At a Term of the County Court held in and for the County of Wayne at the Hall of Justice in the Village of Lyons, New York on the 17th day of December, 2012.

Present: Honorable Daniel G. Barrett
County Court Judge

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION
Ind. No. 12-124

PHILIP M. THOMAS,

Defendant

Appearances- People - Assistant District Attorney,
Christopher Bokelman, Esq.

Defendant - Assistant Public Defender,
Andrew Correia, Esq.

The Defendant having filed a Notice of Motion seeking various forms of relief. The Court has received from the District Attorney's Office a Response to said Motion.

The Court first rules on matters that seem to have no opposition to nor any real requirement of discussion of the law or record.

The Court orders the following:

1. A copy of complainant's medical records, if any, in possession of the District Attorney's Office or if they come into the possession of the District Attorney's Office in the future;

2. Digital copies of any photographs subject to protective order under CPL 240.50 (2);

3. Copies of audio recordings under protective order CPL 240.50 (2).

The Defendant also seeks dismissal of the charge of Reckless Endangerment 1st and requests a copy of the Grand Jury Minutes. This will be discussed below.

All other requests set forth in the Motion the Court determines are premature, however the Court specifically reserves the right of the Defendant to reargue any requests not covered herein.

The Court initially finds that the Grand Jurors were given proper instructions and there was a sufficient number of Grand Jurors at the time of the voting of the Indictment herein.

The Court has received a copy of the Grand Jury Minutes and did inspect the same. The Court's inspection is to be done for the purpose of determining sufficiency, Miranda v. Isseks, 41 A.D. 2d 176.

The Grand Jury standard for indictment is whether there was reasonable cause to believe that an offense was committed and the Defendant committed it, see CPL 70.10. The Court must view the Grand Jury evidence in light most favorable to the prosecution, People v. Mikuszewski, 73 N.Y. 2d 407. The evidence, unexplained and uncontradicted, would warrant conviction and the motion to dismiss is to be denied, People v. Reeves, 195 A.D. 2d 950.

So long as the evidence is legally sufficient under the standard, the weighing of the evidence is the preponderance of the Grand Jury, People v. Jensen, 86 N.Y. 2d 248. The defense has the burden of making a clear showing of legal insufficiency, People v. Diaz, 201 A.D. 2d 580.

Defense counsel urges the Court to dismiss Count 1, Reckless Endangerment in the First Degree in violation of Section 120.25 of the Penal Law. Sufficient evidence must be shown that the Defendant recklessly engaged in certain conduct under circumstances evincing the depraved indifference to human life. As counsel is aware, the term depraved indifference to human life has generated much case law and is largely dependant on the circumstance of each case.

Defense cites People v. Boutin, 81 A.D. 2d 1399. Therein the court stated where a defendant's conduct endangers a single person, to sustain the charge of depraved indifference, as an element of Assault in the First Degree and Reckless Endangerment in the First Degree, there must be proof of wanton cruelty, mortality or callousness directed against particularly a vulnerable victim, combined with other indifference to life or safety of a helpless target of the perpetrator's inexcusable acts.

In this particular case it is essentially alleged that the Defendant brought a shotgun into the residence of his sister and allegedly at some point pointed the same at the victim, Cynthia Spencer, and that at some point said victim grabbed said gun and the parties struggled. The shotgun was loaded at one point however with a different gauge of shotgun shells opposed to the gauge of the shotgun and the question is whether the shotgun was therefore operable and/or capable of firing a shot.

Additional cases that are helpful with regard to said charge are People v. Lynch, 95 N.Y. 2d 243, which provides that depraved indifference that is necessary to support a first degree Reckless Endangerment requires proof that the actor's reckless conduct is imminently dangerous and presents a great risk of death; this Court requires an objective assessment of the degree of risk presented by the Defendant's reckless conduct.

In People v. Chrysler, 85 N.Y. 2d 413, the court found evidence in Reckless Endangerment prosecution support a finding the defendant created a great risk of death to the victim; defendant physically restrained the victim by her hair, placed a loaded fully operable hand gun in close proximity to her temple and, after the defendant cocked the hand gun, any sudden movement by the victim or the defendant could have readily resulted in accidental discharge of the weapon into complainant's temple.

The People cite People v. Malcolm, 74 A.D. 3d 1483, wherein the defendant angered at the owner of a car repair shop returned armed with a loaded semi-automatic rifle, took aim at the victim and pulled the trigger. The defendant had parked in such a manner as to not been seen by the victim and had additional ammunition with him. However, the weapon did

not go off because the gun's safety was on. The court found evidence that the gun's safety on did not preclude finding that the defendant's conduct created great risk of death; operability of the gun was not factually impossible and where a firearm's expert explained that the safety could be easily disengaged by moving one finger forward from the trigger; considering the ease by which the safety could be disengaged, the victim's testimony that the defendant reloaded the weapon and ejected a round as he rushed to subdue the defendant, and proof that the two struggled for control of the loaded riffle, there was ample support for a finding that defendant recklessly created a grave risk of death by creating a situation where any sudden movement by victim or defendant could have readily resulted in accidental discharge of the weapon.

The People also cite People v. Chrysler, supra, the court found that the trier of fact could have reasonably concluded that the defendant created a situation where any sudden movement by the complainant or the defendant could have readily resulted in the accidental discharge of the weapon. When the use of a firearm is the foundation for a reckless endangerment charge, a discharge of the weapon is not required before the violation is established.

Defendants repeated attempts to pull a trigger while a gun was pointed at an officer's face during a struggle over a gun was sufficient to support convictions for Attempted Murder and Reckless Endangerment, People v. Vega, 238 A.D. 2d 278.

Conviction for Reckless Endangerment in the First Degree was supported by sufficient evidence, which indicated that the defendant put the gun to the complaint's head and complainant thereafter heard a

clicking noise, that the gun was partially loaded and operational and that one of the cartridges may have misfired, People v. Garcia, 146 A.D. 2d 584.

The case at hand alleges the Defendant had a shotgun which he brought into a residence, allegedly pointed it at the victim at some point, that the gun was loaded even though with the wrong ammunition and that the parties struggled for control of said shotgun.

Based upon the standard as required by New York State Law that the Court must view the evidence in light most favorable to the prosecution, the Court finds there was sufficient evidence to support Count One where there be reasonable cause to believe the Defendant committed such offense and the weighing of the evidence is the province of the Grand Jury.

There was testimony provided as to the operation of the shotgun. The Court finds there was sufficient evidence to sustain Count Three of the Indictment.

The Court also finds there was sufficient evidence regarding Count Four of the Indictment where the Grand Jury found reasonable cause that the Defendant wrongfully induced or attempted to induce such person to absent themselves from or otherwise to avoid testifying.

Defense counsel also asks for disclosure of the Grand Jury Minutes pursuant to Section CPL 210.30. Defense argues the Defendant cannot raise the insufficiency of proof before the indicting Grand Jury as an issue on appeal from any subsequent possible conviction therefore said testimony is needed to permit a more intelligent argument of the motions

directed to dismissal of the Indictment. The District Attorney's Office opposes said release of Grand Jury testimony.

Under the law the defense must make a two step showing for release:

1. Compelling a particularized need;

2. Where the disclosure is appropriate under the circumstances present.

The Court finds that there is particularized need of the Defendant as to part of the Grand Jury testimony. The operation of the shotgun is an issue and an element that the People must sustain burden on at trial. Providing said testimony just before the prosecution's witness would testify would not be sufficient for the Defendant's attorney to properly review said testimony to allow for proper cross-examination or to be allowed to be prepared for said issue or prepared to present testimony on behalf of the Defendant.

Therefore, the Court orders that the District Attorney's Office provide a copy of the testimony of the witness, David Dentico, to Defendant's attorney within a reasonable period of time.

This constitutes the Decision of the Court.

Dated: December 17, 2012
Lyons, New York

Daniel G. Barrett
County Court Judge