

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE
INTEGRATED DOMESTIC VIOLENCE PART

THE PEOPLE OF THE STATE OF NEW YORK

AFFIDAVIT

v

MICHAEL IZZARD

Defendant

IDV No. 2012ID000142
Docket No. 05000I-2012

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

FRANK A. SEDITA, III, being duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of New York. I am also the duly elected District Attorney of Erie County, appearing on behalf of the People of the State of New York.

2. This affidavit is submitted in response to this Court's decision dated October 4, 2012, requesting a "clear and meaningful declaration of the People's intention to exercise prosecutorial discretion on this matter from the Erie County District Attorney."

3. Unless otherwise stated herein, I make this affidavit upon information and belief, the sources of which include my review of my opposing affidavit dated September 25, 2012 and the supporting documents attached thereto, this Court's decision dated October 4, 2012, and conversations with members of my staff in the Office of the Erie County District Attorney. Unless I state so otherwise, I dispute the factual assertions and legal conclusions contained within that Decision. In other words, my restraint from disputing any particular factual assertion or legal conclusion does not indicate a concession.

4. Pursuant to an Order to Appear and to “show cause and explain why this Court should not enter an order pursuant to County Law §701 appointing a Special Prosecutor to prosecute the instant case” dated September 20, 2012, I filed an opposing affidavit on September 25, 2012. I appeared before this Court on September 26, 2012 at 9:45 a.m. The Erie County Attorney, Michael Siragusa was also present, as was defendant and his counsel, Edward Martnshin, Esq. The Chief of the Appeals Bureau of the Office of the Erie County District Attorney, Donna A. Milling, appeared on my behalf and demonstrated that the District Attorney had not “failed to prosecute or failed to appear” in the instant matter and directed the Court’s attention to my opposing affidavit and its attachments in support of our position. This Court reserved decision on the matter and requested that the parties return on October 4, 2012 at 9:30 a.m. for a decision.

5. Prior to today, I spoke with Assistant District Attorney Rachel Newton, Chief, of the Domestic Violence Bureau about the evidence in the instant case. I learned from Ms. Newton that this particular criminal file had been transferred from the Buffalo City Court Domestic Violence Court where the presiding jurist has been designated by the Office of Court Administration to preside over criminal matters involving domestic violence. I assume that the presiding jurist in the Buffalo City Court Domestic Violence Court has received adequate training in the handling of such matters and that her court staff is sufficiently equipped to handle misdemeanor domestic violence files. I further learned that the other pending matter involving the complainant and the defendant is a Family Offense petition in which the defendant is accused of committing the same acts which are the subject of the criminal complaint and that there are no matrimonial, custodial or visitation issues to resolve. I advised Ms. Newton that after consultation with her and a review of the evidence against defendant, that I intended to seek an indictment. I requested that she advise the Court of that intention. Ms. Newton reported to me that on October 2, 2012 a letter had been sent to Edward Martnshin, counsel for defendant pursuant to CPL 190.50. Ms. Newton further advised that on October 3, 2012, she spoke to one of the IDV Court Attorneys, Sheila Schwanekamp, and suggested that the matter be adjourned

until the grand jury had an opportunity to review the evidence. As of the commencement of the proceedings on October 4, 2012, Ms. Newton had yet to receive a response to that suggestion.

6. On October 4, 2012, I was again present in court accompanied by Assistant District Attorney Donna A. Milling. Michael Siragusa, the Erie County Attorney, was also present. Approximately two minutes before Justice Haendiges took the bench, I was handed a copy of this Court's decision. Before I had an opportunity to read the decision, Justice Haendiges took the bench and called the case. The Court acknowledged the presence of the parties while Assistant District Attorney Donna Milling, defendant and Mr. Martnshin stood at counsel tables. The Court announced that it had issued its written decision which had been provided to the parties and that its decision required a written response from the District Attorney. The court staff provided a copy of the decision to members of the media while the parties were summarily dismissed. No opportunity was afforded to the parties to address the Court.

7. Had the Court not summarily dismissed the parties, Assistant District Attorney Donna A. Milling had been prepared to remind the Court that, in addition to the arguments against the appointment of a Special District Attorney outlined in my opposing affidavit, this Court is prohibited from such an appointment pursuant to the Uniform Rules of Trial Courts (22 NYCRR) § 200.15 (Exhibit 1). No party in these proceedings (the District Attorney, the defendant or the victim) has made an application to the Chief Administrator of the Courts. Accordingly, there is no application before the Presiding Justice of the Appellate Division, Fourth Department, for him to designate this Court to consider.

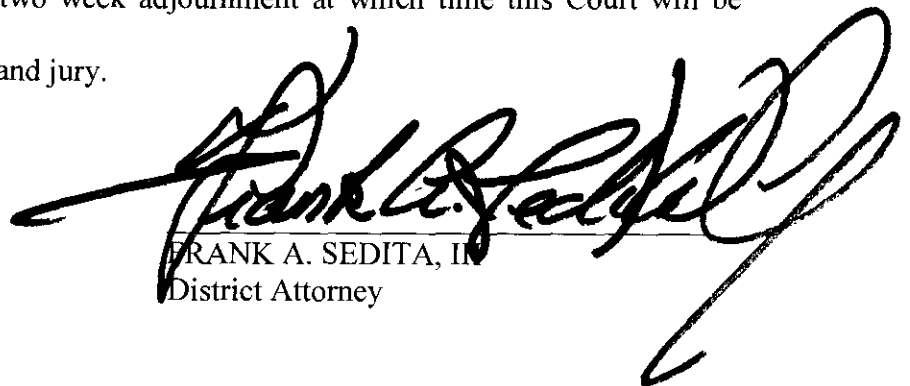
8. As I have stated in my correspondence which was attached as Exhibit 1 to my opposing affidavit, and still maintain, I will prosecute felonies and misdemeanors in the Erie County Domestic Violence Part, as well as the IDV Part, provided those cases are filed in accordance with the provisions of the CPL 210.05. If the Erie County grand jury returns an

indictment against the defendant, CPL 210.05 will allow me to prosecute that indictment in any court the administration chooses, including the IDV Court.

9. Had the Court not summarily dismissed the parties, Assistant District Attorney Donna A. Milling would have also advised the Court that I and have authorized Assistant District Attorney Newton to present the charges against defendant to an Erie County grand jury for its consideration. The presentation has been scheduled on October 17, 2012 and defendant's attorney acknowledged his receipt of the notice pursuant to CPL 190.50 (Exhibit 2).

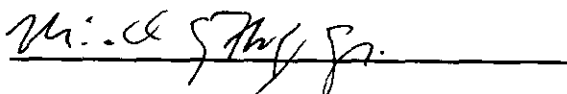
10. I intend to exercise my prosecutorial discretion in this matter by seeking an indictment in this matter. Accordingly, because I have provided this Court with a "clear and meaningful declaration" of intention to exercise prosecutorial discretion in this matter, as well as for the reasons stated in this affidavit and my previous affidavit, a Special District Attorney should not be appointed.

WHEREFORE, it is respectfully requested that this Court not appoint a Special Prosecutor in this matter and grant a two week adjournment at which time this Court will be advised as to the action taken by the grand jury.



FRANK A. SEDITA, II
District Attorney

Subscribed and sworn to before me
this 4th day of October, 2012.



Notary Public, State of New York

MICHAEL J. FLANNERY, JR.
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 08/08/2015

Westlaw

22 NYCRR 200.15

Page 1

N.Y. Comp. Codes R. & Regs. tit. 22, § 200.15

C

Compilation of Codes, Rules and Regulations of the State of New York Currentness

Title 22. Judiciary

Subtitle A. Judicial Administration.

Chapter II. Uniform Rules for the New York State Trial Courts

Part 200. Uniform Rules for Courts Exercising Criminal Jurisdiction

▣ Rules Applicable to Superior Courts. (Refs & Annos)

→→ **Section 200.15. Appointment of a special district attorney**

Any party filing with a superior court an application for appointment of a special district attorney, pursuant to section 701 of the County Law, shall make the application to the Chief Administrator of the Courts. The Chief Administrator, in consultation and agreement with the Presiding Justice of the appropriate Appellate Division, then shall designate a superior court judge to consider the application as provided by law.

Sec. filed Oct. 16, 1986 eff. Oct. 7, 1986.

22 NYCRR 200.15, 22 NY ADC 200.15

Current with amendments included in the New York State Register, Volume XXXIV, Issue 40, dated October 3, 2012.

END OF DOCUMENT

EXHIBIT 1

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OFFICE OF THE ERIE COUNTY DISTRICT ATTORNEY

FRANK A. SEDITA, III
DISTRICT ATTORNEY

October 2, 2012

EDWARD J. MARTNSHIN, ESQ.
4438 RUSHFORD DRIVE
HAMBURG NY 14075

Re: People v MICHAEL IZZARD
Docket No. 2012ER012306F

Dear Mr. Martnshin:

You are hereby notified that the Erie County Grand Jury is considering the pending above-captioned matter.

If it is your client's intention to exercise his right to appear pursuant to Criminal Procedure Law Section 190.50, please notify this office on or before October 12, 2012 so that we may make proper arrangements for the Grand Jury to receive his testimony.

Please address all correspondence to the undersigned Assistant District Attorney; you may telephone me 858-2413 if you have any questions.

Very truly yours,

FRANK A. SEDITA, III
DISTRICT ATTORNEY

A handwritten signature in black ink that reads "Danielle N. Soluri".

BY: DANIELLE N. SOLURI
Assistant District Attorney
Domestic Violence Bureau

DNS/tsb

EXHIBIT 2

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE
INTEGRATED DOMESTIC VIOLENCE PART

THE PEOPLE OF THE STATE OF NEW YORK

Affidavit of Service

v

MICHAEL IZZARD

Defendant

IDV No. 2012ID000142

Docket No. 05000I-2012

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DENISE M. SCHUNKE, being duly sworn, deposes and says:

That she is over the age of twenty-one (21) years and is employed by the County of Erie at the Erie County District Attorney's Office; that on October 4, 2012, she served the within Affidavit upon Michael Siragusa, Esq., Attorney for County of Erie, at his office at 1634 Rath Building, 95 Franklin Street, Buffalo, New York, 14202, by depositing a true copy of same, securely enclosed in a postpaid wrapper, in a Post Office box regularly maintained by the United States Postal Service at the Erie County Hall in the City of Buffalo, New York in the above-captioned matter.


DENISE M. SCHUNKE

Subscribed and sworn to before
me on October 4, 2012.



Notary Public, State of New York
Qualified in Erie County
My Commission Expires

MICHAEL J. FLAHERTY, JR.
Notary Public State of New York
Qualified in Erie County
My Commission Expires 08/08/2015

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE
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v

MICHAEL IZZARD

Defendant

IDV No. 2012ID000142

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STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DENISE M. SCHUNKE, being duly sworn, deposes and says:

That she is over the age of twenty-one (21) years and is employed by the County of Erie at the Erie County District Attorney's Office; that on October 4, 2012, she served the within Affidavit upon Edward Martshin, Esq., attorney for Michael Izzard, addressed to Edward Martshin, Esq., at his office located at 4438 Rushford Dr., Hamburg, New York 14075, by depositing a true copy of same, securely enclosed in a postpaid wrapper, in a Post Office box regularly maintained by the United States Postal Service at the Erie County Hall in the City of Buffalo, New York in the above-captioned matter.



DENISE M. SCHUNKE

Subscribed and sworn to before
me on October 4, 2012.



Notary Public, State of New York
Qualified in Erie County
My Commission Expires

MICHAEL J. FLAHERTY, JR.
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 08/09/2015