SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: ###### DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,	:	ORDER TO SHOW CAUSE – EXPEDITED REVIEW
-against-	:	OF PROTECTIVE ORDER RULING [C.P.L. §245.70(6)]
###### ######,	:	Ind./Dkt. No. ######
	:	
Defendant-Petitioner.		

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Defendant-Petitioner, ###### ######, having unsuccessfully opposed a protective order issued in the above-named case by Hon. ###### ######, in Supreme Court on ###### ######, seeks expedited review of that ruling pursuant to C.P.L. §245.70(6).

Now, upon filing and reading of defendant-petitioner's proposed Order to Show Cause and the affirmation of defense counsel, and pursuant to C.P.L. §245.70(6), it is hereby:

ORDERED, that Respondent District Attorney SHOW CAUSE at this courthouse on ###### ######, at ###### ###### o'clock, or as soon thereafter as counsel may be heard, why the protective order granted by Hon. ###### ######, pursuant to C.P.L. §245.70, should not be vacated and discovery of the information at issue not be granted to defendant-petitioner without protective order; and it is further

ORDERED, that service of a copy of this Order and the papers upon which it is based be made upon Respondent District Attorney, on or before ###### ######, by delivering copies of such papers by hand to the Office of the District Attorney; and it is further

ORDERED, that service of a copy of this Order and the papers upon which it is based be made upon Hon. ###### ######, on or before ###### ######, by delivering copies of such papers by hand.

SO ORDERED,

_____

Justice of the Appellate Division

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

[IMPORTANT NOTE TO DEFENSE ATTORNEY – DELETE BEFORE FILING: Please consult staff involved in rollout and implementation of Article 245 about strategic considerations regarding when it is appropriate to seek expedited review.]

######
Attorney for the Defendant
######, ###### Floor
######, New York ######

Hon. ###### ######
District Attorney of ###### County
######, ###### Floor
######, New York ######
Attn: Assistant District Attorney ###### ######

Hon. ###### ######
Justice of the Supreme Court
######, ###### Floor
######, New York ######

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: ###### DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

-against- : AFFIRMATION

######, :

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

:

Defendant-Petitioner.

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######, 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 application, by order to show cause, for expedited review pursuant to C.P.L. §245.70(6) of the protective order granted by Hon. ###### ######, in Supreme Court on ###### ######.

2. 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 court, the defendant, and counsel's own investigations.

3. The defendant respectfully requests expedited review pursuant to C.P.L. §245.70(6). That statute provides as follows:

> *Expedited review of adverse ruling*. (a) A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order under this section relating to the name, address, contact information or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken.
>
> (b) Such review shall be sought within two business days of the adverse or partially adverse ruling, by order to show cause filed with the intermediate appellate court. The order to show cause shall in addition be timely served

> on the lower court and on the opposing party, and shall be accompanied by a sworn affirmation stating in good faith (i) that the ruling affects substantial interests, and (ii) that diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed or that no accommodation was feasible; except that service on the opposing party, and a statement regarding efforts to reach an accommodation, are unnecessary where the opposing party was not made aware of the application for a protective order and good cause is shown for omitting service of the order to show cause on the opposing party. The lower court's order subject to review shall be stayed until the appellate justice renders a determination.
>
> (c) The assignment of the individual appellate justice, and the mode of and procedure for the review, shall be determined by rules of the individual appellate courts. The appellate justice may consider any relevant and reliable information bearing on the issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to the lower court. The appellate justice may dispense with the issuance of a written opinion in rendering his or her decision, and when practicable shall render decision and order expeditiously. Such review, decision and order shall not affect the right of a defendant, in a subsequent appeal from a judgment of conviction, to claim as error the ruling reviewed.

4. The statute does not specify the standard of review that the appellate justice applies, but we respectfully submit that it is *de novo* review, without "deference" to the lower court. For example, *de novo* is the applicable standard of review in the analogous context of C.P.L. §530.30 bail reviews by a superior court judge when an action is pending in local criminal court – and that statute also does not specify a standard of review. *See* Preiser, "Practice Commentary" to CPL 530.30 ("This section . . . provides an avenue for *de novo* review of securing orders fixed by all local criminal courts where defendants allege the terms to be unlawful or overly severe"). Moreover, deference to the lower court would not fit the legislative scheme, since the appellate justice "may consider any relevant and reliable information bearing on the issue" – so he or she is free to consider or request *additional* evidence or materials that were not before the lower court judge. This feature of the review proceeding further confirms that it uses a *de novo* review standard. Another ground for concluding that it is *de novo* review is that protective order determinations can be based on "constitutional rights or limitations" [*see* 245.70(4)] – and appellate judges do not "defer" to lower court judges on rulings of law.

5. In this case, the defendant is charged with violating Penal Law §[###### CURRENT TOP CHARGE] and various other charges.

6. The defendant was arraigned in Criminal Court on [###### ARRAIGNMENT DATE].

7. On [######DATE], the prosecution notified defendant that, pursuant to a protective order granted by Hon. [####### ##### JUDGE], it was withholding [###### DESCRIBE SUBJECT MATTER OF PROTECTIVE ORDER AND THE WITNESS'S ROLE IN THE CASE, ETC.].

8. On [######DATE], the defendant "unsuccessfully opposed" that protective order – as required when seeking expedited review under C.P.L. §245.70(6)(a). Defense counsel argued that the prosecution had not shown "good cause" for the protective order, and that the protective order was unnecessarily and unduly restrictive, because [######SUMMARIZE ARGUMENT, INCLUDING WHETHER "COUNSEL-ONLY" FALLBACK WAS PROPOSED]. The lower court ruled [######SUMMARIZE RULING, IF APPLICABLE, INCLUDING IF THERE WAS ANY WRITTEN DECISION OR IT WAS ORAL].

9. [######IF APPLICABLE: We also submit, on information and belief, that the lower court did not conduct the "appropriate hearing" required by C.P.L. §245.70(3) on the protective order application within three business days. ######SUMMARIZE ARGUMENT WHY IT WAS NOT "APPROPRIATE," OR WAS UNTIMELY, OR WAS NOT HELD].

10. All of the other requirements for expedited review are also satisfied. The protective order "relat[es] to the name, address, contact information or statements of a person," as required by C.P.L. §245.70(6)(a). This application for expedited review is being sought within two business days of the adverse or partially adverse ruling, and it has been timely served on the lower court and on the opposing party, as required by C.P.L. §245.70(6)(b).

11. Furthermore, as required by C.P.L. §245.70(6)(b), counsel hereby affirms in good faith that the challenged ruling "affects substantial interests" because [######SUMMARIZE IMPORTANCE – IF NOT DONE FULLY ABOVE].

12. Counsel also hereby affirms in good faith that "diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed." Specifically, [######SUMMARIZE EFFORTS AND WHY THEY FAILED – IF NOT DONE FULLY ABOVE].

13. The applicable factors for determining whether "good cause" exists for a protective order are set forth in C.P.L. §245.70(4), which provides as follows:

> *Showing of good cause*. In determining good cause under this section the court may consider: constitutional rights or limitations; danger to the integrity of physical evidence or the safety of a witness; risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk; a risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, and the nature, severity and likelihood of that risk; the nature and circumstances of the factual allegations in the case; whether the defendant has a history of witness intimidation or tampering and the nature of that history; the nature of the stated reasons in support of a protective order; the nature of the witness identifying information that is sought to be addressed by a protective order, including the option of employing adequate alternative contact information; danger to any person stemming from factors such as a defendant's substantiated affiliation with a criminal enterprise as defined in subdivision three of section 460.10 of the penal law; and other similar factors found to outweigh the usefulness of the discovery.

14. Here, the lower court's ruling should be vacated because [######ADD ARGUMENTS – OBVIOUSLY, ALSO ASSESS STRATEGIC RISKS OF FACTUAL STATEMENTS, COMMITTING TO A DEFENSE, ETC.].

15. [######IF PROSECUTION HAS ARGUED IT IS A "GANG" CASE BUT HAS NOT SUBSTANTIATED THAT CLAIM:] One of the itemized factors in this list of factors that may be considered is "danger to any person stemming from factors such as a defendant's substantiated affiliation with a criminal enterprise as defined in Penal Law § 460.10(3)." The referenced term involves: "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope

of individual criminal incidents." Significantly, the word "*substantiated*" was used because claims of "gang affiliation" have been too sweepingly and unreliably employed to target lawful groups or associations, or based only on inferences from ordinary characteristics such as wearing a red hat. We hereby contend that the prosecution has not "substantiated" this claim because [######ADD ARGUMENT].

16. [######IF INVESTIGATIONS HAVE BEEN IMPAIRED BY THE PROTECTIVE ORDER:] Of course, the accused has a federal and state constitutional right to effective assistance of counsel, which includes adequate investigation. *See* U.S. Const., Amend. VI; N.Y. Const., art. I, § 6*; see also People v. Oliveras*, 21 N.Y.3d 339, 346 (2013) ("[e]ssential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case") (*citing Strickland v. Washington*, 466 U.S. 668, 690-691 (1984)); *People v. Bennett*, 29 N.Y.2d 462, 466 (1972) ("A defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial"); OCA, Order to Counsel in Criminal Cases (providing that defense counsel has an obligation to conduct "a reasonable investigation of both the facts and the law pertinent to the case (including as applicable, *e.g.*, visiting the scene, interviewing witnesses . . . etc.)").

17. Here, important investigations have been impossible because [######IF PRIOR PARAGRAPH IS USED, SPECIFY WHY INVESTIGATIONS HAVE BEEN IMPAIRED IN THIS PARTICULAR CASE – BUT, OBVIOUSLY, ASSESS STRATEGIC RISKS OF FACTUAL STATEMENTS, COMMITTING TO A DEFENSE, ETC.]

18. [######IF AN *EX PARTE* EXPLANATION OF THE DEFENSE'S THEORY OF THE CASE IS NEEDED:] We wish to raise additional arguments *ex parte* to Your Honor, because they will help to show why the protective order should be vacated or modified. An "offer of proof" may be conducted *ex parte*, as authorized by C.P.L. §245.70(1), and we request that option. Under the statute, the prosecution has no right to learn the defendant's *theory of defense* and/or how counsel believes that materials *could be relevant to it* prior to

trial, except as specifically provided under C.P.L. §245.20(4) or C.P.L. article 250. *See also* 245.30(3) ("discretionary" court-ordered discovery is *not* available to the prosecution); *see generally People v. Lane*, 56 N.Y.2d 1 (1982)(endorsing *ex parte* arguments by the defense in the context of an "offer of proof" for a severance motion); *People v. Lloyd*, 51 N.Y.2d 107 (1980)("the exact nature of the defense and particularly defense strategy must remain off limits").

19. [######IF ANY OF THIS CASE LAW WOULD BE HELFPUL IN THE INDIVIDUAL CASE:] Courts have found protective orders to have been improper in similar situations. *See People v. Nesmith*, 144 A.D.3d 1508 (4th Dept. 2016)("County Court abused its discretion in issuing a protective order that allowed the People to withhold from the defense until the time of trial the identity of an eyewitness to the crime. . . . [T]he People's moving papers merely asserted in conclusory fashion that there was a substantial risk that Witness A would be harmed and/or intimidated if his or her identity were disclosed, and they offered no evidence in support of that claim"); *People v. Arrellano*, 150 Misc.2d 574 (Sup. Ct., Queens Co. 1991)("a remote and unlikely possibility of witness intimidation cannot override all other considerations. It is too convenient an excuse for a prosecutor to use in all cases when what is really feared is that defense counsel will learn the weaknesses in the People's case or will develop impeachment material"); *People v. Leon*, 134 Misc.2d 757 (Co. Ct., Westchester Co. 1987)("While the witness' feelings are certainly understandable, the allegation that a witness is generally apprehensive about disclosure of his name and address, or would simply prefer that such information not be disclosed, does not . . . establish good cause").

20. [######IF MODIFICATION OF THE LOWER COURT'S RULING TO A "COUNSEL-ONLY" PROTECTIVE ORDER IS BEING SOUGHT:] Modification of the lower court's ruling to a "counsel-only" protective order is appropriate and needed here. The Legislature specifically included this option in C.P.L. §245.70(1), which provides: "The court may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant." While such orders impair the attorney-client relationship and should not be over-used, at least this will allow defense counsel to investigate and prepare for trial. The Appellate Division has also approved of

such orders. *See, e.g.*, *People v. Mojica*, 244 A.D.2d 138 (1st Dept. 1998). Defense counsel will, of course, scrupulously comply with a "counsel-only" order if it is issued – and is fully aware that disobedience of the order would be criminal contempt. *See* C.P.L. §245.70(7).

21. Finally, we ask Your Honor to bear in mind that the Legislature has provided in C.P.L. §245.20(7) that "[t]here shall be a *presumption in favor of disclosure* when interpreting . . . subdivision one of section 245.20, of this article." The protective order issued below is unnecessarily and unduly broad – thus, it is inconsistent with the Legislature's fundamental goal of providing for "open" discovery. This further supports the application that the protective order be vacated or modified. *See generally* C.P.L. §§245.10(1) (disclosures occur "as soon as practicable"); 245.20(1) (right to obtain "all items and information . . . not limited to" itemized materials); 245.55(3) (all "police recordings" must be preserved and disclosed); 245.20(1)(e) (right to obtain all police and law enforcement agency reports and notes); 245.20(1)(g) (right to obtain all recordings "made or received" in connection with case); 245.20(1)(j) (court "shall issue subpoenas or orders" upon either party's request for non-disclosed scientific testing materials); 245.20(1)(o) (right to obtain all tangible property); 245.30(1) (expedited court orders to "preserve" evidence); 245.30(3) (court orders for non-statutory discovery); 245.80(2) (court can impose "further order for discovery"); 245.35(4) (court can impose "other measures" designed to meet "goals of this article"); 245.20(7) ("presumption of openness"); 245.20(2) (all items possessed by police and law enforcement agencies are "deemed" possessed by DA); 245.55(2) (complete copies of complete records and files of police and law enforcement agencies provided).

22. Discovery of this critical information is required on federal and state constitutional grounds as well. *See Roviaro v. U.S.*, 353 U.S. 53 (1957); *U.S. v. Saa*, 859 F.2d 1067 (2d Cir. 1988); *People v. Peltak*, 45 N.Y.2d 905 (1978); *People v. Andre W.*, 44 N.Y.2d 179 (1978); *People v. Goggins*, 34 N.Y.2d 163 (1974); *People v. Stanfield*, 7 A.D.3d 918 (3rd Dept. 2004); *see also Brady v. Maryland*, 373 U.S. 83 (1963); *People v. Waver*, 3 N.Y.3d 748 (2005); *People v. Stilley*, 128 A.D.3d 88 (1st Dept. 2015).

23. Defendant therefore seeks an order vacating or modifying the protective order. Defendant also asks Your Honor to order such other and further relief as may be proper.

WHEREFORE, the affiant respectfully requests Your Honor to grant the relief sought herein and to grant such other and further relief as may be just and proper.

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

Yours, etc.

JANET E. SABEL
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Of Counsel

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