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# COUNTY OF ERIE

MARTIN A. POLOWY  
ACTING COUNTY ATTORNEY

**CHRIS COLLINS**  
COUNTY EXECUTIVE

THOMAS F. KIRKPATRICK, JR.  
ACTING FIRST ASSISTANT COUNTY ATTORNEY

DEPARTMENT OF LAW

February 3, 2011

Mr. Robert M. Graber, Clerk  
Erie County Legislature  
92 Franklin Street, 4th Floor  
Buffalo, New York 14202

Dear Mr. Graber:

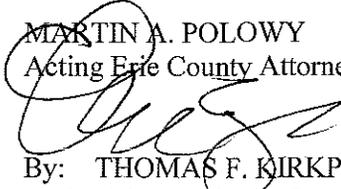
In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	<i>Sieteski, Larry vs Erie County Probation Department</i>
Document Received:	Order to Show Cause
Name of Claimant:	Larry Sieteski #90-C-0705 Sullivan Correctional Facility P.O. Box 116 Fallsburg, New York 12733
Claimant's attorney:	Pro Se

Should you have any questions, please call.

Very truly yours,

MARTIN A. POLOWY  
Acting Erie County Attorney

  
By: THOMAS F. KIRKPATRICK, JR.  
Acting First Assistant County Attorney

TFK/mow

Enc.

cc: MARTIN A. POLOWY, Acting Erie County Attorney

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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IN THE MATTER OF THE APPLICATION OF  
**LARRY SIETESKI, #90-C-0705**

Petitioner,

-vs-

**ERIE COUNTY PROBATION DEPARTMENT,**

Respondent.

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ORDER TO  
SHOW CAUSE

RETURN ON  
PAPERS ONLY

Index No.  
I-2010-9262

SUPREME COURT, ERIE COUNTY

**HON. PAULA L. FEROLETO, JUSTICE PRESIDING**

APPEARANCES:

Petitioner, Pro Se  
**LARRY SIETESKI, #90-C-0705**

This *ex parte* matter was referred to my attention at a Term of the Supreme Court,  
Erie County.

Upon the reading of the petition for relief pursuant to Article 78 of the Civil Practice  
Law and Rules, sworn to on June 24, 2010, with accompanying exhibits,

**LET RESPONDENT SHOW CAUSE** at a Special Term of the Supreme Court to  
be held in and for the County of Erie on **JANUARY 18, 2011** before the **HON. JOHN  
MICHALSKI**, Acting Justice of the Supreme Court, in Part 18 at 25 Delaware Avenue, Buffalo,  
New York, **WHY** the relief requested in the Petition should not be granted.

**IT IS ORDERED that the production of petitioner or appearance by or on behalf of the respondent on said return date is not required, and the matter shall be decided on all papers submitted to the Court prior to said return date;** and it is further

**ORDERED** that in the event the petitioner should receive an unfavorable decision, said petitioner is hereby granted poor person relief pursuant to Article 11 of the Civil Practice Law and Rules for the limited purpose of filing a Notice of Appeal in the Erie County Clerk's Office without paying the fee required by CPLR 8022(a); and it is further

**ORDERED** that a waiver of fees for service by publication, for stenographic transcripts, or for any other cost or fee related to this proceeding in this Court shall only be granted upon a separate application to the Court, on notice to the County Attorney of Erie County, pursuant to CPLR 1101, showing the need therefor; and it is further

**ORDERED** that service of a signed and executed copy of this Order to Show Cause, by ordinary First Class mail, upon the named respondent, Erie County Probation Department, on or before **December 21, 2010** be deemed adequate. In addition, the petitioner, on or before said date, shall similarly serve the Erie County Attorney, 95 Franklin Street, Room 1634, Buffalo, New York 14202; and it is further

**ORDERED** that it shall be the responsibility of the party seeking an extension of time to serve papers or seeking an adjournment of this matter to make such request for an extension of time or an adjournment to Acting Supreme Court Justice Michalski and any party receiving an adjournment shall notify the other party or parties of said adjourned date; and it is further

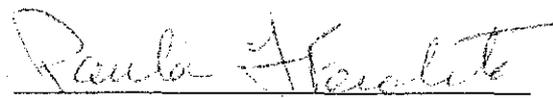
**ORDERED** that it is the petitioner's responsibility to:

(a) Serve a signed and executed copy of this Order to Show Cause, the petition and any supporting papers as authorized above or by personal service.

(b) Submit the original proof of service to the chambers of the **Hon. John Michalski**, 25 Delaware Avenue-Third Floor, Buffalo, New York 14202 at least eight (8) days prior to the return date; and it is further

**ORDERED** that a copy of any answer or response shall be served upon the petitioner not less than five (5) days before the return date. The original of any such answer or response is to be delivered to the chambers of Acting Justice Michalski not less than three (3) days prior to said return date.

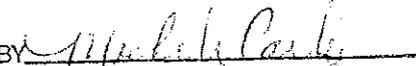
DATED: Buffalo, New York  
November 22, 2010

  
**HON. PAULA L. FEROLETO**  
Justice of the Supreme Court

GRANTED:

**GRANTED**

NOV 23 2010

BY   
MICHELE CARTER  
COURT CLERK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ERIE

-----X  
In the Matter of the Application of  
LARRY SIETESKI,

Petitioner

AFFIDAVIT IN SUPPORT  
OF ORDER TO SHOW  
CAUSE

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

RJI #  
Index No. 2010-9262

-against-

ERIE COUNTY DEPT. OF PROBATION  
WILLIAM REGAN, Probation Supervisor

Respondent.

-----X

STATE OF NEW YORK )  
                          ) :ss  
COUNTY OF ERIE     )

1). Mr. Larry Sieteski, upon being duly sworn, deposes  
and says:

2). I am the petitioner in this proceedings.

3). I make this affidavit in support of my petition  
pursuant to Article 78 of the Civil Practice Law and Rules  
(CPLR), that this honorable court order the Erie County  
Department of Probation to remove and expunge the inaccurate  
information contained in petitioner's pre-sentencing report,  
and to have the pre-sentencing report accurately reflect  
that petitioner was found not guilty upon a jury verdict  
of the crime of intentional murder (P.L. §125.25-2), which  
charge was dismissed.

4). I also entreat this court to order the Erie County  
Department of Probation to send a copy of the revised pre-  
sentencing report (as referred to above) to the Department

of Correctional Services in Albany, New York, and Sullivan Correctional Facility Inmate Record's Coordinator, and the New York Division of Parole in Sullivan Correctional, and their Albany New York office.

5). An Order to Show Cause is being used rather than a Notice of Petition because petitioner is currently incarcerated and cannot arrange to have a Notice of Petition personally delivered to the Respondent(s).

6). Petitioner designates Erie County as the place of the special proceeding; the basis of venue is that this is the county in which Respondent(s) prepared the pre-sentencing report.

7). No previous Article 78 for the same relief herein prayed has been made.

WHEREFORE, Petitioner respectfully asks for an Order directing the Respondents to Show Cause why the relief requested should not be granted, and for any further relief the court may deem just and proper.

Mr. Larry Sieteski, Petitioner

*Larry Sieteski*

Sworn to me this

7th day of June 2010

*Charles A. Gramlich*

NOTARY PUBLIC.

CHARLES A. GRAMLICH  
Notary Public, State of New York  
Sullivan County Clerk's #2006  
Commission Expires September 5, 2013

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ERIE

-----X  
In the Matter of the Application of

LARRY SIETESKI,  
Petitioner,

PETITION

For a Judgment Pursuant to Article 78  
of Civil Practice Law and Rules

RJI #  
Index No. 2010-9262

-against-

ERIE COUNTY DEPARTMENT OF PROBATION,  
WILLIAM J. REGAN Probation Supervisor,

Respondent.

-----X  
TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of Larry Sieteski respectfully alleges that:

1). This is a special proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules (CPLR).

2). Pursuant to CPLR § 7804, and § 506(b), venue of this proceeding is Erie County because it is where Respondent made the pre-sentence report.

3). This petition challenges Respondent's failure to accurately prepare Petitioner's pre-sentence report, in that Respondent states on page 3 (Exhibit "A"), "This defendant has been convicted of conspiring to have one, Terrance A. May, intentionally murdered with the result of that particular deed being performed," of which crime (PL §125.25-2), petitioner was found not guilty by a jury verdict.

### PARTIES

4). Petitioner Larry Sieteski is an inmate currently serving an indeterminate term of imprisonment in the State of New York and, as such, as in the care and custody of the New York Department of Correctional Services and is currently incarcerated at Sullivan Correctional, 325 RiverSide Dr., Fallsburg, NY 12733.

5). Respondent is William J. Gegan, Probation Supervisor of the Erie County Department of Probation which inaccurately prepared Petitioner's pre-sentence report in May of 1990 and has the authority to issue a corrected report.

### FACTS

6). In May of 1990, a pre-sentence report was prepared by the Erie County Department of Probation (Arthur F. Tomczak, Probation Officer; William J. Regan, Probation Supervisor) about Petitioner, correctly indicating on page 1 (the face sheet) which charges Petitioner was accused of and which charges Petitioner was convicted of. See (Exhibit "B").

7). Petitioner was charged with two (2) counts of Murder in the 2nd Degree, PL §125.25-2, intentional murder, and PL §125.25-3, Felony Murder. This exhibit shows that Petitioner was not found guilty of PL §125.25-2, Intentional Murder, and guilty of PL §125.25-3 Felony Murder. See (Exhibit "B").

8). On page three (3) of the pre-sentence report, it states, "This defendant has been convicted of conspiring

to have one, Terrance A. May, intentionally murdered with the result of that particular deed being performed." See (Exhibit "A"). Hence the Erie County Department of Probation failed to understand the difference between PL §125.25-2 and PL §125.25-3 and wrongly used the phrase "intentionally murdered."

9). In Petitioner's sentencing minutes (P. 5, lines 4, 5; See Exhibit "C"), sentencing judge Joseph McCarthy states, "They have acquitted you of the higher offense of which you were charged, that of conspiring to kill (hence conspiracy, 2nd Degree reduced to Conspiracy, 4th Degree See Exhibit "D", and not guilty of Intentional Murder PL §125.25-2). Also, Honorable McCarthy states (P. 5 lines 12-13), "... similarly concluded that you aided and abetted another in the UNINTENDED death of Terrance May."

10). In Petitioner's sentencing minutes (P. 7 lines 10-11, 16-18), Honorable McCarthy states, "... jurors have been heard from... that they did conclude unequivocally, apparently, that you did not intend Terrance May's death..." See (Exhibit "D").

11). Upon information and belief, the wrong information contained in Petitioner's pre-sentencing report was communicated to the D.O.C.S. and infected both Petitioner's header sheet, See (Exhibit "E"), and pre-parole summary sheet on page 2, See (Exhibit "F"). Mr. S. Christie, Sullivan C.F. parole officer who prepared Petitioner's pre-parole summary sheet, told Petitioner in a September 2009 meeting

before Petitioner's parole appearance on 11/4/09 that he got the phrase "conspired with his codefendant to have the victim murdered intentionally, with the result of that deed being performed," from Petitioner's pre-sentencing report.

12). This inaccurate and damaging statement from the pre-sentencing report was considered by the Division of Parole at Petitioner's 11/4/09 parole board appearance. Petitioner's header sheet and pre-parole summary sheet mimic and almost exactly quote the inaccurate statement in the pre-sentencing report being challenged herein. This error has caused great prejudice to Petitioner in that the board of parole relies heavily on these documents to determine a person's readiness for parole, as is stated in Executive Law §259i. Petitioner was given a two (2) year "hit", based solely on the nature of his crime, See (Exhibit "G"), due to the huge error by the Erie County Department of Probation being contested herein. Thus it is entirely possible and even probable that Petitioner is doing two more years in prison due to the error in the pre-sentencing report, because he excelled in every other area considered by the parole board under Executive Law § 259i.

13). Under CPL §430.10 the court cannot change the sentence if it is in accordance with the law. But when a courts original sentence is defective, it has the inherent power to correct it's own error by resentencing the defendant. People v. Ford, 533 N.Y.S.2d 35 (4th Dept. 1988).

In order for a court to impose a proper sentence, a broad scope of inquiry into the life of the defendant is essential. U.S. v. Grayson, 438 U.S. 41, 98 S.Ct. 2610; Gregg v. U.S., 394 U.S. 489, 89 S.Ct. 1134.

14). There are due process limitations to the rule, and a sentence can not be imposed on the bases of an inaccurate criminal record. Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252; U.S. v. McIlcolm, 432 F.2d 809 (2d Cir. 1970); where the sentence was based on a misapprehension that defendant had tried to fix a case, and tried other ruses to avoid jail; U.S. v. Stein, 544 F.2d 96 (2d Cir. 1976); where the sentence was based on uncorroborated assertions that the defendant was a large scale drug dealer; U.S. v. Weston, 448 F.2d 626 (9th Cir 1971); and where the sentence on one count may have been influenced by invalid convictions on the other two counts. U.S. v. Mapp, 476 F.2d 76 (1963).

15). In People v. Freeman, 889 N.Y.S.2d at 120, (3rd Dept. 2009), the Appellate Division Third Department ruled that, "...unjustifiable risk of future adverse effects to defendant in other contexts, including appearances before the board of parole... ...an agency relies on the unedited version at the Probation Department (see CPL §390.30), defendant will not only have to refute the information in the PSI but also explain why the sentencing court did not correct the PSI... ... an inaccurate PSI could keep a defendant incarcerated for a longer duration of time, affect future determinations..."

16). There is a due process right to be sentenced on reliable, and accurate information. A due process violation occurs when a court is unaware of the unconstitutionality of a prior conviction, or is otherwise misinformed as to material facts in a defendant's criminal history. People v. Wright, 429 N.Y.S.2d at 1000.

17). Rehabilitation is a stated goal of the Penal Law §1.05 Subd 6. A sentencing judge is obligated to give due consideration to the purpose of imprisonment. Social protection, rehabilitation, and deterrence. People v. Farra, 52 N.Y.2d 302, 305, 437 N.Y.S.2d 961.

18). The legislature has granted the court discretionary power to review or modify an unduly harsh or excessive sentence as well in the interest of justice. People v. Whiting, 453 N.Y.S.2d 790 at 791-92; CPL §470.15 Subd 6 (a); CPL §470.2 Subd 6.

#### CONCLUSION

WHEREFORE, the Petitioner prays that a judgment under CPLR Article 78 be granted:

That this honorable court order the Respondent, Erie County Department of Probation to remove and expunge the damaging and inaccurate sentence from Petitioner's pre-sentence report and send copies of the corrected presentencing report to;

a). Petitioner Larry Sieteski 90 C 0750 at Sullivan

Correctional, 325 RiverSide Dr., Fallsburg, NY 12733.

b). Sullivan C.F. Division of Parole, at 325 RiverSide Dr., Fallsburg, NY 12733.

c). N.Y.S. Division of Parole st State of New York, Executive Department, 97 Central Ave, Albany NY 12206.

d). Sullivan C.F. Inmate Records Coordinator at 325 River Side Dr., Fallsburg, NY 12733.

WHEREFORE, Petitioner prays for such other and further relief as the court deems just and proper.

Dated: 7-1-10

  
Mr. Larry Sieteski Petitioner  
Pro Se

VERIFICATION

STATE OF NEW YORK )  
                          )ss.:  
COUNTY OF SULLIVAN )

I, Mr. Larry Sieteski, being duly sworn, deposes and says that deponent is the petitioner in the above-encaptioned proceeding, that he has read the foregoing CPLR Article 78 petition, and knows the contents thereof, that the same is true to deponent's own knowledge, except as to matters therein stated upon information and belief, which those matters deponent believes them to be true.

Respectfully,

Larry Sieteski

Sworn to me before this  
14th day of JUNE 2010

Charles A. Gramlich  
NOTARY PUBLIC.

CHARLES A. GRAMLICH  
Notary Public, State of New York  
Sullivan County Clerk #12086  
Commission Expires September 8, 2013