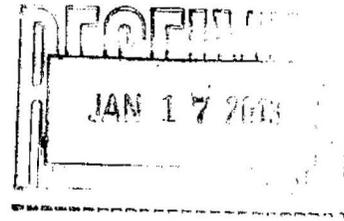


STATE OF NEW YORK: COUNTY OF SULLIVAN
TOWN OF FALLSBURG JUSTICE COURT



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THE PEOPLE OF THE STATE OF NEW YORK,

AFFIRMATION IN OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS

-against-

WILLIAM BARBOZA

Defendant.

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JOEY Z. DRILLINGS, an attorney authorized to practice law in the State of New York, hereby affirms the following:

1. I am an Assistant District Attorney in the office of James R. Farrell, District Attorney of Sullivan County, and I am familiar with the facts and circumstances of this case.¹
2. The People were served with the defendant's notice of motion to dismiss the pending charges in this Court in the interest of justice, along with a supporting affirmation and memorandum of law, on December 24, 2012
3. The People now make this affirmation in opposition to defendant's motion to dismiss in the interest of justice.
4. This affirmation is made upon information and belief, based upon an examination of the pertinent records and documents on file in the Sullivan County District Attorney's Office.
5. It is well-settled that, "[t]he power to dismiss an indictment in the interest of justice should be exercised sparingly, in those rare cases where there is a 'compelling factor'

¹ And also, Katy M. Schlichtman, law intern in the office of James R. Farrell, District Attorney of Sullivan County.

which clearly demonstrates that prosecution of the indictment would be an injustice.” (CPL § 210.40); (People v. Crespo, 244 A.D.2d 563, 564 [2nd Dep’t 1997]) (emphasis added).

6. A court may dismiss a misdemeanor complaint or information in furtherance of justice when, even though there may be no basis for dismissal as a matter of law, such dismissal is required as a matter of judicial discretion by the existence of some compelling factor clearly demonstrating that prosecution or conviction of the defendant would result in injustice. (People v. Jenkins, 11 N.Y.3d 282 [2008]); (People v. Clayton, 41 A.D.2d 204 [2nd Dep’t 1973]). Dismissal of an indictment is precluded in the absence of such a compelling factor.
7. A compelling factor is present if the denial of the motion would be such an abuse of discretion as to shock the conscience of the court. (People v. Moore, 167 Misc.2d 994 (City. Crim. Ct. 1996)). As such, *Clayton* motions and *Clayton* hearings are granted only in exceptional circumstances.
8. In exercising this option, a court’s discretion is not absolute and should be reserved for that unusual situation which cries out for fundamental justice. (People v. Ntarelli, 154 A.D.2d 769 [3rd Dep’t 1989]) (emphasis added); (People v. Litman, 99 A.D.2d 573, 573 [3rd Dep’t 1984]). This situation does not cry out any fundamental injustice.
9. It is well-settled that the use of this remedy depends solely upon the justice to be served by dismissal, rather than the legal or factual merits of the case, or the guilt or innocence of the defendant. The immediate question for this Court is whether the continued prosecution or conviction would result in injustice.

10. In making its determination, the Court must, to the extent applicable, examine and consider, individually and collectively, the following factors enumerated under Criminal Procedure Law § 210.40:

(a) the seriousness and circumstances of the offense;

Aggravated harassment is a serious offense. The defendant acted with the intent to make the victim uncomfortable, alarmed, and annoyed. Penal Law criminalizes defendant's conduct because employees have the right to feel safe and free from annoyance and alarm in fulfilling their employment duties.

(b) the extent of harm caused by the offense;

Defendant's victims have suffered emotional stress in the workplace as a result of his violation of the Penal Law.

(c) the evidence of guilt, whether admissible or inadmissible at trial;

Defendant does not contest making the communications, which on their face, provide reasonable cause to believe that it was defendant's conscious purpose to harass or at minimum to cause annoyance to the complainant, by inscribing "Fuck your shitty town, bitches" on his communication to the court.

(d) the history, character and condition of the defendant;

The fact that the defendant does not have a criminal record is irrelevant to the instant case and the instant motion. It is well established that a defendant's lack of a criminal history is insufficient to compel the conclusion that dismissal is warranted in the interest of justice. (People v. Crespo, 244 A.D.2d at 564). Defendant's character, however, is highly relevant and does not warrant dismissal in the interest of justice. It is significant that the defendant has sent harassing letters to not only the court, but also to the District

Attorney's Office. (See annexed communication from defendant, dated Number 28, 2012). The accusatory instrument in the instant case sufficiently put defendant on notice of the charge against him. The crime of aggravated harassment can be committed by a single act, and it is significant that the defendant has persisted in continuing with his harassing communications, despite the current charge pending against him. A consideration of his character and most recent actions does not warrant dismissal in the interest of justice.

(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

There is no misconduct alleged on the part of law enforcement personnel in the investigation, arrest, and prosecution of the defendant.

(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

Defendant should be held accountable for his crimes, and this Court should deny his motion to dismiss. The purpose of imposing on the defendant a sentence for his crimes is to hold her accountable for his actions. Defendant cannot attempt to hide behind his protective cloak of "free speech," when his conduct satisfies the statutory requirements for aggravated harassment.

(g) the impact of a dismissal upon the confidence of the public in the criminal justice system; and (h) the impact of a dismissal on the safety or welfare of the community;

A dismissal of defendant's charge would result in the loss of confidence in holding defendants accountable for their conduct under the Penal Law.

(i) where the court deems it appropriate, the attitude of the complainant or victim

with respect to the motion;

Both the People and the victim are adamantly opposed to the dismissal of any pending charges against the defendant. The People respectfully request that Your Honor deny his motion to dismiss in the interest of justice.

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

There are no relevant facts in the instant case warranting the view that a conviction would serve no useful purpose.

11. The People submit that the above articulated statutory factors do not warrant dismissal in the interest of justice.
12. Additionally, a motion to dismiss in the interest of justice should not be used as a substitute for a trial or when the motion merely raises a trial defense. (People v. Rahmen, 302 A.D.2d 408 [2nd Dep't 2003]).
13. Defendant's culpability arises from his harassing conduct, not from the content of his speech.
14. Liability arising from harassing conduct does not subject the defendant to criminal liability for engaging in protected speech.
15. The pertinent part of Penal Law § 240.30(1)(b) provides that a person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten, or alarm another person, he causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written

communication in a manner likely to cause annoyance or alarm. (Penal Law § 240.30(1)(b))(emphasis added).

16. Penal Law § 240.30 does not prohibit speech or expression on its face, rather, its proscription is limited to conduct. (People v. Shack, 86 N.Y.2d 529, 535 [1995]). The statute proscribes only conduct, and moreover, expressly removes from its application any legitimate communication. (Shack, 86 N.Y.2d at 535).
17. Penal Law § 240.30 does not prohibit speech or expression. (People v. Goldstein, 763 N.Y.S.2d 390, 395 [2nd Dep't 2003]). Rather, it is facially limited to proscribing conduct, respectively, communicating and making a telephone call (*Id.*). Subsection (1) is specifically limited to communication “in a manner likely to cause annoyance or alarm.” This subsection requires a showing of defendant's intent to “harass, annoy, threaten or alarm.” Thus, it excludes from the statute's ambit speech which is merely unpleasant to the recipient (People v. Morgenstern, 531 N.Y.S.2d 751). As it was defendant's intent to harass, annoy, and alarm his recipients, his conduct is properly proscribed by the Criminal Procedure Law.
18. Dismissal in the interest of justice cannot be based on the court's view of the strength of the People's case, but must turn on an assessment of whether there was *prima facie* proof of the crimes charged, or of any lesser included offenses. (People v. Dunlap, 629 N.Y.S.2d 407 [1st Dep't 1995]). There is prima facie proof of defendant's culpability of aggravated harassment,
19. Repetition of the offending act is not required. Rather, a single act can be sufficient so long as the defendant's intent is present. (People v. Wood, 698 N.Y.S.2d 122, 128 [4th Dep't 1999]). The Criminal Procedure Law, by its terms, imposes criminal liability for a

- single act. (Id.) It is insignificant that defendant directed only one communication towards the court. While only one communication was directed at the Court, defendant's invective, denigrating communication was intended to harass and annoy both the clerk and judge of the court to whom defendant's communication was directed to.
20. Moreover, there is an intent element within Penal Law 240.30. "By including a specific intent element in the statute, the Legislature has removed the possibility that a defendant could be unaware of his criminal conduct." (Shack, 86 N.Y.2d at 538).
 21. To prove intent, defendant's conduct must have been intended to annoy or alarm the recipient, not just that the recipient was annoyed or alarmed.
 22. In the instant matter, defendant does not contest making the communications, which on their face provide reasonable cause to believe that it was defendant's conscious purpose to harass or at minimum to cause annoyance to the complainant.
 23. Moreover, in determining whether to grant a motion in the interest of justice, the court may consider any evidence of the defendant's guilt, whether or not it would be admissible at trial.
 24. It is significant that defendant has sent additional communications to the Sullivan County District Attorney's Office, intending to harass, annoy, and threaten prosecuting attorney, further demonstrating culpable conduct with respect to the crime charged. (See annexed communication from defendant, dated November 28, 2012).
 25. Any contention the defendant has with the People's proof is an issue properly addressed at trial, and is not a proper basis for the purpose of a motion to dismiss. (People v. Rahmen, 302 A.D.2d 408 [2nd Dep't 2003]).

26. Contrary to defendant's assertion, the New York Court of Appeals' decision in People v. Mangano is inapposite and distinguishable from the instant case, and the People do not rely on its holding or reasoning for the purposes of this case. (People v. Mangano, 100 N.Y.2d 569 [2003]). Unlike the answering machine in Mangano, there is no room for complaints from the public upon answering a summons or ticket; there are only two options: to either plead guilty or not guilty. Court tickets and summons are not established to facilitate, among other things, comments and criticism from defendants who are dissatisfied with their plea. There is no space provided on a ticket for a dissatisfied defendant to write whatever he may please and direct such communications to the court. The court process in the instant case does not allow any window for communication of a dissatisfaction of a defendant with his or her court case or view on what is "fair" or "unfair."
27. Moreover, while justice court employees are considered public employees, the public at large does not have any access to viewing the content on a defendant's tickets submitted to the court. Thus, the submissions by defendants to the court employees remain forever hidden from the eyes of the public, and are only seen by the court employees. To the extent that the statute limits the right to free speech, the statute permissibly subordinates that right to the recipient's right to be free from unwanted mail.
28. The instant case is not an unusual circumstance that cries out fundamental injustice by holding the defendant accountable for his actions. There is no compelling factor that warrants dismissal because defendant's conduct is properly proscribed by the statute, not his speech.

For the foregoing reasons, the People respectfully request that defendant's motion to dismiss in the interest of justice be denied. Additionally, the People request that any demands for a *Clayton* hearing also be denied.

Dated: January 14, 2012
Monticello, New York

Respectfully submitted,



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