

**CRIMINAL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK**

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PEOPLE OF THE STATE OF NEW YORK,

Dkt. No. 2009NY068946

--AGAINST--

KATHLEEN NEILL,

Defendant.

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS  
INFORMATION AS DEFECTIVE AND ON CONSTITUTIONAL GROUNDS**

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## FACTS

Defendant was a nude model posing for a professional photographer at a photo shoot in the Arms and Armor Room of the Metropolitan Museum of Art and was arrested for doing so. *Hillgardner Affirmation* ¶ 3. The information charges defendant with endangering the welfare of a child (Penal Law § 260.10), public lewdness (Penal Law § 245.00), and exposure of a person (Penal Law § 245.01). *See, Hillgardner Affirmation* ¶ 2 (Exh. 1). The factual portion of the information reads as follows:

Deponent states that she observed the defendant, inside the Arms & Armor Room of the Metropolitan Museum of Art in open view, rolling on the ground with defendant's naked breasts and naked vagina exposed. Deponent further states that she observed other individuals looking in the direction of the defendant as the defendant was engaging in the above-described activity.

Deponent further states that she viewed the Metropolitan Museum of Art video surveillance footage of the above described event and observed some of the individuals present in the Arms & Armor Room were children less than seventeen years old, to wit, deponent observed more than five (5) children, all appearing to be less than ten (10) years old, all weighing less than seventy-five pounds (75), and all standing less than five (5) feet tall.

*Hillgardner Affirmation* ¶ 2 (Exh. 1).

Defendant now moves *inter alia* to dismiss all counts of the information based on facial insufficiency and constitutional grounds.

## LEGAL ARGUMENT

### **I. ALL COUNTS OF THE INFORMATION MUST BE DISMISSED AS EACH AND EVERY ONE OF THEM IS FACIALLY INSUFFICIENT AS A MATTER OF LAW AND COMMON SENSE.**

The information charges 3 counts: endangering the welfare of a child (PL § 135.10), public lewdness (PL § 245.01), and exposure of a person (PL § 245.00). As is

more fully shown below, each and every one of these charges must be dismissed where the information is facially insufficient to support the charges.

### **Facial sufficiency standard**

In order to be facially sufficient, an information must substantially conform to the formal requirements of CPL 100.15. 11A *McKinney's* Crim. Pro. L. § 100.40[1][a] (2004). Additionally, the factual portion and any accompanying depositions must allege facts of an evidentiary character demonstrating reasonable cause to believe the defendant committed the offense charged. 11A *McKinney's* Crim. Pro. L. § 100.15[3]; § 100.40[1][b] (2004); *see, People v. Dumas*, 68 N.Y.2d 729, 731 (1986). The failure of an information to contain non-hearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof renders it insufficient on its face. 11A *McKinney's* Crim. Pro. L. § 100.15[3]; § 100.40[1][c] (2004); *see People v. Alejandro*, 70 N.Y.2d 133, 134-135 (1987). On a motion to dismiss an information based on facial insufficiency, "the court must consider whether both the alleged facts and the reasonable inferences to be drawn from those facts, viewed in the light most favorable to the People, would, if true, establish every element of the crime charged." *People v. Barona*, 19 Misc.3d 1122A (Crim. Ct., N.Y. Co., 2008).

**(a) The Count charging defendant with exposure of a person (Penal Law § 245.01) is facially insufficient where it fails to negate the exceptions set forth in the statute, defendant's conduct clearly falls within the exception to the statute for persons performing at an exhibition, and where the legislature intended the statute to proscribe only commercial exploitation of nudity and nude sunbathing in public parks and beaches.**

The count of the information charging defendant with exposure of a person must be dismissed for three independent reasons: (1) the information fails to negate that defendant's conduct falls within the exceptions set forth in the statute; (2) defendant's

conduct falls within the exception to the statute; and (3) the statute does not apply to defendant's conduct where defendant's nudity was noncommercial and where she was not sunbathing in the nude at a public park or beach.

**1. The information is facially insufficient where it fails to negate that defendant's conduct did not fall within the exceptions set forth in the statute.**

The information is facially insufficient to the extent it attempts to plead a count for the violation of exposure of a person (PL 245.01) where the information fails to negate that defendant's conduct fell within any of the exceptions expressly set forth in the statute. *See, People v. Krathaus*, 181 Misc.2d 378, 381-382 (Cty. Ct., Cattaraugus Co., 1999).

PL 245.01 provides in pertinent part as follows:

A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

39 *McKinney's* Penal Law § 245.01 (2008).

Here, the factual part of the information reads as follows:

Deponent states that she observed the defendant, inside the Arms & Armor Room of the Metropolitan Museum of Art in open view, rolling on the ground with defendant's naked breasts and naked vagina exposed. Deponent further states that she observed other individuals looking in the direction of the defendant as the defendant was engaging in the above-described activity.

Deponent further states that she viewed the Metropolitan Museum of Art video surveillance footage of the above described event and observed some of the individuals present in the Arms & Armor Room were children less than seventeen years old, to wit, deponent observed more than five (5)

children, all appearing to be less than ten (10) years old, all weighing less than seventy-five pounds (75), and all standing less than five (5) feet tall.

*Hillgardner Affirmation* ¶ 2 (Exh. 1).

Where a statute defining a crime contains an exception, an indictment or information charging the crime must allege that the conduct of the defendant does not fall within the exception. *People v. Kohut*, 30 N.Y.2d 183, 187 (1972); *People v. Krathaus*, 181 Misc.2d 378, 381-382 (Cty. Ct., Cattaraugus Co., 1999); *see*, 35C N.Y.Jur.2d § 1807 at 164 (2008).

In *People v. Krathaus*, *supra*, four defendants were charged with exposure of a person for alleged nude sunbathing and the information failed to negate the exceptions in the statute for breastfeeding a baby or performing or entertaining in a play, exhibition, show, or entertainment. *Id.* at 187; *see*, 35C N.Y.Jur.2d § 1807 at 164 (2008). The Court, citing to *People v. Kohut*, *supra*, dismissed the information as facially insufficient for failing to negate the exceptions explicitly set forth in the statute. *Id.*; *cf.* *People v. Wilhelm*, 69 Misc.2d 523, 523 (City Ct., Buffalo, 1972) (properly pleading the exception in a predecessor statute).

Here, the information does not negate that defendant's conduct fell within any of the exceptions contained within the statute and therefore it must be dismissed.

- 2. Assuming arguendo that exceptions were pled, or would be pled, where defendant was engaged as a nude model in a professional photo shoot with renowned photographer Zach Hyman at the time of her conduct upon which her arrest was based, defendant's conduct clearly falls within the exception to the statute.**

At the outset defendant requests that the Court take judicial notice of facts dehors the information. Ms. Neill's conduct giving rise to the criminal charges herein was widely reported upon by scores if not hundreds of newspapers worldwide, including two

major daily New York City newspapers, at least two local television stations, and was national news reported repeatedly by the 24-hour cable news channel, CNN. *Hillgardner Affirmation* ¶ 3; see, *Grebow v. City of New York*, 173 Misc.2d 473, 479 (Sup. Ct., N.Y. Co., 1972) (“The Court may take judicial notice of newspaper publications, CPLR 4511[d].”); *People v. Ascher*, 57 Misc.2d 251 (Crim. Ct., N.Y. Co., 1968) (taking judicial notice that “demonstrations against the war in Vietnam were conducted in [honor of Secretary of State Dean Rusk] across the street” from a midtown hotel Rusk was visiting); 7B *McKinney’s C.P.L.R.* § 4511(d) (2007); cf. *People v. Resciniti*, 191 Misc. 719, 721-722 (Cty. Ct., Cortlandt Co., 1948) (information need not plead matters of which court may take judicial notice). At the time of her conduct giving rise to the criminal charges herein, Ms. Neill was posing nude as a model for renowned photographer Zach Hyman. See, *Hillgardner Affirmation* ¶ 3.

A nude model in a photo shoot with a professional photographer using a public space as a backdrop is a “person entertaining or performing in a[n]...exhibition” within the meaning of one of the exceptions contained in Penal Law § 245.01. See, *Tunick v. Safir*, 228 F.3d 135, 141 (2<sup>nd</sup> Cir. 2000); cf. *People v. Wilhelm*, 69 Misc.2d 523, 524 (City Ct., Buffalo, 1972) (construing predecessor statute and noting that totally nude persons in public exhibitions are apparently within the scope of the same statutory exception as exists in the present statute).

The exception to Penal Law § 245.01 excepting from the prohibition against public nudity a person “entertaining or performing in a play, exhibition, show or entertainment” includes within its scope the activities of photographers photographing nude models in public, whether indoors or outdoors, or whether in front of an audience or

not, where the posing of nude models in public can plausibly be deemed an exhibition and where this construction involves no absurdity or contradiction. *Tunick v. Safir*, 228 F.3d 135, 141 (2<sup>nd</sup> Cir. 2000) (Calabrese, J., concurring) (abstract arrangement of 75 to 100 nude models draped across a public street can more than plausibly be deemed an exhibition). Where defendant was engaged in a photo shoot with renowned photographer Zach Hyman in the Arms & Armor Room of the Metropolitan Museum of Art at the time she was nude as alleged in the information, *Hillgardner Affirmation* ¶ 3, her conduct clearly falls within the exception that excludes from the scope of the prohibition “persons...performing in a[n]...exhibition.” *See, Tunick v. Safir, supra.*

Accordingly, even if the People substitute the information with one pleading the exception, where defendant was posing in a public place as a nude model for a professional photographer, she was a person performing in an exhibition within the meaning of the statutory exception and any substituted information pleading that she was not must be dismissed.

**3. The statute does not apply where defendant is not a topless waitress and her conduct did not constitute nude sunbathing in a public beach or park.**

Finally, Penal Law § 245.01 should not be applied to the noncommercial, certainly not lewd conduct alleged in the information. *See, People v. Santorelli*, 80 N.Y.2d 875, 877 (1992). When originally enacted, Penal Law § 245.01 “was aimed at discouraging ‘topless’ waitresses and their promoters.” *Id.* Notwithstanding the amendment of the statute in 1983, the Court of Appeals extended the underlying principle of *People v. Price*, 33 N.Y.2d 831 (1973), to the statute as currently codified. Thus, it is

an inherent element of the offense that the public exposure is for commercial purposes. Moreover, if the conduct is lewd, a prosecution lies under Penal Law § 245.01.

The present statute, adopted in 1983 to replace the statute at issue in *Price* (L. 1983, ch. 216, § 1), was specifically intended to expand the reach of the "public exposure" prohibition. *People v. Santorelli*, 80 N.Y.2d 875, 879 (1992) (Titone, J., concurring). The new provision was aimed at filling a gap resulting from the fact that the existing law prohibited women from appearing topless in public but contained no prohibition against either men or women appearing bottomless in public places. *Id.* citing Governor's Approval Mem, L. 1983, ch. 216, 1983 McKinney's Session Laws of NY, at 2756. The explicit purpose of the new law was to protect parents and children who use the public beaches and parks "from the discomfort caused by unwelcome public nudity" *Id.*; *accord*, Sponsors' Mem re: Assembly Bill A5638, Bill Jacket, L. 1983, ch. 216; Letter dated May 31, 1983 from Assembly Member G. E. Lipschutz to Governor Cuomo re: Assembly Bill A5638. The focus of the legislation was to proscribe nude sunbathing by ordinary citizens. *People v. Santorelli*, 80 N.Y.2d at 879 (Titone, J., concurring) citing *People v. Hollman*, 68 N.Y.2d 202, 207 (1986).

Thus, and in light of the narrow construction afforded the statute due to concerns about its constitutional validity, *see, People v. Santorelli*, 80 N.Y.2d at 876-877, it may only be applied to discourage topless waitresses and their promoters and to prohibit nude sunbathing. *See id.* at 879. Accordingly, where defendant was not engaged in topless waitressing or nude sunbathing, the statute does not apply and the count of the information charging defendant with exposure of a person must be dismissed.

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**(b) The Count charging defendant with endangering the welfare of a child must be dismissed where rolling on the ground with one's naked breasts and naked vagina exposed is not likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years of age.**

Mere nudity combined with rolling on the ground is not conduct likely to be injurious to the mental or moral welfare of a child less than seventeen years of age, and where this is all that is alleged in the information that defendant did in the presence of children less than seventeen years of age, this Count, too, must be dismissed for facial insufficiency.

Penal Law § 260.10(1) requires the People to prove that the defendant "knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old." 39 *McKinney's* Penal Law § 260.10(1) (2007). "A person acts knowingly with respect to conduct or to a circumstance described by statute defining an offense when he is aware that his conduct is of such a nature or that such circumstance exists." 39 *McKinney's* Penal Law § 15.05 (2) (Supp. 2009).

It is respectfully submitted that the mere exposure of a person in the presence of children is insufficient by itself to sustain a charge of endangering the welfare of a minor. No reported cases can be found wherein a court of this state upheld a conviction for endangering the welfare of a child founded upon the theory that exposure of a child to nudity, without more, is conduct likely to be injurious to the physical, mental, or moral welfare of a child less than seventeen years old. Indeed, no such prosecutions may be found. Rather, "[p]rosecutions under section 260.10 have traditionally dealt almost exclusively with sexual offenses or morals cases[.]" *People v. Suarez*, 133 Misc.2d 762, 763 (Sup. Ct., Bronx Co. 1986) (citing cases). "A charge of endangering the welfare of a child should only be brought in cases where there is a direct nexus between the adult's

conduct and the potential harm to the child's welfare – that is, where the actor's conduct is focused directly upon the child or his welfare.” *Id.* at 764.

In *People v. Mercado*, 188 A.D.2d 941 (3<sup>rd</sup> Dept. 1992), defendant was charged with nine counts of sodomy in the first degree and five counts of endangering the welfare of a child. *Id.* at 942. At trial, the Court *inter alia* admitted evidence of nudity in the household and the family's one trip to a nudist camp. *See id.* at 943. Defendant was convicted and he appealed. *Id.* at 941. The Appellate Division reversed defendant's conviction and ordered that upon retrial evidence of nudity in the household and the family's one trip to a nudist camp must be excluded where “[t]he enormous prejudice generated by this sort of testimony outweighs any slight probative value that it may have.” *Id.* at 943-944. *A fortiori*, the Court did not view exposure of a child to nudity in the household or at a nudist camp as conduct likely to be injurious to the physical, mental, or moral welfare of a child, let alone prima facie evidence of same, else it would not have viewed the conduct as only of “slight probative value.” *Id.* at 944.

Here, the People's theory is that exposure of the person in a public place combined with rolling on the ground, regardless that it was conduct not focused directly upon the child or his welfare, is likely injurious to the mental or moral welfare of children. Not only may no case be found supporting the view that mere nudity is likely to be injurious to the physical, mental, or moral welfare of a child, this runs contrary to many state and federal laws and regulations which acknowledge that nudity, by itself, is not injurious to children. Perhaps the best example of this is a statute in the State of Virginia that requires children attending a youth nudist camp to be accompanied by an adult. *See*, Va. Code § 35.1-18. Thus, the Commonwealth of Virginia compels child

nudists to observe adult nudists. *See, White Tail Park, Inc. v. Stroube*, 413 F.3d 451 (4<sup>th</sup> Cir. 2005).

Common sense further dictates the result urged. *See, Matter of Excelsior Pictures Corp. v. Regents of Univ. of State of N. Y.*, 3 N.Y.2d 237, 242 (1957). Absent lewd conduct, mere nudity alone should not be viewed as conduct likely to be injurious to the mental and moral welfare of a child less than seventeen years of age. *Cf., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (“Clearly all nudity cannot be deemed obscene even as to minors.”).

Finally, the likelihood that the children who actually were present in the Arms & Armor Room at the Metropolitan Museum of Art at the time alleged in the information would be injured in their physical, mental, or moral welfare by seeing a naked woman rolling on the ground must be zero where the Metropolitan Museum of Art owns thousands of works of art depicting the nude human form and has scores, if not hundreds, of them on display just about everyday. *See, Hillgardner Affirmation* ¶ 4. The chances are overwhelming that the children present in the Arms & Armor Room of the Metropolitan Museum of Art on that day already had viewed quite a lot of nudity in the form of drawings, paintings, sculpture, and even photography during the course of their time in the museum on that day. These are the children – and not some other hypothetical children – from which the Court must evaluate the likelihood that they could be injured by defendant’s conduct as alleged in the information. It is respectfully submitted that after observing a good deal of nudity throughout the day, albeit inanimate, these children could not be harmed by seeing the real thing for a fleeting moment, in

motion, in the Arms & Armor Room of the Metropolitan Museum of Art, that is if they saw it at all.

Wherefore, the count of the information alleging that defendant, with her naked breasts and vagina exposed, was rolling on the ground in the Arms & Armor Room of the Metropolitan Museum of Art, must be dismissed where it is facially insufficient where, as a matter of law and common sense, such conduct is not likely to be injurious to the physical, mental, or moral welfare of a child less than seventeen years of age.

**(c) The Count charging defendant with public lewdness (Penal Law § 245.00) must be dismissed for facial insufficiency where “rolling on the ground” with one’s naked breasts and naked vagina exposed is not the exposure of a person in a lewd manner nor from which it may be inferred that defendant intended to commit a lewd act.**

The Count charging defendant with public lewdness must also be dismissed where it essentially alleges nudity and nothing else that constitutes either a lewd act or conduct from which it may be inferred that defendant intended to engage in lewd conduct.

The statute proscribing public lewdness sets forth two alternative methods of commission. Donnino, Practice Commentary, 207 in 39 *McKinney’s* Penal Law § 245.00 (2008). The defendant must either (a)(1) intentionally (2) in a public place,<sup>1</sup> (3)(a) expose the private or intimate parts of her body in a lewd manner; or (b) commit any other lewd act. 39 *McKinney’s* Penal Law § 245.00 (2008); *see, e.g., People v. Hardy*, 77 Misc.2d 1092 (App. Term, 2<sup>nd</sup> Dept., 1974); *People v. Darryl M.*, 123 Misc.2d 723, 725 (Crim. Ct., N.Y. Co., 1984). Thus, a defendant may be convicted of public lewdness

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<sup>1</sup> For the purposes of this motion defendant concedes that the Arms & Armor Room of the Metropolitan Museum of Art is a public place within the meaning of Penal Law § 245.00. The statute also criminalizes like conduct committed “in a private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed.” 39 *McKinney’s* Penal Law § 245.00 (2008).

without exposing the private or intimate parts of one's body in a public place if in said public place he intentionally commits a lewd act. *See id.*; Donnino, Practice Commentary, 207 at 39 *McKinney's Penal Law* § 245.00 (2008). But lewdness is a required element.

Here, the relevant factual part of the information alleges that defendant was "rolling on the ground with defendant's naked breasts and naked vagina exposed." *Hillgardner Affirmation* ¶ 2 (Exh. 1). This is insufficient. Mere exposure of an intimate body part in a public place does not constitute a lewd act or exposure of a private body part in a lewd manner, *Matter of Excelsior Pictures Corp. v. Regents of Univ. of State of N. Y.*, 3 N.Y.2d 237, 242 (1957); *People v. Gilbert*, 72 Misc.2d 75, 77 (Crim. Ct., Kings Co., 1972); *see, People v. Burke*, 243 App. Div. 83, 84 (1<sup>st</sup> Dep't 1934) *aff'd* 267 N.Y. 571 (1935); *People v. Hardy*, 77 Misc.2d 1092, 1093 (App. Term, 2<sup>nd</sup> Dep't., 1974), and lewdness cannot be presumed from mere nudity. *See id.*; *People v. Ventrice*, 96 Misc.2d 282, 286 (Crim. Ct., Queens Co., 1978); 35C N.Y.Jur.2d § 1806 at 161 (2008). There must be an allegation of lewd conduct from which an inference may be drawn that defendant intended to act in a lewd manner. *People v. Hardy, supra*; *People v. Ventrice, supra*. Moreover, Black's Law Dictionary defines lewd as "[o]bscene or indecent; tending to moral impurity or wantonness[.]" Black's Law Dictionary 927 (West Pub. Co., 2004, 8<sup>th</sup> ed.), and "lewdness" as "[g]ross, wanton, and public indecency that is outlawed by many state statutes; a sexual act that the actor knows will likely be observed by someone who will be affronted or alarmed by it." *Id.* The New Oxford American Dictionary defines "lewd" as

“crude and offensive in a sexual way.” *The New Oxford American Dictionary* 974 (Oxford U. Press, 2005 2<sup>nd</sup> ed.).

There is no doubt that masturbation in a public place constitutes a lewd act, *see, People v. Gible*, 2 Misc.3d 510, 517 (Crim. Ct., N.Y. Co., 2003); *People v. Kennedy*, NYLJ, Oct. 1, 1990, at 30, col. 3 (Crim. Ct., Queens Co.); regardless of whether the penis is exposed. *See, People v. Darryl M.*, 123 Misc.2d 723, 725 (Crim. Ct., N.Y. Co., 1984). Moreover, sexual intercourse occurring in a place where one can and is likely to be seen by a casual passerby constitutes the offense of public lewdness. *People v. McNamara*, 78 N.Y.2d 626, 633-634 (1991). And regardless that it was not the intent of the Legislature when it enacted PL § 245.01 to criminalize the public exposure of the female breast, *see People v. Santorelli*, 80 N.Y.2d 875, 877 (1992) (Titone, J., concurring), exposure of male or female genitalia while sunbathing on a public beach is not exposure of a private part of the body in a lewd manner or such other lewd act. *People v. Hardy*, 77 Misc. 2d 1092 (2<sup>nd</sup> Dept. 1974); *People v. Gilbert*, 72 Misc. 2d 75 (Crim. Ct., Kings Co., 1972). The Supreme Court has recognized that exposure of the genitals absent a provocative or suggestive pose does not appeal to prurient interests and is not obscene per se, *see, Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *Mounce v. United States*, 355 U.S. 180 (1957); *Rosenbloom v. Virginia*, 388 U.S. 450 (1967); *cf. United States v. Central Magazine Sales, Ltd.*, 381 F.2d 821 (4<sup>th</sup> Cir. 1967), even when a minor is involved. *Erznoznik v. City of Jacksonville*, 422 U.S. at 213. Thus, an information charging public lewdness must do more than allege nudity and it is respectfully submitted that “rolling on the ground” is not conduct from which this Court may infer that it was defendant’s intent to be naked in a lewd manner.

In *People v. Burke, supra*, the court held that totally nude persons observed in a public place playing handball, tossing a medicine ball, exercising, showering and swimming were not engaged in lewd conduct and their convictions for public lewdness were reversed. *See id.*

In New York, nude sunbathers, despite that they are laying on the ground and may frequently roll over, are not committing the criminal offense of public lewdness. *See, People v. Hardy*, 77 Misc.2d 1092 (App. Term, 2<sup>nd</sup> Dept., 1974); *People v. Gilbert*, 72 Misc. 2d 75 (Crim. Ct., Kings Co., 1972). Indeed, nude female sunbathers slathering their breasts and pubic area with suntan lotion are not guilty of public lewdness. *See id.* In *Gilbert*, the trial evidence showed that defendant was a female in her late twenties on a public beach in Brooklyn accompanied by one female and one male companion. 72 Misc.2d at 75. Within 100 feet of the defendant were approximately 15 or 20 other persons, including men, women and children. *Id.* Defendant, shortly after arriving, removed her bathing suit and was totally nude. *Id.* During the following one and one-half hours until her arrest by the harbor police, she was observed playing with a ball, swimming, waving at a passing boat, slowly applying suntan lotion (to the frontal portion of her body including her breasts and down to her pubic hair), and sunbathing on a blanket (arms behind her propping her up, legs outstretched and knees approximately 12 to 18 inches apart). *Id.* at 75-76. While she was sunbathing one or more persons took photographs and several persons attempted to cover her with a blanket which she removed. *Id.* at 76. When the police arrived, after a brief conversation she put on her bathing suit and accompanied them to the station house. *Id.* Defendant was charged with public lewdness (PL § 245.00). *See id.* at 75. The Court acquitted defendant after trial

finding that the People failed to prove “the fourth essential element, lewdness, beyond a reasonable doubt.” Subsequently, Ms. Gilbert was convicted of exposure of a person. *See, People v. Gilbert*, 72 Misc.2d 795 (Crim. Ct., Kings Co., 1973).

In stark contrast, in *People v. Topy*, 2002 WL 493146 (App. Term, 1<sup>st</sup> Dep’t, 2002), the female defendant was convicted upon a bench trial of public lewdness and disorderly conduct and the Appellate Term upheld her conviction where she was naked from the waist down and moved her hips in a sexual manner while standing in front of an open restaurant on a busy public street in New York City in the presence of onlookers.

Here, the only conduct of defendant that is alleged that could possibly support the allegation that defendant, while her “naked breasts and naked vagina were exposed,” exposed them in a lewd manner or committed some other lewd act is the allegation that defendant was “rolling on the ground.” It is respectfully submitted that as a matter of both law and common sense, *see, Matter of Excelsior Pictures Corp. v. Regents of Univ. of State of N. Y.*, 3 N.Y.2d 237, 242 (1957), “rolling on the ground” while naked is not a lewd act, that rolling on the ground while defendant’s naked breasts and naked vagina were exposed is not exposure of a private part of the body in a lewd manner, and that it may not be reasonably inferred from the factual allegation that defendant was “rolling on the ground” while naked that she was doing so with an intention to act in a lewd manner. *See, People v. Burke*, 243 App. Div. 83 (1<sup>st</sup> Dep’t 1934) *aff’d* 267 N.Y. 571 (1935); *People v. Gilbert*, 72 Misc. 75 (Crim. Ct., Kings Co., 1972); *cf. People v. Topy*, 2002 WL 493146 (App. Term, 1<sup>st</sup> Dep’t, 2002).

Accordingly, where the information charges only that defendant was rolling on the ground while naked, the information does not allege facts showing or from which it

reasonably may be inferred that defendant exposed a private part of her body in a lewd manner or committed some other lewd act. Therefore the information does not allege facts supporting each element of the offense of public lewdness and this count of the information must be dismissed for facial insufficiency.

**II. THE STATUTE CHARGING DEFENDANT WITH EXPOSURE OF A PERSON IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED UNDER BOTH THE NEW YORK CONSTITUTION AND U.S. CONSTITUTION.**

It is respectfully submitted that Penal Law § 245.01 is unconstitutional on its face and as applied under both the state and federal constitutions. However, where the Court of Appeals has severely limited the construction of this statute in order to save it from being unconstitutional, *see, People v. Santorelli*, 80 N.Y.2d at 876-877, and where, in any event, it appears that this case falls within the exception to the statute for persons performing in an exhibition, *Tunick v. Safir*, 238 F.3d 135, 141 (2<sup>nd</sup> Cir. 2000) Calabrese, J., concurring), in the interests of brevity and to not unnecessarily burden the record or brief issues the Court is not likely to reach, defendant reserves a more comprehensive argument on these points while mentioning them and discussing them briefly to make clear that she is raising these issues and reserves her right to more fully brief them.

Briefly, it is clear that this case comes to this Court in the context that was lacking in *People v. Hollman*, 68 N.Y.2d 202 (1986), wherein the Court of Appeals doubted that nude sunbathing sufficiently communicated an idea to require the Court to extend to nude sunbathers the protections afforded to expressive activity by the state and federal constitutions. *Id.* at 208. Certainly, where defendant was posing as a nude model in a photo shoot with a professional photographer inside the Arms & Armor Room of the Metropolitan Museum of Art, expressive activity undoubtedly was occurring. *See,*

*Tunick v. Safir*, 228 F.3d 135 (2<sup>nd</sup> Cir. 2000). “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989) citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988). Now more than ever, nudity is symbolic expression. Nudity is not just an absence of clothing anymore. Nudity is used to communicate ideas. *See, e.g., Sole v. Wyner*, 551 U.S. 51 (2007).

Moreover, morality no longer may serve as a substantial governmental interest. *See, Barnes v. Glen Theatres, Inc.*, 501 U.S. 560, 581 (1991) (Souter, J. concurring). And to argue that nudity threatens disorder is to allow threats of tyranny and violence to prevail over those engaging in peaceful expressive conduct.

Moreover, the alleged Judeo-Christian mores that courts in the past have used to justify the rationality and objectives of the legislature in enacting laws governing morality, sexuality, and gender, *see, Bowers v. Hardwick*, 478 U.S. 186 (1986); *People v. David*, 146 Misc.2d 115 (City Ct., Rochester, 1989), are no longer the prevailing mores of the community. *See, Lawrence v. Texas*, 539 U.S. 558 (2003); *People v. Santorelli*, 80 N.Y.2d 875 (1992); *People v. David*, 152 Misc.2d 56 (Cty. Ct., Monroe Co., 1991). I ask the Court to take judicial notice of the following: We live in a celebrity-obsessed culture in which many celebrities have sex tapes and occasionally expose their “private parts” for the paparazzi. Joe Francis’ “Girls Gone Wild” franchise has come and gone, but it has left an indelible mark on our culture. As proof of this fact, sexting (i.e. texting pornography, frequently of yourself or acquaintances, using a cell phone) is the latest fad. Pornography proliferates on the Internet where you can purchase those videos of your

favorite celebrity having sex or those “Girls Gone Wild” videotapes. The decision in *People v. Santorelli*, 80 N.Y.2d 875 (1992), now allows women to ride the subway topless. Howard Stern is getting to seem mild. Soft core porn is available on demand from your cable operator. The full frontal nudity contained in the musical “Hair” is so mainstream that it plays at the Sheakespeare Festival outdoors in Central Park. *Cf. Tunick v. Safir*, 228 F.3d 135 (2<sup>nd</sup> Cir. 2000) (argument by the City of New York that statutory exception permitting public nudity for shows, plays, etc. is limited to indoors is without merit). You can purchase all the porn you want and have it downloaded to your cell phone. And the most popular, rich, teenage kids portrayed on television shows are having underage sex and taking drugs and alcohol. This is not Bob Hope and Bing Crosby in another “Road” picture. Yet it is the societal values that were prevalent in the days of Bing Crosby and Bob Hope that remain on the law books.

This ignores that American society has changed drastically in the 23 years since *Hollman* driven by technology and all the ways we can all now share video. Indeed, it is doubtful whether a plurality of Americans in the State of New York still share the Judeo-Christian tradition to the extent that it was shared in 1986. Young people today are not nearly in accord with those quaint and seemingly archaic views that exposure of the “private parts” of one’s body is shameful and inappropriate.

Defendant respectfully asserts that if her conduct does not fall within the exception to the statute, then the statute unconstitutionally abridges her freedom of expressive conduct, both facially and as applied, under both the state and federal constitutions. Defendant stands prepared to more fully brief these issues should the Court so desire.

**III. THE STATUTE CHARGING DEFENDANT WITH ENDANGERING THE WELFARE OF A CHILD IS UNCONSTITUTIONAL AS APPLIED UNDER BOTH THE NEW YORK CONSTITUTION AND U.S. CONSTITUTION WHERE DEFENDANT WAS ENGAGED IN CONSTITUTIONALLY PROTECTED EXPRESSIVE CONDUCT.**

Finally, the freedom of speech clauses of both the state and federal constitutions also protect defendant from prosecution for endangering the welfare of a child based on her conduct. Where the First Amendment rights of an individual are implicated by a criminal charge of endangering the welfare of a child, the statute criminalizing endangering the welfare of a child may not be enforced. *People v. Baird*, (Dist. Ct., Suffolk Co., 1972) (unreported) from facts recited in *Farkas v. Barry*, 335 F.Supp. 681, 683 (E.D.N.Y. 1972).

Here, defendant was engaged in constitutionally protected conduct, *see, Tunick v. Safir*, 228 F.3d 135, 141 (Calabrese, J. concurring), where she was arrested for being a nude model in a photo shoot with renowned professional photographer Zach Hyman said photo shoot being conducted in the Arms & Armor Room of the Metropolitan Museum of Art. Such conduct unquestionably is expressive activity entitled to First Amendment protection. *See id.* Accordingly, defendant's prosecution for endangering the welfare of a child is barred.

**CONCLUSION**

For the foregoing reasons the information must be dismissed in its entirety. In the alternative, one or more of the counts should be dismissed and the Court should grant

defendant the discovery and bill of particulars as requested and specified in the attorney affirmation supporting this motion.

DATED: October 19, 2009

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