

STATE OF NEW YORK COUNTY OF MONROE
MONROE COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

ANSWER AND
CROSS MOTION

(name) ,

Defendant.

State of New York
County of Monroe) ss:
City of Rochester)

(Attorney name), an attorney admitted to practice in the State of New York, affirms under penalty of perjury pursuant to CPLR 2106 that:

1. I am of counsel to Timothy Donaher, Monroe County Public Defender, counsel for the defendant herein.
2. I am the assistant public defender assigned to this case and as such I am fully familiar with its facts and records.
3. I make this affirmation in opposition to the People's motion based upon my own knowledge and information and belief. The sources of such information and the grounds for such belief are conversations with my client, a review of the accusatory instruments filed in this case, and a review of the motion filed by the People.

FACTS

4. Defendant was arrested on (date) at (time). He was arraigned on a felony complaint on (date). A preliminary hearing was set for (date and time)
5. Defendant has been held in custody since the time of his arrest.

6. The prosecution, relying on Executive Order 202.28, has requested that this Court find that good cause exists to continue detaining defendant without a hearing.

7. Executive Order 202.28 references Executive Order 202.8, which states, in pertinent part, “any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law... or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020...”

8. On Thursday, May 7, the Governor signed Executive Order 202.8, which states, in pertinent part:

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law, do hereby continue the suspensions and modifications of law, and any directives, not superseded by a subsequent directive, made by Executive Order 202 and each successor Executive Order up to and including Executive Order 202.14, for thirty days until June 6, 2020, except as modified below: (laws listed)...

... IN ADDITION, I hereby temporarily suspend or modify the following **if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster**, (emphasis added) for the period from the date of this Executive Order through June 6, 2020: (other statutes listed)...

The suspension of the provisions of any time limitations contained in the Criminal Procedure Law contained in Executive Order 202.8 is modified as follows:

...

Section 180.60 of the Criminal Procedure Law to provide that (i) all parties' appearances at the hearing, including that of the defendant, may be by means of an electronic appearance; (ii) the Court may, for good cause shown, withhold the identity, obscure or withhold the image of, and/or disguise the voice of any witness testifying at the hearing pursuant to a motion under Section 245.70 of the Criminal Procedure law—provided that the Court is afforded a means to judge the demeanor of a witness;

Section 180.80 of the Criminal Procedure Law, to the extent that a court must satisfy itself that good cause has been shown within one hundred and forty-four hours from May 8, 2020 that a defendant should continue to be held on a felony complaint due to the inability to empanel a grand jury due to COVID-19, which may constitute such good cause pursuant to subdivision three of such section; and

Section 190.80 of the Criminal Procedure Law, to the extent that to the extent that a court must satisfy itself that good cause has been shown that a defendant should continue to be held on a felony complaint beyond forty-five days due to the inability to empanel a grand jury due to COVID-19, which may constitute such good cause pursuant to subdivision b of such section provided that such defendant has been provided a preliminary hearing as provided in section 180.80.

THE EXECUTIVE ORDER DID NOT ELIMINATE PRELIMINARY HEARINGS IN NEW YORK

9. On May 11, Chief Justice DiFiore of the Court of Appeals stated,

Turning to the impact of the pandemic on our criminal justice system, we had expressed our growing concern about the number of individuals who have been arrested for serious crimes and are being held in jail without a review of the charges pending against them by a court or a grand jury. While we remain unable to convene grand juries, last week the Governor issued an Executive Order that enables us to conduct preliminary hearings at which a judge will evaluate the sufficiency of the evidence supporting the charge or charges filed against a defendant who is being held in custody.

We have conducted the training necessary for our staff and judges, and we have been working with both the prosecutors and the defense bar to schedule these preliminary hearings in our virtual parts. Pursuant to the Governor's Order, all participants at these hearings may appear electronically, and appropriate measures have been authorized to protect the confidentiality of the participants where that is necessary. We look forward to working with our partners in the criminal justice system to provide accused individuals being held in jail with the independent and timely judicial review they are entitled to.

It is within this context that the Executive Order must be examined. Executive Order 202.28 was intended to facilitate the holding of preliminary hearings. It is clear that Justice DiFiore's statement, as well as two provisions of the order reflect that purpose.

10. First, the portion of the Executive Order that expanded the form of testimony admissible in preliminary hearings under CPL 180.60, temporarily expanding electronic appearances as permitted under CPL 180.20, which prohibits electronic testimony in hearings. This modification is clearly intended to *facilitate* preliminary hearings in the time of the pandemic. While the current statute does not appear to permit electronic testimony in preliminary hearings, as the pandemic limits the number of and manner in which individuals may convene in person, this Order specifically allows hearings to be

held remotely. Had the Order intended to eliminate hearings, there would be no reason to create an alternative manner of taking testimony.

11. Additionally, the Order has added provisions for protecting the identity of witnesses. Thus, it is clear that the purpose is not to avoid their testimony, but instead to ensure that individuals deprived of liberty and presumed innocent receive the protection of a court's assessment of whether there is a sufficient legal basis, while simultaneously permitting the Court to protect witnesses.

12. The Executive Order addressing CPL 180.80, relating to the 144 hour deadline for a preliminary hearing before a defendant is released, does not become effective until 144 hours have passed. The Order references the statute that entitles a defendant to be released if 144 hours has elapsed and no preliminary hearing has gone forward. To claim that there can be a finding of good cause prior to any effort to hold the hearing is to vitiate the purpose of this Order, seeking to protect defendants' rights, not destroy them.

13. Furthermore, the modification of CPL 180.80 must be read in the context of the entire order. The prefatory language to the order is that it applies "if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster..." Courts have been opening and increasing the types of appearances in civil and criminal cases. If courts may proceed with civil matters, pleas, and a variety of other appearances, an appearance involving a liberty interest is no greater hindrance to the ability to cope with disaster emergency and its elimination is clearly not necessary to aid in coping with the disaster.

14. Additionally, the empaneling of a grand jury is unrelated to Article 180 of the Criminal Procedure Law. Based on the language of the executive order, although a prosecutor may be able to argue that their inability to impanel a grand jury is a basis to continue holding a defendant, the language does not directly state that the preliminary hearing should not go forward. If a prosecutor is unable to proceed with a preliminary hearing and wishes to present the case to the grand jury, then a court may consider whether to release the defendant or whether the difficulty in empaneling a grand jury should result in the defendant's continued detention. This order must be read in a manner consistent with protection of a defendant's constitutional rights. Thus, this

order should not be seen to bar or delay hearings, but permit delay of release for good cause shown when a hearing has not proceeded for good cause shown, and the case could not be presented. This order does not extend the time for proceeding with a preliminary hearing; just the time for holding a defendant after good cause has been shown.

15. “Good cause” is not a standard to be taken lightly, particularly in the context of the deprivation of liberty. Good cause is defined in the preliminary hearing statute (CPL 180.80[3]) as a “compelling fact or circumstance.” Good cause is defined in the grand jury statute CPL 190.8(b) as “compelling fact or circumstance.” Good cause within the discovery statute’s protective order language (CPL 245.70) requires an equally solemn assessment of deprivation of rights. While the Executive Order permits (and does NOT require) a finding of good cause, the determination of good cause must require at least as serious and solemn an evaluation as these other statutes. Defendant submits that as both 180.80(3) and 190.80(b) relating to liberty interest require a “compelling fact or circumstance,” this Order demands at least that much, especially for a defendant who has now been held without any assessment of the basis for his detention for (x) days.

16. The inability to empanel a grand jury is not good cause on its own, but may constitute good cause. Defendant submits that an example of a circumstance in which good cause may exist might be one in which a witness is having difficulty making themselves available due to interruptions on transportation, medical needs and other COVID related circumstances.

17. Courts have begun to assess good cause. The Eighth Judicial District has set forth the following procedural guidance.

18. If the prosecutor claims that the holding of a preliminary hearing is violative of a defendant’s rights because the hearing will not be in an open courtroom, defendant submits that there are procedures to ensure openness of the proceedings, and more importantly, defendant’s liberty interest is paramount, and outweighs the concern about an open courtroom. To the extent defendant must waive the open courtroom right to secure this hearing, he is prepared to do so.

CROSS MOTION FOR DISCOVERY

19. The Discovery statute has not been eliminated by the Executive Order. Although the prosecution has up to 20 days to provide discovery to the defense, the prosecution must provide it “as soon as practicable,” as required by CPL 245.10(1). As the prosecution has now communicated with witnesses and police officers and presumably has discoverable material from those sources, and given the presumption in favor of disclosure, and the requirement that even if the prosecutor does not have all material that may be voluminous or outside their reach at this stage they must provide the rest of the discovery, defendant respectfully requests all discovery be provided.

MOTION FOR HEARING TO ASSESS GOOD CAUSE

20. If this Court is considering determining whether good cause exists, defendant respectfully moves this Court for a hearing in which defendant may cross examine witnesses and present evidence, if appropriate, and be heard, as to whether such good cause exists.

WHEREFORE, upon the grounds stated in this affirmation, the defendant respectfully requests this Court to deny the People's application, or alternatively, the defendant requests that the relief requested in the cross-motions be granted , and for such other relief as this Court deems proper.

(Attorney name)

Affirmed this ____

Day of May, 2020