

COUNTY COURT, COUNTY OF ONONDAGA
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK

vs.

Plaintiff,

Indict. No. 09-0348-1

Index No. 09-0376

DWIGHT DELEE,

AFFIDAVIT IN SUPPORT
OF PRETRIAL MOTIONS

Defendant.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss:

Clarence Q. Johnson, being duly sworn, states as follows:

1. That he is an attorney duly admitted to practice law in the courts of the State of New York and in the United States District Court for the Northern District of New York and that he maintains a law office at 48 East Elizabeth Street, Syracuse, New York 13152.

2. That on or about February 27, 2009, he was assigned by the Hon. Anthony Aloï, Judge of the Onondaga County Court, to represent the above defendant, after a prior attorney was relieved, in a case where the defendant was charged, under Felony Complaint DR 08-513725, with Murder in the Second Degree, in violation of section 125.25(1) of the *Penal Law*, for criminal conduct alleged to have occurred on November 14, 2008, in the City of Syracuse, County of Onondaga.

3. That on April 6, 2009, he appeared with the defendant in Onondaga County Court, before the Hon. William D. Walsh, for arraignment of the defendant on Indictment No. 09-0348-1, Index No. 09-0376, charging the defendant in a three-count indictment with Murder in the Second Degree (As a Hate Crime), Murder in the Second Degree, and with Criminal Possession of a Weapon in the Third Degree, in violation of sections 125.25(1), 485.05(1)(a), 125.25(1), and 265.02(1) of the *Penal Law*, respectively, for criminal conduct alleged to have occurred on November 14, 2008, in the City of Syracuse, at which time a plea of not guilty was entered on behalf of the defendant and the case was scheduled for a motion return date on May 27th, for pretrial hearings on June 1, and for trial on June 15th, with the trial date being subsequently adjourned to July 13, 2009.

4. That on April 20, 2009, he appeared with the defendant in Onondaga County Court, before the Hon. William D. Walsh, for a pretrial conference, at which time the defendant rejected any alternative dispositions and the case was continued for a motion return date on May 27th and for trial on July 13, 2009.

5. That on April 22, 2009, he filed with the court and served upon the people Pretrial Discovery Demands and Request for Bill of Particulars.

6. And now, with the defendant's plea of not guilty having been continued throughout the above proceedings and with no previous application having been made for the relief sought herein, the deponent makes this affidavit in support of the pretrial motions set forth herein, together with the grounds therefore, as follows:

I. MOTION FOR INSPECTION OF GRAND JURY MINUTES AND DISMISSAL OF INDICTMENT OR ANY COUNT THEREOF

7. Pursuant to sections 210.20 and 210.30 of the *Criminal Procedure Law*, the defendant moves for inspection by the court and the defendant of the stenographic minutes of the grand jury proceeding resulting in Indictment No. 2009-0348-1, Index No. 09-0376, for a determination of whether the indictment or any count thereof should be dismissed or reduced on the following grounds:

(A) Dismissal of Indictment or Count as Defective

(1) Section 485.05(1)(a) of the *Penal Law*, as charged in the First Count of the Indictment, with section 125.25(1) of the *Penal Law*, as Murder in the Second Degree as a Hate Crime, is unconstitutionally vague or otherwise invalid both facially and as applied to the defendant

(a) unconstitutional vagueness as applied to the defendant

(i) notice of nature and cause of accusation

(ii) arbitrary and discriminatory enforcement

(b) facial unconstitutional vagueness of section 485.05 of *Penal Law*

(B) Dismissal of Indictment for Legal Insufficiency of Evidence Presented to Grand Jury

(C) Legal instructions and integrity of grand jury proceedings

(D) General request.

(A) DISMISSAL OF INDICTMENT OR COUNT AS DEFECTIVE

8. Pursuant to sections 210.20(1)(a) and 210.25(1) and (3) of the *Criminal Procedure Law*, the defendant moves for dismissal of the indictment or any count thereof as defective, on the following grounds:

(1) Section 485.05(1)(a) of the Penal Law and the First Count of Indictment are unconstitutionally vague or otherwise invalid both facially and as applied to the defendant

9. Pursuant to sections 210.20(1)(a) and 210.25(1) and (3) of the *Criminal Procedure Law*, the defendant moves for dismissal of the First Count of the Indictment, charging the defendant with Murder in the Second Degree (As a Hate Crime), in violation of sections 125.25(1) and 485.05(1)(a) of the *Penal Law*, on the grounds that the statute defining the offense is unconstitutionally vague or otherwise invalid both facially and as applied to the defendant.

10. Specifically, the defendant argues that section 485.05(1)(a) of the *Penal Law* is unconstitutionally vague both facially and as applied to the defendant because it fails to substantially conform to the requirements of Article 200 of the *Criminal Procedure Law* and because it fails to inform the defendant of the nature and cause of the accusation, and fails to provide officials with clear standards for enforcement, as required by the Due Process Clauses of Article I, Section 6, of the New York State Constitution, and by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

11. A vagueness challenge to a statute involves a two-part test: first, the court must determine whether the statute in question is “sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,” and secondly, that the statute provides officials “with clear standards for enforcement.” *People v. Stuart*, 100 NY2d 412, 420 (2003) (internal citations omitted).

12. The first requirement relates to the traditional “notice” requirement of due process and the second requirement is intended to prevent arbitrary and discriminatory application of the statute, whereby basic policy determinations are impermissibly delegated to the police and eventually to judges and juries for resolution on an ad hoc, subjective basis. *People v. Stuart*, 100 NY2d 412, 420-21 (2003) (internal citations omitted).

13. Because legislative enactments carry a strong presumption of constitutionality, facial challenges to statutes are generally disfavored and when presented with both a facial and as-applied challenge to a statute, the court should first decide whether the statute is impermissibly vague as applied to the defendant. *People v. Stuart*, 100 NY2d 412, 422 (2003).

(a) Unconstitutional vagueness as applied to the defendant

14. The First Count of the Indictment in the present case accuses the defendant of the crime of Murder in the Second Degree (As a Hate Crime), in violation of sections 125.25(1) and 485.05(1)(a) of the *Penal Law* and alleges that the defendant:

on or about the 14th day of November 2008, at the City of Syracuse, in this county, intentionally caused the death of Moses Cannon, and the defendant intentionally selected the person against whom the offense was committed, or intended to be committed, in whole or substantial part, because of a belief or perception regarding the sexual orientation of a person, to wit: the defendant shot Moses Cannon at close range with a rifle because of Moses Cannon's sexual orientation.

15. The defendant argues that the accusation in the First Count of the Indictment, and the statute upon which it rests, as applied to the defendant, fails to provide the defendant with adequate notice of the nature and cause of the accusation and allows for arbitrary and discriminatory enforcement by law enforcement and prosecutorial and court officials, and for those reasons that the First Count of the Indictment as applied to the defendant is unconstitutionally vague.

(i) notice of nature and cause of accusation

16. In the present case, the defendant is accused of having "intentionally selected" a crime victim, "in whole or in substantial part," because of a "belief or perception" about that victim's "sexual orientation."

17. Upon information and belief, the source of which is from news reports of the incident and from pretrial disclosure of some discovery documents, the victim in this case, Moses Cannon, is reported by family members to have been a transsexual who often dressed in women's clothing and who was known by the alias of Latiesha or Teish Green.

18. The victim, along with two other individuals, had reportedly driven to a party in the 400 block of Seymour St. on the night of November 14th when someone fired a shot into their car, wounding the driver and killing the victim, who was seated in the front passenger seat.

19. From the evidence known at this time, it does not appear however that the victim, Moses Cannon, or any other individual in the car, was dressed in female clothing at the time of the incident.

20. From the evidence, it also does not appear clear whether the defendant is accused of having made any statements about the victim's sexual orientation, with the District Attorney being reported in news accounts to have said only that some comments were made by people outside the car about the sexual orientation of the people in the car.

21. From the evidence, it also does not appear whether the defendant is alleged to have known anything about the victim's sexual orientation, by prior knowledge or from the circumstances of the moment, or what if any beliefs or perceptions the defendant may have had about sexual orientation issues.

22. Consequently, the defendant cannot determine from the allegations of the indictment and the statute as applied to him what “beliefs or perceptions” he is accused of having that violated the statute and he cannot determine what conduct he is alleged to have exhibited that represents the “selection” of a victim in “whole or substantial part” based upon sexual orientation.

23. The statute as applied to the defendant in this case is in marked contrast to two other cases where the Hate Crimes statute has been upheld against vagueness-as-applied challenges, in *People v. Diaz*, 188 Misc.2d 341 (New York County, Supreme Court, 2001) and in *People v. Fox*, 17 Misc.3d 281 (Kings County, Supreme Court, 2007).

24. In *Diaz*, evidence showed that the defendant made repeated slurs about the sexual orientation of the victim, calling him a “faggot” and “degenerate,” while assaulting the victim and that the defendant later confessed to the police that he had selected the victim because he thought that the victim was gay and because he was angry after hearing assertions in a radio talk show about gay men molesting children. *Diaz* at 342.

25. In *Fox*, the defendant with three others actively lured the victim to a meeting through an internet “gay chat room” with a promise of drugs and sex, but with the actual intention of robbing the victim, a trick one of the defendants had done before, and after that initial meeting was not completed, the defendants repeated the deception, eventually met with the victim, assaulted him and caused his death. *Fox* at 284.

26. In contrast, the allegations and evidence in this case do not show that the defendant took any affirmative steps to arrange a meeting with the victim, or that the defendant himself made any slurs about the sexual orientation of the victim, or that the defendant even knew anything, by past experience or the circumstances of the moment, about the sexual orientation of the victim.

27. Under such circumstances, the defendant argues that the statute and the allegations of the First Count of the Indictment are not sufficiently definite to give him, or any other person of ordinary intelligence, fair notice of what conduct may constitute the “intentional selection” of a victim from a protected class, “in whole or in substantial part,” and what past or current “beliefs or perceptions” may be forbidden by the statute and the defendant therefore argues that the statute as-applied is unconstitutionally vague.

(ii) arbitrary and discriminatory enforcement

28. The defendant further argues that that the accusation in the First Count of the Indictment and the statute as applied to him does not provide officials with clear standards for enforcement and impermissibly delegates basic policy determinations to the police, to prosecutors, and eventually to judges and juries for resolution on an ad hoc, subjective basis.

29. The original Felony Complaint in the present case, appearing under DR 08-513725, charged the defendant with only intentional murder, rather than with Murder as a Hate Crime, and the defendant cannot determine by what internal policies of the District Attorney's Office a decision was made to present the case to the Grand Jury as a Hate Crime.

30. From information about the case reported in the news, it appears that the defendant's case is only the second Hate Crime prosecution to be brought in Onondaga County, and the first homicide case to be so prosecuted, since the statute was enacted and became effective on October 8, 2000.

31. The discrepancy between the original arrest charges and the charges of the indictment, along with the lack of governmental transparency in the policies and procedures of the District Attorney's Office for the selection of cases to be prosecuted as Hate Crimes, demonstrates how the statute fails to provide officials with clear standards for enforcement and how the statute may be applied in an arbitrary and discriminatory manner, as the defendant argues it was in his case.

32. The fact of only two Hate Crime prosecutions in Onondaga County since enactment of the statute in 2000, if accurate, also appears contrary to the Legislative Findings of the statute that such crimes have become "more prevalent" in recent years and suggests that cases have not been consistently evaluated by the District Attorney's Office for such prosecution and that the statute is now being applied in an arbitrary and discriminatory manner.

33. Therefore the defendant argues that the statute and First Count of the Indictment as applied to him in this case is an arbitrary and discriminatory application of the statute and that the statute fails to provide officials with clear standards for enforcement.

(b) facial unconstitutional vagueness of section 485.05 of *Penal Law*

34. Under the Hate Crimes Act of 2000, section 485.05(1)(a) of the *Penal Law* reads as follows:

1. A person commits a hate crime when he or she commits a specified offense and either:
 - (a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or ...

35. A facial challenge to a statute for vagueness “requires the court to examine the words of the statute on a cold page and without reference to the defendant’s conduct” and in pursuing a facial challenge, “the defendant must carry the ‘heavy burden’ of showing that the statute is impermissibly vague in all of its applications. *People v. Stuart*, 100 NY2d 412, 421 (2003) (internal citations omitted).

36. A facial challenge also requires the court to consider whether the words of the statute, standing alone, are sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and whether the statute provides officials with clear standards for enforcement. *Id.* at 420 (internal citations omitted).

37. In the present case, the defendant argues that the statute as drafted fails to conform with statutory and constitutional due process requirements and thereby fails to give a person reasonable notice of what conduct is forbidden and fails to provide officials, including law enforcement, the prosecution, and the courts, with clear standards for enforcement.

38. The statute as drafted fails to include any definitional section to give government officials and persons of ordinary intelligence any guidance as to the most critical terms of the statute, including the terms: “intentionally selects,” “in whole or substantial part,” and “a belief or perception.”

39. Although recourse may be had to the ordinary meaning of some terms, the statute appears especially vague and deficient in explaining what “beliefs or perceptions” may be regarded, even in combination with conduct, as a violation of the statute.

40. The “beliefs and perception” language of the statute fails to provide any notice as to whether the phrase is referring to past or present beliefs and perceptions, or how such beliefs and perceptions may be expressed, either by words, symbols, or associations, thereby opening the door to a vague and ill-defined body of evidence which may be claimed to constitute evidence of a hate crime.

41. The defendant argues that the “beliefs or perceptions” language of the statute also fails to meet the fundamental constitutional requirements embodied in section 200.50(7) of the *Criminal Procedure Law*, governing the form and content of an indictment and requiring “a plain and concise factual statement in each count which, without allegations of an evidentiary nature, (a) asserts facts supporting every element of the offense charged and the defendant’s or defendants’ commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation.”

42. An indictment “is intended to prevent the people of this State from potentially oppressive excesses by the agents of the government in the exercise of prosecutorial

authority,” and as a document, the indictment serves several purposes, “first and foremost, an indictment has been considered as the necessary method of providing the defendant with fair notice of the accusations made against him, so that he will be able to prepare a defense” and this function of the indictment is derived from “the notice requirement of section 6 of Article 1 of our State Constitution and presumably that of the Sixth Amendment to the Federal Constitution.” *People v. Iannone*, 45 NY2d 589, 594 (1978).

43. Although *CPL* section 200.50(7)(c) may require inclusion of the “Hate Crimes” language of *PL* 485.05 in the indictment, the defendant argues that the “beliefs and perceptions” portion of that underlying statute fails to provide the defendant with fair notice of the accusation such that the defendant will be able to prepare a defense and that such vague language is especially susceptible of abuse by governmental authorities.

44. Therefore, the defendant argues that section 485.05(1)(a) of the *Penal Law* is unconstitutionally vague in all of its applications and that the First Count of the present Indictment should be dismissed.

(B) DISMISSAL FOR INSUFFICIENCY OF EVIDENCE

45. Pursuant to sections 210.20(1)(b) and 210.30 of the *Criminal Procedure Law*, the defendant moves for dismissal of the indictment for legal insufficiency of the evidence presented to the grand jury, specifically requesting that the court examine the sufficiency of the evidence presented to the grand jury as to each of the issues raised below.

46. As to the First Count of the Indictment, charging the defendant with Murder in the Second Degree (As a Hate Crime), in violation of sections 125.25(1) and 485.05(1)(a) of the *Penal Law*, the defendant challenges the sufficiency of the evidence offered to establish that the defendant intentionally selected a victim in whole or substantial part because of a belief or perception about the sexual orientation of the victim.

47. Upon information and belief, the source of which is from news accounts of the incident, the victim in this case was not dressed in any manner that would obviously indicate his sexual orientation and it does not appear that the defendant himself made any statements about the sexual orientation of the victim.

48. Therefore, the defendant challenges the sufficiency of the evidence to establish that the sexual orientation of the victim had any role in the alleged crime or that the defendant had any knowledge of the sexual orientation of the victim, or that the defendant expressed any beliefs or perceptions about the sexual orientation of the victim.

49. The defendant further argues that even if the sexual orientation of the victim, or the defendant, was established by some evidence in the grand jury, that such a fact standing alone is not sufficient evidence, under *CPL 485.05(2)*.

46. As to the Second Count of the Indictment, charging the defendant with Murder in the Second Degree, in violation of section 125.25(1) of the *Penal Law*, the defendant challenges the sufficiency of the evidence offered to establish that the identity of the defendant as the person alleged to have intentionally cause the death of another person.

47. As to the Third Count of the Indictment, charging the defendant with Criminal Possession of a Weapon in the Third Degree, in violation of section 265.02(1) of the *Penal Law*, the defendant challenges the sufficiency of the evidence offered to establish that the identity of the defendant as the person alleged to have possessed a weapon and the proof that the defendant had previously been convicted of a crime.

(C) LEGAL INSTRUCTIONS AND INTEGRITY OF GRAND JURY PROCEEDINGS

48. Pursuant to sections 210.20(1)(c) and 210.35(5) of the *Criminal Procedure Law*, the defendant moves for inspection of the grand jury minutes to determine whether the indictment should be dismissed on the grounds that the proceeding fails to conform with the requirements of Article 190 of the *Criminal Procedure Law* to such a degree as to impair the integrity of the grand jury process and thereby result in prejudice to the defendant.

49. Specifically, the defendant requests that the court examine the legal instructions given to the grand jury to determine whether such instructions may have been either incomplete, misleading, or so confusing as to be misunderstood by grand jury members, especially as to the definition of a Hate Crime.

50. Additionally, the defendant requests that the court examine whether any documentary evidence introduced to the grand jury was introduced consistent with the rules of evidence required by article 60 and section 190.30 of the *Criminal Procedure Law*.

(D) GENERAL REQUEST

51. In addition to the above specific issues on the sufficiency of the proof before the grand jury, the integrity of the grand jury proceedings, and the adequacy of legal instructions, the defendant further requests that the court review and consider any other alternative grounds for dismissal of the indictment or reduction of any count thereof, of which the defendant may be unaware due to the secrecy of grand jury proceedings.

II. MOTION FOR SUPPRESSION OF STATEMENTS

52. Pursuant to section 710.20(3) and (4) of the *Criminal Procedure Law* and under Article I, Section 6, of the New York State Constitution, and under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the defendant moves for the suppression of potential testimony reciting or describing statements attributed to the defendant on the grounds that such statements were obtained in violation of *Miranda* rights, were involuntary in a traditional due process sense, were obtained in violation of the defendant's state and federal rights to counsel, were a product of an unlawful search and seizure of the defendant, and were not voluntarily made, within the meaning of section 60.45 of the *Criminal Procedure Law*.

53. Attached to the present indictment is a Notice of Intent to Use Admission or Confession, pursuant to section 710.30 of the *Criminal Procedure Law*, alleging an "oral" statement by the defendant and indicating "see attached," referring to two pages of an attached police report, from Det. George Hack, and a single-page summary of the alleged statement.

54. From the attached notice and incorporated documents, it appears that the people intend to offer into evidence oral statements attributed to the defendant from an interrogation of the defendant, on November 16th, from about 3:16 A.M. through 8:45 A.M., at the Criminal Investigations Division of police headquarters, after his arrest at a residence on Spruce Tree Circle in Liverpool, at around midnight.

55. The defendant argues for the suppression of such alleged oral statements on the grounds that such statements were obtained after an unlawful arrest and search of the defendant, on the grounds that the defendant was not adequately advised of his *Miranda* rights, and on the grounds that the statements were not voluntarily made.

56. As to the circumstances of the defendant's arrest, the defendant alleges that he was sleeping in a bedroom at 7 Spruce Tree Circle, at around midnight on November 16th, when he was confronted by about eight police officers.

57. The defendant alleges that he was immediately ordered onto the floor, that several officers jumped on him and that he was immediately handcuffed behind his back

58. He was subsequently searched, with the police seizing his clothing, and he was taken outside and placed in an unmarked police car, while still handcuffed, and transported to police headquarters.

59. The defendant argues that on the above circumstances he was arrested without probable cause and that the alleged oral statements attributed to him, and the tangible property seized at that time, were the product of an unlawful arrest and should be suppressed.

60. The defendant further argues that he was not adequately advised of his *Miranda* rights at police headquarters and that the alleged oral statements attributed to him were not voluntarily made under the circumstances of his arrest and interrogation.

61. Therefore, the defendant argues that the statements attributed to him were the product of an unlawful seizure of the defendant without probable cause, that any such statements were obtained in violation of the defendant's *Miranda* rights and right to counsel, and that any such statements were not voluntarily made and the defendant moves for the suppression of such statements, or for a hearing to determine the admissibility of such evidence.

III. MOTION FOR SUPPRESSION OF IDENTIFICATION TESTIMONY

62. Pursuant to section 710.20(6) of the *Criminal Procedure Law*, the defendant moves for the suppression of potential testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, on the grounds that such testimony would not be admissible upon the prospective trial due to a suggestive and improperly made previous identification of the defendant by a prospective witness.

63. Attached to the indictment in the present case is a Pretrial Notice, pursuant to section 710.30 of the *Criminal Procedure Law*, advising the defendant that the People intend to offer identification testimony at trial and that the defendant has previously been identified in photographic arrays with five eyewitnesses, on November 15, 2008, at 511 S. State Street, Syracuse, New York, and by another eyewitness on the same date, at 404 Arthur Street.

64. The defendant argues that such identifications were unconstitutionally suggestive and moves for suppression of both in-court and out-of-court identification testimony, or for a hearing to determine the admissibility of such evidence.

IV. MOTION FOR SUPPRESSION OF TANGIBLE PROPERTY

65. Pursuant to section 710.20(1) and (4) of the *Criminal Procedure Law* and under Article I, Section 12, of the New York State Constitution, and under the Fourth Amendment to the United States Constitution, the defendant moves for the suppression of tangible property on the grounds that such property was obtained by means of an unlawful search and seizure and under circumstances precluding its admissibility in a criminal action against the defendant.

66. Upon information and belief, the source of which is information from the defendant, the defendant's clothing was seized during the course of his arrest on November 16th, at 7 Spruce Tree Circle.

67. The defendant re-alleges and incorporates by reference the factual allegations in paragraphs X through X above and argues that the seizure of such tangible property was the result of an unlawful arrest of the defendant without probable cause and the defendant moves for the suppression of such tangible property or for a hearing to determine the admissibility of such evidence.

V. LEAVE TO FILE ADDITIONAL MOTIONS

68. Pursuant to section 255.20(3) of the *Criminal Procedure Law*, the defendant requests leave to file additional motions as appropriate on the grounds that Pretrial Discovery Demands have been made but have not yet been responded to by the prosecution at the time of these motions and may upon disclosure reveal additional legal issues subject to argument.

WHEREFORE, the defendant requests that the court inspect the stenographic minutes of the grand jury and dismiss the indictment, or reduce any count thereof; that the court order suppression of statements, identification evidence, and tangible property, or order that a hearing be held to determine the admissibility of such evidence; and that the court grant leave to file additional motions based upon subsequent disclosure and review of discovery materials.

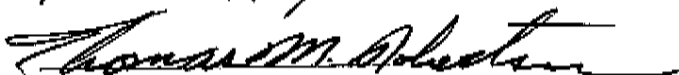
Dated: May 19, 2009

Respectfully submitted,



Clarence Q. Johnson, Esq.
Attorney for Defendant
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Skaneateles, New York 13152
(315) 569-4881

Sworn to before me this
19 day of May, 2009.



Notary Public

Dwight Delee
Pretrial Motions

THOMAS M. ROBERTSON
Notary Public in the State of New York
Qualified in Onondaga County No. 4875542
My Commission Expires Oct. 14, ~~19~~ 2010

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