMATION SOUGHT IS *NOT* IN TANGIBLE FORM AND REQUIRES CREATION OF A DOCUMENT OR MEMORIALIZATION: Notably, the statute does *not* limit the Court’s authority to granting disclosure of tangible objects or “existing” things. Since C.P.L. §245.30(3) also refers to disclosure of “*information*,” the Legislature has authorized courts to issue orders that require the creation of a document to memorialize information in a form that can be disclosed.]

11. [##### IF THE MATERIALS SOUGHT ARE FROM AN UNRELATED CASE, AND IT IS LIKELY THAT THE COURT OR DA WILL ARGUE THAT MAKES GRANTING DISCOVERY INAPPROPRIATE (*E.G.*, WE SEEK MATERIAL FROM COMPLAINT’S PRIOR UNRELATED CASE, TO SUPPORT JUSTIFICATION OR OTHER DEFENSE; OR, POLICE INVESTIGATED ANOTHER CASE THAT LED THEM TO CLIENT, AND WE WANT TO SHOW LACK OF PROBABLE CAUSE; OR, COMPLAINANT MADE FALSE RAPE ALLEGATION IN UNRELATED CASE; ETC.): Furthermore, it is important to recognize that courts frequently determine that items/information from *factually unrelated* cases are “material” and admissible in the defendant’s case, based on relevance to a “material factual issue” or to a “material” type of impeachment (such as a witness’s possible bias, interest, hostility, reason to fabricate, etc.). The defendant in fact often has the *constitutional right* to introduce the item/information from the “unrelated” case. *See* U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, §6. Many key cases demonstrate this point. *See generally* *Rosario v. Kuhlman*, 839 F.2d 918 (2d Cir. 1988)(tests for “material” factual issues); *People v. Gissendanner*, 48 N.Y.2d 543 (1979)(“peculiar relevance” test for materiality); *see, e.g., People v. Baghai-Kermani*, 84 N.Y.2d 525 (1994)(investigation of unrelated third parties); *People v. Torres*, 169 A.D.3d 1068 (2d Dept. 2019)(interaction with unrelated witness on different date); *People v. Farez*, 150 A.D.3d 528 (1st Dept. 2017)(arrest of unrelated third party); *People v. Hubbard*, 132 A.D.3d 1013 (2d Dept. 2015); *People v. Santos*, 306 A.D.2d 197 (1st Dept. 2003), *aff’d*, 1 N.Y.3d 548 (2003); *People v. Mosby*, 69 A.D.3d 1045 (3rd Dept. 2010); *People v. Bruce*, 219 A.D.2d 662 (2d Dept. 1995); *People v. Lineszy*, 212 A.D.2d 548 (2d Dept. 1995); *People v. Ramos*, 206 A.D.2d 260 (1st Dept. 1994). Granting disclosure of materials relating to a separate case is, therefore, fully appropriate.]

12. [##### IF THE PREVIOUS PARAGRAPH IS USED AND THE ORDER IS DIRECTED TO THE PROSECUTION OR ANOTHER LAW ENFORCEMENT AGENCY UNDER ITS CONTROL, ALSO ADD: Moreover, the baseline provision of C.P.L. §245.20(1) already requires the prosecution to provide “all” materials relating to the “subject matter of the case” – so “discretionary” discovery orders to the prosecution under C.P.L. 245.30(3) logically must have broader applicability and can reach materials in *factually distinct* cases.]

13. Defendant therefore moves for an order requiring disclosure of this evidence.

14. Defendant also respectfully 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.

JANET E. SABEL
Attorney for the Defendant
The Legal Aid Society
Criminal Defense Practice
#####, ##### Floor
#####, New York #####

Of Counsel

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