SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 15
----------X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Ind. No. 5497/97

VIPPAN SAREEM, et al.,

Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT GURMIT DHINSA'S PRETRIAL MOTIONS

JEFFREY LICHTMAN
Attorney for Gurmit Dhinsa
1585 Broadway
19th Floor
New York, New York 10036
(212) 969-5670

PRELIMINARY STATEMENT

This memorandum is submitted in support of defendant Gurmit Dhinsa's pretrial motions. Mr. Dhinsa is charged, along with three codefendants, in a 26 count indictment which stemmed from a May 16, 1997 search of the premises located at 276 North Henry Street in Brooklyn. Counts One through Three of the indictment allege Criminal Possession of a Weapon in the Second Degree [P.L. § 265.03]; Counts Seven through 12 allege Criminal Possession of a Weapon in the Fourth Degree [P.L. § 265.01(1)]; Count 13 alleges Criminal Sale of a Firearm in the Third Degree [P.L. § 265.11(2)]; Count 14 alleges failure to hold Permits for Possession and Purchase of Rifles and Shotguns [N.Y.C.A.C. § 10-303]; and Counts 15 through 20 charge Criminal Possession of a Weapon in the Third Degree [P.L. §265-02(1)].

In order to indict Mr. Dhinsa on any of the charges, the People were required to present evidence to the Grand Jury demonstrating that he "possessed" the firearms. Because Mr. Dhinsa was not observed in actual physical possession of the firearms-- he was nowhere near the building at the time law enforcement authorities arrested his codefendants and allegedly discovered the nine firearms inside--his criminal responsibility must be based upon his "exercise [of] dominion and control over" the firearms. [P.L. § 10.00(8)]. Included in the defendant's motion directed towards the propriety of the Grand Jury proceedings, therefore, is a challenge to the sufficiency of the evidence presented on the possessory crimes.

Another challenge to the presentation of evidence to the Grand Jury is addressed to the counts alleging Criminal Possession of a Weapon in the Second Degree. A finding that the defendant had intended to use these weapons unlawfully against another could not have flown

rationally from any proven facts, but instead was based entirely upon the permissive presumption caused by the defendant's purported constructive possession of the weapons. Defendant Dhinsa requests inspection of the Grand Jury minutes and a dismissal of the indictment if that inspection reveals this or any other material defect.

Defendant Dhinsa additionally requests a hearing, pursuant to People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), in order to determine whether the statement allegedly made by him to law enforcement authorities was voluntary. Finally, defendant Dhinsa requests suppression, pursuant to CPL § 710.20, of evidence seized during the approximate 15 hour search of 276 North Henry Street. Dhinsa joins in the motions made by his codefendants to the extent that they are applicable to him.

STATEMENT OF FACTS

At approximately 7:15 in the morning of May 16, 1997, detectives from the 115th Precinct in Queens, along with members of the Emergency Services Unit, acting on an identification supplied by two accompanying witnesses, allegedly observed a suspect from a 1991 homicide enter the premises of 276 North Henry Street, Brooklyn, New York. (Exhibits A, C) Detective Christopher McDonnell then allegedly heard gunfire from the rear of the premises and observed the rear gate "vibrating." (Exh. A) Detective Maryann Bubelnik claimed to have then observed "small holes" in the rear gate. (Exh. A) Despite the claim of shooting, law enforcement authorities did not believe that the shots were directed at them. (Exh. D)

Members of the Emergency Services Unit entered the one-story commercial building and

proceeded to "freeze the location." (Exh. E) Defendants Gurmit Singh, Gurdit Singh[1] and Vipin Sareem were arrested. (Exh. D) Detective Maryann Bubelnik, along with at least six other law enforcement officers, then entered the location. (Exh. E)

Detective Bubelnik claimed to have then observed four discharged shotgun shells on the floor of the rear of the building. (Exh. A) Bubelnik smelled the shells and determined that they had recently been fired. (Exh. A) Despite the fact that the location had already been secured by members of the Emergency Services Unit, and three defendants arrested, Bubelnik and the other detectives entered into the storage area inside the building purportedly to "ensure for the safety of the entry team." (Exhs. A, E) During the search of the storage area, which was done without a warrant, Bubelnik noticed "numerous boxes." (Exh. A) She then observed that "one of the boxes was partially opened and that it contained a semi-automatic weapon with a silencer." (Exh. A)

With the location secured, the search continued into a number of closed rooms in the building. A safe locked by a chain was claimed by detectives to have been left wide open with five firearms in plain view. (Exhs. C, D & G) In reality, the safe was broken open during the search. (Affidavit of Jeffrey Lichtman at ¶ 5) A shotgun was also allegedly discovered in between palletes on the floor of the garage area of the building. (Exhs. C, D & F) Finally, an armored van parked inside of the building was alleged to have two weapons in plain view on the front seat. (Exhs. C, D, F & I)

[1] For purposes of these motions, defendant Rajeev Bhasin will be referred to under the name in which he was indicted, Gurdit Singh.

According to law enforcement reports, defendant Gurmit Dhinsa arrived 15 minutes later at 276 North Henry Street (Exhs. D, J) and encountered a scene of three men in handcuffs and a large number of officers in the midst of a search. Dhinsa was asked if he was the owner of the building to which he is alleged to have replied in the affirmative. While no police report indicates that he was ever asked if he also owned the firearms found inside, the People have provided notice, pursuant to C.P.L § 710.30(1)(a), that Mr. Dhinsa claimed ownership of not only the building but "all this stuff" inside. (Exh. J) The four defendants were then taken to the 115th Precinct for processeing. (Exh. A)

During the remainder of the day and evening, the officers and detectives conducted a wholesale search of the building. A locked armored van, however, proved to especially troubling, and required hours of work to open. (Affidavit of Jeffrey Lichtman at ¶ 4) Though badly damaged, the van was eventually opened and two firearms allegedly found.

At the end of the day, Detective Bubelnik finally applied for and received a warrant to search for additional guns at 276 North Henry Street. In her affidavit in support of the application for the search warrant, Detective Bubelnik did not inform Judge Heffernan of the efforts already expended during the previous 15 hour search. Instead, the discovery of four shotgun shells and the gun allegedly found in the "partially opened box" was provided as the basis for Bubelnik's belief that additional guns existed inside the building. (Exh. A) That night at 10:32 pm, more than 15 hours after officers initially entered the premises, a search warrant for the 276 North Henry Street building was signed by the Honorable Charles J. Heffernan, Jr. (Exh. B)

ARGUMENT

POINT I

DEFENDANT IS ENTITLED TO INSPECTION OF THE GRAND JURY MINUTES AND TO DISMISSAL OF THE INDICTMENT IF THAT INSPECTION REVEALS ANY MATERIAL DEFECTS

Since grand jury proceedings are secret, see CPL § 190.25(4), it is incumbent upon a trial court to ensure that they were conducted in compliance with the various statutory requirements. Thus, "unless good cause exists to deny the [defendant's] motion to inspect the grand jury minutes, the court must grant the motion." CPL § 210.30(3). Moreover, if such inspection reveals "a significant failure to conform to one or more of the requirements set forth in CPL Article 190," the indictment must be dismissed.[2] People v. Ehrlich, 136 Misc.2d 514, 518 N.Y.S.2d 742, 744 (Sup.Ct., N.Y.Co., 1987).

In this case, there is a substantial likelihood that material substantive defects occurred during the grand jury proceedings: (i) the charges in the indictment were not supported by

---

[2] Alternatively, if the inspection reveals the possibility of a defect, the Court may order that the minutes be released to the defendants so that they may assist in determining the motion to dismiss. CPL § 210.30(3). As the Chairman of the Codes Committee and sponsor of the 1980 revisions of CPL § 210.30(3), wrote in his legislative memorandum:

> These minutes are ultimately disclosed anyway at a hearing or trial, so that the issue is not a question of confidentiality vs. disclosure, it is instead merely a question of timing, i.e., when the minutes will be disclosed. Unless a reason exists to delay disclosure it should be done during argument on their sufficiency. (Emphasis supplied)

sufficient and competent evidence; (ii) the prosecutor, as legal advisor to the grand jury, failed to properly instruct it; and (iii) procedural defects existed in the makeup and operation of the grand jury. In addition, Mr. Dhinsa requests that the Court carefully scrutinize the grand jury minutes to determine whether any other procedural error occurred.

A. Insufficiency of the Evidence That Mr. Dhinsa Committed the Crimes Charged in the Indictment

Under CPL § 190.65(1), a grand jury may properly vote to indict for an offense only when

> (a) the evidence before it is legally sufficient to establish that such person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.

In turn, CPL § 70.10(1) defines the phrase "legally sufficient" as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof." "Reasonable cause to believe that a person has committed an offense," according to CPL § 70.10(2),

> exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay.

Thus, a reviewing court must determine whether the People established a prima facie case

with respect to each element of the crime. See People v. Jennings, 69 N.Y.2d 103, 512 N.Y.S.2d 652 (1986); People v. Valles, 62 N.Y.2d 36, 38, 476 N.Y.S.2d 50, 51 (1984); People v. Duleavy, 41 A.D.2d 717, 341 N.Y.S.2d 500, 502-503 (1st Dept.), aff'd, 33 N.Y.2d 573, 347 N.Y.S.2d 448 (1973). The adequacy of this showing "is properly determined by inquiring whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by petit jury." People v. Jennings, 69 N.Y.2d at 114, 512 N.Y.S.2d at 657, citing People v. Pelchat, 62 N.Y.2d 97, 105, 476 N.Y.S.2d 79, 83 (1984). Since matters of credibility must be resolved in favor of the People, the standard effectively becomes one of "reasonable cause," determined through the eyes of the hypothetical "reasonable person." People v. Jennings, 69 N.Y.2d at 115, 512 N.Y.S.2d at 657-658; CPL § 70.10(2). This test applies to both direct and circumstantial evidence. Id.

Constructive Possession of the Firearms

All crimes charged against Mr. Dhinsa require proof that he possessed the firearms found inside 276 North Henry Street on May 16, 1997. Mr. Dhinsa was not observed in actual physical possession of the weapons; therefore, his criminal responsibility for these possessory crimes had to be based on his “exercise [of] dominion or control over” the weapons. P.L. § 10.00(8); People v. Brian, 84 N.Y.2d 887, 620 N.Y.S.2d 789, 644 N.E.2d 1345 (N.Y. 1994).

The People have a “heavy burden of establishing the ownership of a weapon found in an area occupied by several people and where no one individual could be said to have dominion and control of the weapon.” People v. Roberson, 1 N.Y.2d 106; 359 N.E.2d 408; 390 N.Y.S.2d 900 (N.Y. 1976). Logically, this burden is further elevated in instances, as here, where the defendant

was not even in the building where the weapons were found. People v. Perez, 127 Misc. 2d 309, 485 N.Y.S.2d 913 (Sup. Ct. 1984). Athough a number of men were allegedly found inside the building where the guns were found, Mr. Dhinsa's alleged response to a question upon his arrival at the building--that he owned the building and "all this stuff" inside--appears to be the single strand that holds the People's case together against this defendant. As will be shown, neither this statement nor any of the other circumstances surrounding Mr. Dhinsa's conduct on May 16, 1997, could possibly support a claim of weapons possession.

New York courts apply the rule that the People's burden of proving constructive possession is sustained by showing that the defendant had ready access to the weapon or its storage place, i.e. within immediate control and reach, and that he admitted owning or using the weapon. People v. Persce, 204 N.Y. 397; 97 N.E. 877 (N.Y. 1912); People v. Casanova, 117 A.D.2d 742, 498 N.Y.S.2d 471 (2d Dep't 1986); People v. Lucas, 84 A.D.2d 582, 443 N.Y.S.2d 422 (2d Dep't 1981); People v. Vastola, 70 A.D.2d 918, 417 N.Y.S.2d 287 (2d Dep't 1979).

Access to the weapons by itself is not sufficient for a finding of constructive possession. Lucas, supra (defendant's knowledge of gun's whereabouts and willingness to direct the police to the location of the gun was not sufficient to show dominion and control but only access). This is especially true where numerous adults are present inside the location where the guns were found and any of them could have been in possession. Vastola, supra.

In a case that is relevant to the case at hand, one Olivo was arrested on drug charges while standing outside of his car repair shop. During a subsequent search of the premises, the arresting officers discovered a shotgun, in plain view in the back of a car which was being restored in the

work area at the rear of the shop. The two other individuals who were also present inside the shop were arrested. Following Olivo's conviction on a possessory gun charge, the Appellate Division reversed, finding that the facts "judicate only access, not dominion and control. An inference of possession cannot be placed upon so slender a reed as the access a defendant shared with other adults who also could have owned the property." People v. Olivo, 120 A.D.2d 466, 502 N.Y.S.2d 739 (1st Dep't 1986).

Since Mr. Dhinsa was not found to be anywhere near the guns at the time of their discovery, it is questionable whether he can even be claimed to have had access to the firearms as defined by New York courts. In People v. Persce, 204 N.Y. 397, constructive possession was defined as that "which places (the forbidden article) within the immediate control and reach of the accused and where it is available for unlawful use if he so desires." Id. at 402 (emphasis added).

The difficulty in making a showing that constructive possession of a weapon exists when numerous persons are observed near the weapons is illustrated in People v. Patel, 132 A.D.2d 498, 518 N.Y.S.2d 384 (1st Dep't 1987). To begin, the People are required to establish constructive possession individually as to each defendant regardless of whether multiple defendants are tried together in a theory of acting in concert. People v. Vasquez, 104 A.D.2d 429, 478 N.Y.S.2d 947 (2d Dep't 1984). In Patel, officers observed the defendant, with a handgun protruding from his waistband, fleeing and then running back into an apartment. Following a chase into the apartment, the officers watched as the defendant tossed a handgun out the kitchen window. In the ensuing frey, another man inside the apartment aimed a Mossberg shotgun at one of the officers. Following the surrender of the defendnat and two other men, the officers discovered the Mossberg shotgun in

the kitchen of the apartment and, just below the kitchen window outside the apartment, a handgun and a Winchester shotgun.

Following the defendant's convictions on Criminal Possession of a Weapon in the Third Degree with regard to the two shotguns, the Appellate Division reversed. Although the defendant was observed tossing a handgun out the window which was found next to the Winchester shotgun, the Court held that the defendant did not have constructive possession of the shotgun: "The police officers never noticed this shotgun in the defendant's hands, nor did they observe him throwing it out the window." Patel, 518 N.Y.S.2d at 386. As for the Mossberg shotgun found in the kitchen of the apartment (where the defendant had been observed throwing the handgun out the window), the Court also reversed the conviction finding that there was "no proof that the defendant ever handled the Mossberg himself or that he exercised any authority over" the man who pointed it at the officers. Id.

The evidence presumably presented to the Grand Jury supporting the possessory charges against Dhinsa was remarkably weaker than in Patel. Most significant in this case, it is assumed, was Dhinsa's broad purported statement of ownership of the building at 276 North Henry Street and all the "stuff" inside. No document provided to the defense, however, indicates that Dhinsa was even asked whether he owned the guns found inside 276 North Henry Street. Similarly, no document produced supports the contention that Dhinsa claimed he owned the guns.

In People v. Bailey, 159 A.D.2d 1009, 552 N.Y.S.2d 733 (4th Dep't 1990), the prosecution relied exclusively on proof that, during execution of a search warrant at defendant's house, a gun was found in the pocket of a jacket lying on a bed. When asked by officers whose jacket it was,

the defendant admitted that it was his. Nonetheless, the Court reversed the conviction of Criminal Possession of a Weapon in the Third Degree because the

> defendant's admission to ownership of the jacket does not furnish the requisite proof that the gun was his or that he knew it was in his jacket. The police did not display the weapon or reveal discovery of the gun in the pocket before asking whose jacket it was. The fact that defendant readily admitted owning the jacket, when he otherwise might be expected to remain silent, suggests an absence of guilty knowledge.

Id. Considering the fact that a person is more likely to know what is inside his jacket than what is inside a large building, the "evidence" purporting to show Dhinsa's constructive possession of the firearms is even less compelling than in Bailey. See also People v. Brian, supra (although there may have been direct evidence of defendant's dominion and control over his apartment from defendant's observed presence in the apartment and his admissions that he lived there, there was no direct evidence of his dominion or control over the drugs and weapons found inside the apartment).

Applying these principles to the facts at hand, there is also a great probability that the Grand Jury was not presented sufficient evidence to find that any of Mr. Dhinsa's codefendants actually had constructive possession of the firearms found inside 276 North Henry Street. None of the men apprehended inside the building were seen holding a gun and none admitted ownership. The evidence purportedly finding Mr. Dhinsa in constructive possession of the weapons is even weaker: he was nowhere near the weapons when they were discovered and did not admit ownership of them. Because a clear showing has been made that the evidence adduced by the People cannot support a finding that Mr. Dhinsa had any dominion or control over the

weapons, all possessory counts should be dismissed upon a review of the Grand Jury minutes.

The Presumption of Intent to Use a Firearm Against Another

The Grand Jury minutes must also be examined to discern whether the prosecutor relied solely on the permissive presumption of intent pursuant to P.L. § 265.15(4)--possession of a weapon is presumptive evidence of intent to use the same unlawfully against another--to establish the element of unlawful intent for the charges of Criminal Possession of a Weapon in the Second Degree (Counts One through Three). Because the presumed fact (intent) is not more than likely to flow from the purportedly proven fact (constructive possession), the defendant requests inspection of the Grand Jury minutes and dismissal of Counts One through Three if there is an insufficiency of evidence.

In New York, statutory presumptions in criminal cases are not true presumptions but instead create permissible inferences. People v. Lemmons, 40 N.Y.2d 505, 387 N.Y.S.2d 97, 354 N.E.2d 836, (N.Y. 1976). Presumptions must be carefully scrutinized before they will be allowed to operate against an accused since there is a real and substantial possibility that they will conflict with the overriding, more fundamental presumption of innocence accorded every defendant. People v. Dumas, 156 Misc. 2d 1025, 595 N.Y.S.2d 644 (Sup. Ct. 1992). In order for a criminal presumption to satisfy constitutional requirements, it must at least be said with substantial assurance that the fact presumed is more likely than not to flow from the proven fact on which it is made to depend. People v. Baron, 103 Misc. 2d 1057, 431 N.Y.S.2d 234 (2nd

Dept. 1980).

The defendant in Dumas was the wife of a man who was accidentally killed by the discharge of a firearm. The defendant, her husband and another man were transporting firearms from North Carolina to New York when the defendant's husband asked the other man to see one of the guns. When the man withdrew the gun from a bag, it discharged, killing the defendant's husband. After the defendant alerted the police in a futile attempt to save her husband's life, the police, instead, arrested her and charged her with Criminal Possession of a Weapon in the Second Degree.

Thereafter, the Court dismissed this charge. The Court initially noted that the prosecutor's instructions to the Grand Jury relied on one presumption upon another. The first presumption, the "atuomobile presumption," provides that "[t]he presence in an automobile ... of any firearm ... is presumptive evidence of its possession by all persons occupying such automobile ...." [P.L. § 265.15(3)] The prosecutor then relied on this presumption which established "possession" in conjunction with the presumption contained in P.L. § 265.15(4) ("the possession by any person of any ... weapon... is presumptive evidence of intent to use the same unlawfully against another") to establish the inent requirement of Criminal Possession of a Weapon in the Second Degree.

The use of "bootstrapping" presumptions was not determined to be necessarily fatal. However, the Court determined that the Grand Jury's finding that the defendant intended to use the weapon unlawfully against another "did not flow naturally, logically or rationally from any proven facts ...." Dumas, 595 N.Y.S.2d at 647. The Court stated further that had the defendant

"been the actual shooter or if she had physically possessed the weapon, a different result might ensue." Id. See also People v. Flores,19 A.D.2d 40, 640 N.Y.S.2d 20 (1st Dep't 1996)(Appellate Division found that evidence of defendant pointing a gun down a street crowded wth people and cars factually sufficient to satisfy intent requirement of Criminal Possession of a Weapon in the Second Degree).

Although Mr. Dhinsa was nowhere near the weapons when they were discovered, the prosecutor presumably used the defendant's alleged statement of ownership of the building and "all this stuff" inside to trigger the presumption that the defendant intended to use the weapons against another. Such a leap in logic does not flow rationally from the facts in this case. For this reason, defendant Dhinsa requests inspection of the Grand Jury minutes and dismissal of the defective Counts One through Three of the indictment.[3]

B. The Prosecutor's Failure to Give Proper Instructions

Clearly, without adequate instructions, no group of human beings can intelligently gauge whether or not an indictment should be returned. Thus, when the prosecutor, as legal advisor to the Grand Jury, fails to properly instruct the jurors on the applicable law, the indictment must be

[3] Similarly, no facts exist in this case which support the presumption that Mr. Dhinsa intended to sell the firearms allegedly found inside 276 North Henry Street (Count 13). Because the presumption of P.L. § 265.15 (6) does not flow rationally from any facts in this case, defendant requests inspection of the Grand Jury minutes and dismissal of this count if an insufficiency of evidence is found.

dismissed. See e.g., People v. Barysh, 95 Misc.2d 616, 408 N.Y.S.2d 190 (Sup.Ct., N.Y. Co., 1978) (failure to apprise the Grand Jury that intent to defraud is an essential element of the crime falsifying business records); People v. Darcy, 113 Misc.2d 580, 449 N.Y.S.2d 626 (Co.Ct., Yates Co., 1982) (in a case involving the illegal receipt of food stamps, prosecutor failed to instruct on the applicable regulations governing their use); People v. Garcia, 103 Misc.2d 915, 427 N.Y.S.2d 360 (Sup.Ct., Bronx. Co., 1980) (improper instructions concerning possession of a weapon); People v. Tucker, 101 Misc.2d 660, 421 N.Y.S.2d 792 (Co.Ct., Suffolk Co., 1979) (failure to instruct the Grand Jury that invocation of an alibi defense does not shift the burden of proof to the defendant).

There is, obviously, a myriad of ways in which the prosecutor's instructions could have been inadequate in the instant case. Thus, if the prosecutor undertook "to advise, inform, or explain the law, he must [have done] so correctly, and intelligently ...[without] otherwise jeopardize[ing] the proceeding." People v. Ehrlich, 518 N.Y.S.2d at 746.

One possible error may have occurred with regard to the instruction for the statutory "presumption" of intent set forth in P.L. § 265.15(4). As noted earlier, such presumption is actually a "permissive inference" which the members of the Grand Jury were entitled to reject. People v. Williams, 653 N.Y.S.2d 296 (1st Dept. 1997); People v. Rodriguez, 152 Misc. 2d 512, 577 N.Y.S.2d 756, (Sup. Ct. 1991). If the Grand Jury was led to believe that such "presumption" was not mandatory, an error requiring the dismissal of the counts based on such presumption has occurred. But see Flores, supra (prosecutor's failure to instruct the Grand Jury that the presumption set forth in P.L. § 264.15(4) was rebuttable held not to be erroneous

where Grand Jury was not told of presumption in the first place).

In conclusion, given the ambiguity of the legal theory on which this indictment is premised and the tenuousness of the evidence on which the People's allegations rely, we ask the Court to review the Grand Jury minutes to ensure that the elements of the substantive crimes were properly charged.

C. Procedural Defects

In addition to the aforementioned substantive problems, defendant requests that this Court carefully review the Gand Jury minutes to ascertain whether any statutory violations occurred.

First, the Court is asked to determine whether the term of the Grand Jury which voted the instant indictment was extended and, if it was, whether the extension was proper. Criminal Procedural Law § 190.15(1) provides:

> A term of a superior court for which a grand jury has been impaneled remains in existence at least until and including the opening date of the next term of such court for which a grand jury has been designated. Upon such date, or within five days preceding it, *the court may, upon declaration of both the grand jury and the district attorney that such grand jury has not yet completed or will be unable to complete certain business before it, extend the term of court and the existence of such grand jury to a specified future date*, and may subsequently order further extensions for such purpose. (Emphasis supplied)

Where an indictment has been voted by a Grand Jjury extended in derogation of this section, it "is a nullity". Matter of McClure v. County Court of County of Dutchess, 41 A.D.2d 148, 150-151, 341 N.Y.S.2d 855, 857-858 (2d Dept. 1973) (indictment voted by Grand Jury which had

been extended upon application of only the District Attorney). See also Matter of Four Reports of Nassau County Grand Jury, 87 Misc.2d 453, 382 N.Y.S.2d 1013, 1022 (Co. Ct., Nassau Co., 1976) (if Grand Jury term is extended, it may consider only matters before it during its original term).

Second, the Court should determine whether the proceedings were defective within the meaning of CPL §§ 190.25(1) and 210.35(2) and (3) if fewer than 16 grand jurors were present at any session or fewer than 12 grand jurors concurred in the finding of any count of the indictment. As Justice Rothwax noted fifteen years ago:

> The grand jury is interposed 'to afford a safeguard against oppressive actions of the prosecutor and the court.' U.S. v. Cox, 5 Cir., 342 F.2d 167, 170, cert. denied; Cox v. Hauberg, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 [1965]. The decision to hale a person into court is a serious one, and subject to official abuse. For this reason the concurrence of twelve citizens is required before a defendant is tried on a felony charge .... An indictment found without that concurrence is defective and must be dismissed.

People v. Colebut, 86 Misc.2d 729, 734, 838 N.Y.S.2d 985, 990 (Sup.Ct., N.Y.Co., 1976).

Third, it is important that the Court ascertain whether "at least twelve of the Grand Jurors, who voted to indict, heard *all essential and critical evidence*." People v. Brinkman, 309 N.Y. 974, 975, 132 N.E.2d 334 (1956) (emphasis supplied). Simply stated, many serious felony cases

> in New York County, are not presented and submitted at one sitting, and often the grand jury does not resume the proceeding until weeks later. During this interval the same panel may hear other interrupted cases.

People v. Colebut, supra, 86 Misc.2d at 732, 383 N.Y.S.2d at 988-989. Since, unfortunately, not

every juror is present at each session, extended proceedings may well culminate in some grand jurors voting without the benefit of knowing all of the facts.

Fourth, the Court should review the Grand Jury minutes to determine whether any unauthorized persons were present in the Grand Jury room during any portion of the proceedings pursuant to Criminal Procedure Law § 190.25(3). Where any of its provisions are violated, the indictment must be dismissed. As noted by the Court of Appeals:

> Secrecy is a vital requisite of Grand Jury proceedings (CPL 190.25, subd. 4) and its actions and deliberations must be "uninfluenced by the presence of those not officially connected with it (People v. Minet, 296 N.Y.315, 323, 73 N.E.2d 529, 533). The unauthorized appearance of [any person] infringes upon the secrecy requirement, thereby impairing the integrity of the proceeding.

People v. DiFalco, 44 N.Y.2d 482, 488, 406 N.Y.S.2d 279, 283 (1978). See also People v. Beauvais, 98 A.D.2d 897, 898, 470 N.Y.S.2d 887, 888 (3d Dept. 1983).

Fifth, the minutes should be inspected to determine whether the right of the grand jurors to ask questions of the witnesses was in any way impaired. Given the Grand Jury's role as a check against the unbridled exercise of prosecutorial discretion, it is vital that the jurors' right to ask questions not be restricted. See Matter of Four Reports of the Nassau County Grand Jury, supra, 87 Misc.2d 453, 382 N.Y.S.2d at 1019-1020.

Sixth, the Court should determine whether each witness before the Grand Jury was properly sworn. See CPL §§ 60.20 and 190.25(2). As stated in People v. Vazques, 119 Misc.2d 896, 897, 464 N.Y.S.2d 685, 686 (Sup.Ct., N.Y.Co., 1983);

> With the possible exception of a person suffering from mental disease or defect, CPL 60.20 provides an absolute bar against any

> witness over the age of twelve from testifying without first taking an oath ... The testimonial oath serves two discrete purposes: to alert the witness to the moral duty to testify truthfully and to deter false testimony through the sanction of perjury.

See also People v. Zigles, 119 Misc.2d 417, 418-419, 463 N.Y.S.2d 352, 354 (Co.Ct., Suffolk Co., 1983). This mandate applies with equal force to Grand Jury proceedings. People v. Schweain, 122 Misc.2d 712, 713, 471 N.Y.S.2d 729, 760 (Sup.Ct., Bronx.Co., 1983); People v. Vazquez, supra, 119 Misc.2d 896, 464 N.Y.S.2d at 686-687.

Seventh, this Court should ascertain whether any of the evidence presented to the Grand Jury was hearsay. With certain exceptions (see CPL § 190.30(2) and (3)), evidence presented to the Grand Jury must meet the same standards of admissibility as evidence introduced at trial. CPL §§ 190.30(1) and 60.10. Thus, hearsay is inadmissible and, if it forms any part of the factual basis of the indictment, the indictment must be dismissed. People v. Cornachio, 46 A.D.2d 690, 360 N.Y.S.2d 266, 267 (2d Dept. 1974); People v. Ehrlich, supra, 518 N.Y.S.2d at 746; People v. Sanchez, 125 Misc.2d 394, 397, 479 N.Y.S.2d 602, 605 (Sup.Ct., Kings Co., 1984).

Eighth, the Court should determine whether all legal instructions given to the Grand Jury were recorded in its minutes in accordance with the mandate of C.P.L. §190.25(6). Thus, if any or all of the instructions were not recorded, the indictment must be dismissed. People v. Rallo, 46 A.D.2d 518, 520, 363 N.Y.S.2d 851, 861 (4th Dept. 1975), aff'd, 39 N.Y.2d 217, 383 N.Y.S.2d 271 (1976); People v. Percy, 45 A.D.2d 284, 286-287, 358 N.Y.S.2d 434, 436 (2d Dept. 1974), aff'd, 38 N.Y.2d 806, 382 N.Y.S.2d 39 (1975).

POINT II

DEFENDANT REQUESTS A HUNTLEY HEARING

Defendant Dhinsa respectfully requests that this Court order a preliminary hearing pursuant to People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), in order to determine whether the statement allegedly given by him to law enforcement authorities ("I'm the owner. All this stuff is mine.") was voluntary. See People v. Weaver, 429 N.Y.S. 399 (Ct. App. 1980)("[t]here **must** be a hearing whenever defendant claims his statement was involuntary no matter what facts he puts forth in support of that claim.")(emphasis in the original). The relevant statements appear in the People's Notice pursuant to CPL § 710.30(1)(a). If the statement is found to have been made involuntarily, the defendant moves to suppress them pursuant to CPL § 710.20(3).

Because the defendant denies making this statement, the defendant respectfully requests that the People be required to demonstrate beyond a reasonable doubt that he made such statement and knowingly and voluntarily waived his privilege against self-incrimination while in the custody of law enforcement officials on May 16, 1997.

POINT III

ALL EVIDENCE SEIZED DURING THE SEARCH OF 276 NORTH HENRY STREET SHOULD BE SUPPRESSED

Following what is their claim to have been a response to an emergency inside the premises

of 276 North Henry Street, detectives from the 115th Precinct and members of the Emergency Services Unit conducted a thorough, 15 hour search which began while Mr. Dhinsa's three codefendants were secured in handcuffs (Dhinsa arrived later). Because the officers' search was not motivated by a desire to render assistance but, instead, an intent to seize evidence, all evidence seized from 276 North Henry Street, it is respectfully submitted, must be suppressed. In addition, the officers' claims that all firearms but one were discovered in "plain view" is incredulous and not worthy of belief. Finally, the detective's affidavit in support of the search warrant contains intentionally false statements and material omissions which made it impossible for the issuing judge to weigh the facts relied on to show probable cause. Because the omissions and false statements were necessary to the finding of probable cause, the defendant requests a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978).

1. The Officers Abused the "Emergency" Doctrine

It is fundamental that where a "police officer reasonably perceives that an emergency situation exists, he may enter and conduct a warrantless search of the premises." People v. De Vito, 114 A.D.2d 374, 493 N.Y.S.2d 892 (2d Dep't 1985). The scope and duration of the search must be "limited by and reasonably related to the exigencies of the situation." People v. Cohen, 87 A.D.2d 77, 450 N.Y.S.2d 497 (2d Dep't 1982). See also People v. Taper, 105 A.D.2d 813, 481 N.Y.S.2d 745 (2d Dep't 1984)(the "emergency" doctrine sanctions a "limited search in order to discover the perpetrator, or to locate the scene of the crime, or another person who may have

been injured in the violence, or the victim"); People v. Cruz, 89 A.D.2d 526, 452 N.Y.S.2d 616, 618 (1st Dep't 1982)(police may conduct a "limited search" pursuant to the "emergency" doctrine).

A 15 hour search prior to the application for the search warrant cannot be described as simply a quick and limited "security check" of the premises motivated by a reasonable fear that other persons were lurking who might have posed a threat to safety. United States v. Manley, 632 F.2d 978, 986-87 (2d Cir. 1980), cert. denied sub nom. Williams v. United States, 449 U.S. 1112 (1981). Instead, the officers, after claiming to have "secured the premises," conducted a room by room search for evidence and broke into a safe and a locked armored car looking for evidence. New York law does not permit such an abuse of the limited "emergency" doctrine. People v. Mitchell, 39 N.Y.2d 173, 179, 383 N.Y.S.2d 246, 249, 347 N.E.2d 607, 610 (N.Y. 1976)(The "limited privilege afforded to law enforcement officials by the emergency exception does not give them carte blanche to rummage for evidence it they believe a crime has been committed. There must be a direct relationship between the area to be searched and the emergency.").

The officers' failure to seek a search warrant once the premises were secured also requires suppression of the items seized. As noted previously, detectives and members of the Emergency Services Unit had "secured" the location and arrested three defendants only minutes after entering the 276 North Henry Street building. There was no indication that evidence would have been lost or destroyed at this point. Clearly, no emergency circumstances existed at this point to justify this warrantless search. People v. Robinson, 144 A.D.2d 960, 534 N.Y.S.2d 267

(4th Dep't 1988); see also People v. Gonzalez, 212 A.D.2d 410, 622 N.Y.S.2d 685 (1st Dep't 1995)(since the defendants were being held at gunpoint by another officer, the search of the car could not be justified as a reasonable safety measure). The officers could have easily applied for a search warrant at this point but chose, instead, to wait 15 hours. Indeed, the officers' application for the warrant appears to be merely an afterthought after a long day of searching the premises and breaking into the locked safe and van.

B. The Officers' Claims That All Firearms But One Were Found in Plain View Defies Realtiy

Once inside the premises, the officers claim that all firearms seized but one were found in plain view. Such a contention defies logic. If such a story is to be believed, Detective Bubelnik and the other officers are the luckiest law enforcement officers in New York. As detailed in Bubelnik's affidavit in support of the search warrant, during a claimed security check, she encountered "numerous boxes" inside the storage room. (Exh. A) Just one of the boxes, she claims, was "partially opened." (Exh. A) To her surprise, she discovered a gun. In total, Bubelnik and her colleagues claimed to have spotted: guns in plain view inside a safe; guns in plain view inside a box; and guns in plain view inside a locked, armored van. This story simply cannot be believed and, at least, requires a hearing to determine its veracity. See People v. Garafolo, 44 A.D.2d 86, 353 N.Y.S.2d 500, 503 (2d Dep't 1974)("incredulity attaches to the alleged observation of the gun under the driver's seat of the car. .... [I]t is found ... with the butt protruding from an unopened bag on the floor of a darkened car.").

The officers' story, additionally, would not have required a period of 15 hours to

complete. In reality, a "full-blown rummaging search" occurred (Gonzalez, 39 N.Y.2d at 127) which included the breaking open of both the safe and the van. Thousands of dollars of damages were inflicted upon the van during the detectives' attempts to open it. (Affidavit of Jeffrey Lichtman at ¶ 4) While the Supreme Court has established that under certain circumstances, i.e. the "emergency" doctrine, the police may seize evidence in plain view without a warrant (Coolidge v. New Hampshire, 403 U.S. 443 (1971)), if "an item must be moved even slightly, to ascertain its incriminatory nature ... the requirement[s] of the plain view doctrine are not satisfied." United States v. Athehorta, 729 F. Supp. 248, 259 (E.D.N.Y. 1990); Arizona v. Hicks, 480 U.S. 321 (1987). In this case, it is clear that boxes were rummaged, a safe was opened (removing the guns inside from even the possibility that they were seen in plain view, United States v. Isom, 588 F.2d 858 (2d Cir. 1978)) and a van broken open.

The obvious reason why the officers now claim that the firearms were found in plain view is to remove the need for a search warrant for the premises. How else can they explain away their warrantless, intensive 15 hour search after the premises were secured? The only logical explanation is that the officers are attempting to "tailor" the facts in order "nullify constitutional objections." Garafolo, 353 N.Y.S.2d at 502.

3. A Franks Hearing is Necessary Because Det. Bubelnik Lied and Omitted Material Facts in Her Affidavit in Support of the Search Warrant

After a 15 hour delay, Detective Bubelnik finally applied for and received a warrant to search the premises at 276 North Henry Street. In her affidavit, however, she included lies and made material omissions which made it impossible for Judge Heffernan to properly weigh the

facts in support of probable cause:

- Bubelnik claimed that she personally identified and observed a suspect of a homicide enter into the subject location. (Exh. A) According to one of the Kings' County District Attorney's Office's "Synopsis Sheets" provided to the defense, Bubelnik was accompanied by two witnesses who made the actual identification of this suspect. (Exh. C)

- Bubelnik did not indicate in her affidavit that during the 15 hour period prior to the application for the search warrant, an extensive search had occurred at the premises which involved nearly destroying an armored van in an attempt to get inside, breaking open a safe, and the recovery of a number of firearms other than the one described in the affidavit.

- The one firearm alleged to have been found pursuant to the search warrant was not, in fact, found after the warrant was signed at 10:32 pm. According to a "Property Clerk's Invoice" provided to the defense, a semi-automatic weapon and silencer were found pursuant to execution of the search warrant (Exh. K); according to Bubelnik's affidavit, she spotted this semi-automatic weapon with a silencer in plain view inside the "partially opened" box (Exh. A).

- One of the "Synopsis Sheets" indicates that the property found pursuant to the search warrant was, in contrast, a .12 gauge shotgun (Exh. C).

- One of the "Synopsis Sheets" indicates that all of the firearms, including both the .12 gauge shotgun and the semi-automatic weapon with silencer, were found 15 minutes before defendant Dhinsa arrived at 276 North Henry Street. (Exh. D) Such a seizure would have occurred over 15 hours before the warrant was granted.

Detective Bubelnik's application for a search warrant appears to have been nothing more than a "cover" for the illegal search of 276 North Henry Street which had already been completed at the time of the application. The affidavit is clearly filled with lies and material omissions thereby making it impossible for Judge Heffernan to have fairly determined the issue of probable cause. A hearing is requested in order that the defendant may prove this perjury and,

ultimately, void the search warrant and exclude the fruits from the search. Franks v. Delaware, 438 U.S. 154 (1978); United States v. Ferguson, 758 F.2d 843, 848 (2d Cir.), cert. denied, 474 U.S. 1032 (1985)(material omissions from an affidavit are governed by the same rules as false statements).

Section 690.35(3)(c) of the Criminal Procedure Law requires that an application for a search warrant may be based "upon personal knowledge of the applicant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated." (emphasis added) Detective Bubelnik did not bother to inform Judge Heffernan that her identification of a suspect of from a 1991 homicide who had allegedly entered 276 North Henry Street was actually based on an identification from unnamed witnesses. Therefore, Judge Heffernan was not able to judge the reliability of this witness in his determination of whether probable cause existed to search the building. See People v. Fromen, 125 A.D.2d 987, 510 N.Y.S.2d 384 (4th Dep't 1986)(Suppression granted because the affiant misled the Magistrate into believing that he had personally observed certain conduct when, in fact, he had not).

In addition, the remainder of Bubelnik's affidavit is so grossly misleading and filled with omissions and lies--including the failure to describe the officers' conduct over the prior 15 hours--as to strike at the very heart of the defendant's Fourth Amendment rights against unreasonable searches and seizures. Even the small amount of personal observations supplied by Bubelnik in her affidavit may not have been able to withstand Judge Heffernan's scrutiny had he been informed of her incomprehensibly successful security check which yielded numerous fireamrs, all

located in containers which were either partially or fully open.

The Supreme Court held, in Franks, that

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56. Because such a preliminary showing has been made, defendant Dhinsa requests a hearing and, ultimately, suppression of the fruits of the search warrant.

In conclusion, the defendant requests suppression of all evidence found during the search of 276 North Henry Street. First, despite the lack of any danger to the searching officers, the search was not limited to a protective sweep thus violating the emergency exception to warrantless searches; second, the officers' claims that all firearms except one were found in plain view is not supported by the reality of the situation; and third, the affidavit in support of the search warrant--submitted 15 hours after the search began--was filled with material lies and omissions making it impossible for the issuing judge to fairly weigh the issue of probable cause. In the alternative, the defendant requests a hearing on these issues.

POINT IV

DEFENDANT JOINS IN THE MOTIONS OF HIS CODEFENDANTS TO THE EXTENT THAT THEY ARE APPLICABLE TO HIM

POINT V

DEFENDANT EXPRESSLY RESERVES THE RIGHT TO MAKE ANY FURTHER MOTIONS WHICH ARE NECESSITATED EITHER BY THE PEOPLE'S DISCLOSURE OF DOCUMENTS OR INFORMATION, OR BY THE DISCOVERY OF NEW FACTS OF WHICH DEFENDANT IS PRESENTLY UNAWARE

CONCLUSION

For the reasons stated above, Mr. Dhinsa's motions should be granted in their entirety.

Dated: New York, New York
August 7, 1997

Respectfully submitted,

JEFFREY LICHTMAN
Attorney for Gurmit Dhinsa
1585 Broadway
19th Floor
New York, New York 10036
(212) 969-5670