

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- : NOTICE OF MOTION

PERCELL ROSS, : 21-CR-571 (BMC)(LB)

Defendant. :

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PLEASE TAKE NOTICE, that the defendant PERCELL ROSS, by his attorneys MICHELLE A. GELERT, ESQ. and MIA EISNER-GRYNBERG, of the Federal Defenders of New York, Inc., and upon the annexed affirmation and declaration, will move the Court, before the Honorable Lois Bloom, United States Magistrate Judge for the Eastern District of New York, for an order:

1. Suppressing physical evidence, observations made by law enforcement, and any other evidence to be offered at trial, which is the unattenuated fruit the unlawful seizure of Mr. Ross, pursuant to Fed. R. Crim. P. 12(b)(3)(C) or, in the alternative, directing that a hearing be held outside of the presence of the jury before trial as to the admissibility of such evidence; and
2. Precluding: 1) any non-noticed statements from Mr. Ross; 2) any non-noticed identifications by other witnesses; and 3) any documents or materials obtained through the use of search warrants the government has yet to disclose discovery (including, but not limited to, cell site data, pen trap and trace devices, license plate reader data, social media data, among other discovery.); and
3. Granting such other and further relief as the Court may deem just and proper.

DATED: BROOKLYN, N.Y.
April 27, 2022

/s/

Michelle A. Gelernt
Mia Eisner-Grynberg
Attorney for Percell Ross
Federal Defenders of New York, Inc.
1 Pierrepont Plaza, 16th Floor

Brooklyn, N.Y. 11201
(718) 330-1204

TO: BREON S. PEACE
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, N.Y. 11201
By: Assistant U.S. Attorney Jack Dennehy, Esq.

CC: Clerk of the Court (by ECF)
Mr. Percell Ross

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :
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-against- :
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PERCELL ROSS, :
 :
Defendant. :
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MOTION TO SUPPRESS

21-CR-571 (BMC)(LB)

MIA EISNER-GRYNBERG, ESQ. and MICHELLE A. GELERT, ESQ., declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. We are attorneys employed by the Federal Defenders of New York, Inc., and are the attorneys of record assigned to represent defendant PERCELL ROSS.

2. This affidavit is submitted in support of the defendant’s motion for an order:

- A. Suppressing physical evidence, observations made by law enforcement, and any other evidence to be offered at trial, which is the unattenuated fruit the unlawful seizure of Mr. Ross, pursuant to Fed. R. Crim. P. 12(b)(3)(C) or, in the alternative, directing that a hearing be held outside of the presence of the jury before trial as to the admissibility of such evidence; and
- B. Precluding: 1) any non-noticed statements from Mr. Ross; 2) any non-noticed identifications by other witnesses; and 3) any documents or materials obtained through the use of search warrants the government has yet to disclose in discovery (including, but not limited to, cell site data, pen trap and trace devices, license plate reader data, social media data, among other discovery.); and
- C. Granting such other and further relief as the Court may deem just and proper.

3. This affidavit is based on records on file in our office, discussions with the defendant, the attached declaration, independent investigation, and discovery provided by the government.

4. Attached, as Exhibit A, is the declaration of PERCELL ROSS, detailing his interactions with law enforcement on the date of his arrest. Because this declaration is being

submitted for the limited purpose of establishing the standing for the present motion, Mr. Ross has not set forth each and every fact and or detail of the circumstances surrounding his arrest or prior encounters with law enforcement. This declaration presents a dispute over a material fact. *United States v. Caming*, 968 F.2d 232, 236 (2d Cir. 1992).

STATEMENT OF FACTS

5. Upon information and belief, including police reports received in discovery, in the early morning hours of October 17, 2021, officers of the New Rochelle (New York) Police Department (“NRPD”) were in Brooklyn, New York. The New Rochelle officers were attempting to locate a 2008 Dodge Caliber car with Virginia license plate number UBV-3726. They found the vehicle, unoccupied, on Tillary Street between Prince Street and Navy Walk. Around 8:00 AM, a man entered the vehicle and drove it to 330 Hudson Walk, Brooklyn. This man was not Mr. Ross. Around 10:05 AM, NRPD officers conducted a car stop on a different vehicle that they believed contained Mr. Ross. It did not.

6. Around 10:30 AM, Mr. Ross was standing on the sidewalk in the vicinity of 330 Hudson Walk, Brooklyn, New York, where his girlfriend resides. Ex. A at ¶ 2. He approached his parked car, opened its doors, removed items, closed the doors, and began to walk back towards the building. *Id.* at ¶ 3. As he walked, he observed unknown men chasing him. *Id.* Mr. Ross did not know who they were, so he ran from them. *Id.* As he ran, he believes that one of the men began to shoot at him. *Id.* at ¶ 4. Mr. Ross returned fire in self-defense. *Id.* The men who attempted to stop, shot at, seized, and arrested Mr. Ross were NRPD officers. To date, Mr. Ross has not been charged with any crime in New Rochelle state court.

7. On October 18, 2021, Mr. Ross was arraigned on a federal complaint before Magistrate Judge Robert M. Levy, charging Felon in Possession of a Firearm, 18 U.S.C. § 922(g). ECF No. 1. On November 15, 2021, Mr. Ross was indicted on a single count of the same charge.

ECF No. 4. On November 22, 2021, Mr. Ross was arraigned on the indictment and entered a plea of not guilty.

8. On December 10, 2021, defendant filed and served a request for discovery pursuant to Rule 16. *See* ECF No. 8. The defendant has specifically requested all warrants for Mr. Ross.

**MOTION TO SUPPRESS PHYSICAL EVIDENCE, OBSERVATIONS,
STATEMENTS AND ANY OTHER EVIDENCE THAT WAS OBTAINED IN
VIOLATION OF THE FOURTH AMENDMENT**

9. This motion concerns the stop, seizure, and arrest of Mr. Ross in Brooklyn, New York, by New Rochelle police officers, who were unlawfully attempting to execute a local New Haven, Connecticut arrest warrant outside of their jurisdiction.

10. Upon information and belief, including the federal complaint (ECF No. 1) and police reports provided in discovery, New Rochelle police officers were located in the vicinity of 330 Hudson Walk, Brooklyn, New York, on October 17, 2021, looking for Mr. Ross. One of the officers was also a federal Task Force officer, based out of New Rochelle, in the Southern District of New York. According to the sworn statement of FBI Special Agent Justin Gray, the officers' purpose was "attempting to apprehend the defendant PERCELL ROSS on an active warrant, dated October 16, 2021, for aggravated assault, First Degree with a weapon, which had been issued out of New Haven, CT (the 'CT warrant')." ECF No. 1 at ¶ 2.¹

11. Upon information and belief, in the early morning hours of October 17, 2021, there existed only one warrant for Mr. Ross's arrest: a New Haven, Connecticut warrant, issued by the Superior Court of Connecticut, charging him with committing a September 18, 2021 assault and robbery, each in the first degree. Ex. B ("Connecticut Warrant"). On its face, the Connecticut

¹ Separately, Special Agent Gray notes that Mr. Ross "was also an identified suspect in a taxicab robbery/shooting homicide which had occurred in Westchester County, N.Y. on or about October 14, 2021 (the 'Westchester robbery/homicide')." Notably, the New York and federal police officers had neither a New York nor federal arrest warrant for this offense.

Warrant authorized “any proper officer of the State of Connecticut,” “by authority of the State of Connecticut,” to make an arrest within the “State of Connecticut.” *Id.*

INFORMATION JD-CR-71 Rev. 3-11		STATE OF CONNECTICUT SUPERIOR COURT		Disposition date
Police Case number 21-33917	Agency name New Haven Police Department, Det. M. Stevens #530			Agency number 093
Arrest Warrant				
Geographical area number 23	State of Connecticut vs. Blakeney, Percell aka Ross, Percell			
To: Any Proper Officer of the State of Connecticut				
By Authority of the State of Connecticut , you are hereby commanded to arrest the body of the within-named accused. (“X” all that apply)				
<input type="checkbox"/> A. Accused is ordered to be brought before a clerk or assistant clerk of the Superior Court. <input type="checkbox"/> B. Accused is not entitled to bail. If A, B or both are checked above, you shall without undue delay bring the arrested person before the clerk or assistant clerk of the Superior Court for the geographical area where the offense is alleged to have been committed, or if the clerk's office is not open, to a community correctional center within said geographical area, or the nearest community correctional center if no such center exists in the geographical area, or to the Correctional Institution, as the case may be.				
<input checked="" type="checkbox"/> C. Bail set at <u>\$1 million cash or surety</u> <input checked="" type="checkbox"/> D. Non-financial conditions of release: <u>BOND POSTED ONLY IN COURT</u>				
<input type="checkbox"/> E. Conditions of release not determined by court.				
By the Court	Signed (Judge of the Superior Court)	Date	Name of Judge (Print or type)	
		10/16/21	J. ALTERN SPAONE JR	
Return On Arrest Warrant				
Geographical area number	Town of	Date	State of Connecticut	
Then and there, by virtue of the within and foregoing complaint and warrant, I arrested the body of the within-named accused and read the same in the hearing of said accused; and have said accused here in court for examination.				
Attest (Officer's signature and Department)				

12. No law enforcement officer present that morning in the vicinity of 330 Hudson Walk, Brooklyn, New York was a proper officer of the state of Connecticut. Of course, Brooklyn is not within the state of Connecticut.

13. For nearly 100 years, Connecticut state law has firmly recognized that the laws of one state “are of no effect beyond its borders.” *Von Walden v. Geddes*, 135 A. 396, 396 (Conn. 1926). Addressing an unlawful arrest within Connecticut, on a California local warrant, the Connecticut Supreme Court held, “no warrant issuing from the courts of that state could here have any effect.” *Id.* at 397. Likewise, New York law does not grant authority to police officers to effectuate out-of-

state arrest warrants within the state of New York, absent hot pursuit. *People v. Lafontaine*, 92 N.Y.2d 470, 475 (1998). Rather than obtaining local arrest warrants, officers making arrests across state lines, for crimes committed out of state, must follow procedures to obtain and effectuate fugitive warrants. Conn. Gen. Stat. Ann. § 54-169; N.Y. Crim. Proc. Law § 570.32.

14. Because the NRPD officers could not validly arrest Mr. Ross on the Connecticut Warrant, they lacked authority to stop or seize him in connection with that warrant.² And any apparent suspicion the NRPD officers had for any New York crime did not rise to the level of reasonable suspicion, as illustrated by their stop of the wrong man in the wrong vehicle.

15. Nonetheless, as Mr. Ross lawfully walked away from his own car on a public sidewalk, acting in no way suspicious, NRPD officers ordered him to stop, absent reasonable suspicion that he had committed any offense within their proper jurisdiction. When he did not stop, they shot their firearms at him. This is a seizure, absent probable cause. *Torres v. Madrid*, 141 S. Ct. 989, 1003 (2021) (holding that the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued). At bottom, when out-of-county local police officers, attempting to execute an out-of-state local arrest warrant, shot at Mr. Ross, their actions were unreasonable pursuant to the Fourth Amendment. Accordingly, the firearm recovered, all other physical evidence, as well as any police observations of Mr. Ross, must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

MOTION TO PRECLUDE AND RESERVATION OF RIGHTS

16. Mr. Ross's discovery demand sought disclosure of any post-arrest statements. Discovery provided by the government indicates that Mr. Ross was informed of his Miranda rights and agreed to speak without his lawyer present; the interrogation was video-recorded on DVD. Ex.

² Neither did the officers comply with Federal Rule of Criminal Procedure Rule 4 in their attempted execution of the Connecticut arrest warrant. They did not "show it to the defendant," as they "must." *Id.*

C (302 report). Despite requests, the government has not provided the interview DVD. Though the alleged sum and substance of the statements are captured within a Fairfield County police report, the undersigned require the video recording in order to determine if the statement was made voluntarily. The Court should preclude any non-noticed statements from Mr. Ross as untimely. In the alternative, the Court should order the government to produce the DVD to Mr. Ross, and he reserves the right to move to suppress the statement, once it is provided.

17. The Court should further preclude any additional statements that have not been disclosed, documents or materials obtained through the use of search warrants the government has yet to disclose discovery, including, but not limited to, cell site data, pen trap and trace devices, license plate reader data, social media data, among other discovery. Specifically, discovery provided by the government indicates the existence of search warrants executed on Mr. Ross's car, cell phone, and cell phone towers. None of those warrants or the affidavits underlying them have been provided to Mr. Ross.

18. The Court ordered the completion of Rule 16 discovery by February 24, 2022. *See* ECF 19. Undersigned defense counsel noted several missing items in discovery in an update on February 28, 2022. *See* ECF 22. To date, Mr. Ross has not received any additional discovery. The Court should therefore preclude any discoverable items that have not been provided to Mr. Ross.

CONCLUSION

19. For the foregoing reasons, the defendant respectfully requests that the Court (i) suppress physical evidence, observations, statements and other evidence obtained in violation of the Fourth Amendment to the United States Constitution; or, in the alternative, hold an evidentiary hearing outside the presence of the jury before trial; (ii) preclude: any non-noticed statements from Mr. Ross; any non-noticed identifications by other witnesses; and any documents or materials obtained through the use of search warrants the government has yet to disclose discovery (including,

but not limited to, cell site data, pen trap and trace devices, license plate reader data, social media data, among other discovery); and (iii) grant such other and further relief that the Court deems just and proper.

DATED: BROOKLYN, N.Y.
April 27, 2022

/s/

Michelle A. Gelernt
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TO: BREON S. PEACE
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Eastern District of New York
271 Cadman Plaza East
Brooklyn, N.Y. 11201
By: Jack Dennehy Assistant U.S. Attorney, Esq.

CC: Clerk of the Court (by ECF)
Mr. Percell Ross (by Hand)

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :
 :
-against- :
 :
PERCELL ROSS, :
 :
Defendant. :
-----X

DECLARATION
21-CR-571 (BMC)(LB)

I, PERCELL ROSS, hereby declare under the penalties of perjury, pursuant to 28 U.S.C. § 1746, that:

1. I am the defendant in above-captioned case.¹ My attorneys, Mia Eisner-Grynberg and Michelle Gelernt, assisted me in preparation of this affidavit.

2. On October 17, 2021, I was outside of 330 Hudson Walk, Brooklyn, New York. I was there visiting my girlfriend, who lives there. At approximately 10:30 AM, I went to my parked car, to retrieve some items.

3. After I retrieved my property, I closed the car doors, and was walking away from the car. All of a sudden, a white car raced up to me and stopped. Two men dressed in dark clothing jumped out and started chasing me. I saw them jumping over fences and coming in my direction. They were carrying guns. I didn't know who they were, so I ran from them.

4. While I was running, I believe one of the men shot at me. I was afraid for my life, so I shot back in their direction in self-defense.

¹ Because this declaration is being submitted for the limited purpose of establishing a dispute of material fact, I have not set forth each and every fact and or detail of the circumstances surrounding my arrest.

5. I declare under penalties of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: BROOKLYN, N.Y.
APRIL 27, 2022

/s/ Percell Ross²

Percell Ross

² I have authorized my attorneys to sign this document on my behalf.