INDEX TO APPENDICES

Appendix – A

121 A.D.3d 1435
Supreme Court, Appellate Division,
Third Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Jose A. RODRIGUEZ, Appellant.

Oct. 30, 2014.

Synopsis

Background: Defendant was convicted in the County Court, Otsego County, Burns, J., of operating as a major trafficker and four counts of criminal sale of a controlled substance in the third degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, Garry, J., held that:
[1] police testimony was sufficient to corroborate accomplices' testimony describing defendant's heroin operation;
[2] sufficient evidence established that monetary value of defendant's heroin operation was in excess of $75,000;
[3] sufficient evidence established a controlled substance organization existed that consisted of four or more persons;
[4] sufficient evidence established that defendant was a principal administrator, organizer or leader;
[5] sufficient established that defendant knowingly aided heroin transactions; and
[6] sentencing court's failure to set forth on record express finding that it would have been unduly harsh to impose indeterminate term did not warrant remitting for resentencing.

Affirmed.

West Headnotes (13)

[1] **Criminal Law**
Reasonable doubt

In assessing a defendant's claim that all of his convictions are against the weight of the evidence, the Appellate Division necessarily determines whether each element of the crimes was proven beyond a reasonable doubt.

3 Cases that cite this headnote

[2] **Criminal Law**
Objections in General

Defendant who did not object to jury instruction failed to preserve for appeal his claim that the instruction was impermissible. McKinney's CPL § 470.05(2).

2 Cases that cite this headnote

[3] **Criminal Law**
Time and place of offense

Trial court did not err, in prosecution for operating as a major trafficker, by instructing jury to base its determination of the trafficking charge only upon evidence of acts transpiring between November 1, 2009, which was the date the Penal Law establishing major trafficker offense went into effect, and September 1, 2010, instead of using dates in indictment of September 1, 2009 and September 1, 2010, since instruction neither altered the theory of the prosecution nor prejudiced the defendant on the merits. McKinney's Penal Law § 220.77.

[4] **Criminal Law**
Quantum of Proof Required

Criminal Law
Evidence warranting conviction or establishing guilt; suspicion

Criminal Law
Connecting accused with crime

While a defendant may not be convicted solely on the basis of accomplice testimony, the People are not required to furnish independent evidence that establishes every element of the offense in question, or even a single element; instead, corroborative evidence need only tend to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth. McKinney's CPL § 60.22(1).

4 Cases that cite this headnote

[5] **Criminal Law**
Intoxicating liquors; narcotics

Criminal Law

Testimony of third persons

Police testimony, in prosecution for operating as a major trafficker, confirming certain details of defendant's alleged operation of selling and distributing heroin was sufficient to corroborate the accomplices' testimony describing that operation; narcotics detectives testified that they used confidential informants to make controlled heroin purchases from female accomplices and that those purchases were initiated by contact with defendant or his employees and conducted according to procedures described by accomplices, male accomplice's testimony was corroborated by same detectives who discovered heroin in stash house as described by that accomplice, and two other witnesses who allegedly worked for defendant confirmed his nickname. McKinney's CPL § 60.22(1); McKinney's Penal Law § 220.77.

3 Cases that cite this headnote

[6] **Criminal Law**

Evidence warranting conviction or establishing guilt; suspicion

Criminal Law

Scope of corroboration in general

Criminal Law

Connecting accused with crime

Corroborative evidence of accomplice testimony need not prove the commission of the crime, directly link a defendant to the crime or lead exclusively to the inference of the defendant's guilt. McKinney's CPL § 60.22(1).

4 Cases that cite this headnote

[7] **Criminal Law**

Conduct Not Amounting to Crime, or Evidence Merely Suggestive of Crime

In prosecution for operating as a major trafficker for defendant's activities in Oneonta area, witness testimony regarding defendant's expansion of his heroin operation into Albany area did not address uncharged crimes or bad acts and was not introduced to suggest propensity, as would require *Ventimiglia* hearing; testimony was instead relevant to charge that defendant directed a controlled substance organization in Oneonta. McKinney's Penal Law § 220.77.

1 Cases that cite this headnote

[8] **Controlled Substances**

Sale, distribution, delivery, transfer or trafficking

Sufficient evidence established that monetary value of defendant's heroin operation was in excess of $75,000, precluding defendant's claim that his conviction for operating as a major trafficker was against the weight of the evidence; first female witness testified as to amounts of heroin she sold, male witness testified as to amounts of his wire transfers, and other accomplices testified as to their own involvement and involvement of other sellers and couriers in the operation. McKinney's Penal Law § 220.77(1).

[9] **Controlled Substances**

Sale, distribution, delivery, transfer or trafficking

Sufficient evidence established a controlled substance organization existed that consisted of four or more persons, each of whom shared common purpose to commit drug felonies by selling heroin, precluding defendant's claim that his conviction for operating as a major trafficker was against the weight of the evidence; three accomplices testified as to their own involvement, that of defendant, and that of multiple other persons who worked for defendant as sellers and couriers in the heroin operation. McKinney's Penal Law § 220.77(1); McKinney's Penal Law § 220.00(18).

[10] **Controlled Substances**

Sale, distribution, delivery, transfer or trafficking

Sufficient evidence established that defendant was a principal administrator, organizer or leader of heroin operation, precluding defendant's claim that his conviction for operating as a major

trafficker was against the weight of the evidence; witnesses described defendant's management of the operation by, among other things, supplying heroin, supervising and directing workers, communicating with buyers and sellers to schedule heroin transactions, and collecting proceeds. McKinney's Penal Law § 220.77(1); McKinney's Penal Law § 220.00(19).

[11] **Controlled Substances**

Sale, distribution, delivery, transfer or trafficking

Sufficient established that defendant knowingly and unlawfully solicited, requested, commanded, importuned, or intentionally aided heroin transactions, supporting his convictions, based on accomplice liability, on four counts of criminal sale of a controlled substance in the third degree; controlled buys were conducted with confidential informants from witnesses who testified that defendant was the supplier of the heroin sold and defendant was contacted be telephone to facilitate at least two of the transactions. McKinney's Penal Law §§ 20.00, 220.39(1).

[12] **Sentencing and Punishment**

Right to stand trial

Disparity between sentence imposed by County Court and shorter sentence offered by People before trial, without more, did not demonstrate that defendant was improperly punished for exercising his right to go to trial.

2 Cases that cite this headnote

[13] **Criminal Law**

Sentence

Sentencing and Punishment

Sufficiency

Sentencing court's failure to set forth on record express finding that it would have been unduly harsh to impose indeterminate life term with minimum term of 15 to 25 years for defendant's conviction for operating as a major trafficker, in imposing determinate term of 20 years, did not warrant remitting for resentencing, where district court made detailed remarks allowing for appellate review of defendant's claim that his sentence was excessive. McKinney's Penal Law §§ 70.00(2)(a), 70.71(2)(b)(i), (5)(c).

Attorneys and Law Firms

**787 Matthew C. Hug, Troy, for appellant.

John M. Muehl, District Attorney, Cooperstown (Michael F. Getman of counsel), for respondent.

Before: PETERS, P.J., STEIN, GARRY, EGAN JR. and CLARK, JJ.

Opinion

GARRY, J.

*1435 Appeal from a judgment of the County Court of Otsego County (Burns, J.), rendered December 22, 2011, upon a verdict convicting defendant of the crimes of operating as a major trafficker and criminal sale of a controlled substance in the third degree (four counts).

Following a lengthy police investigation, defendant, a resident *1436 of the Bronx, was charged with various crimes arising out of his alleged management of a heroin distribution ring in Otsego County. He was tried by a jury and convicted of the crime of operating as a major trafficker, as well as four counts of criminal sale of a controlled substance in the third degree. [1] County Court denied defendant's motion to set aside the verdict and sentenced him to a prison term of 20 years with five years of **788 postrelease supervision on the major trafficking count and four five-year prison terms, each with three years of postrelease supervision, on the criminal sale counts, all sentences to be served consecutively. Defendant appeals.

[1] Defendant contends that his convictions were not supported by legally sufficient evidence and were against the weight of the evidence, basing these arguments primarily upon the claim that the People relied upon inadequately corroborated accomplice testimony. As an initial matter, the corroboration argument is preserved only as to the charge of operating as a major trafficker, as defendant specifically raised that claim when he moved to dismiss the trafficking charge at the close of proof, but did not include it in his

more general motion to dismiss the other charges (*see People v. Gray,* 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919 [1995]; *People v. Hilliard,* 49 A.D.3d 910, 912, 853 N.Y.S.2d 198 [2008], *lv. denied* 10 N.Y.3d 959, 863 N.Y.S.2d 143, 893 N.E.2d 449 [2008]). Nevertheless, in assessing defendant's claim that all of his convictions are against the weight of the evidence, this Court necessarily determines whether each element of the crimes was proven beyond a reasonable doubt (*see People v. Danielson,* 9 N.Y.3d 342, 348–349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]; *People v. Gaudiosi,* 110 A.D.3d 1347, 1348, 973 N.Y.S.2d 855 [2013], *lv. denied* 22 N.Y.3d 1040, 981 N.Y.S.2d 374, 4 N.E.3d 386 [2013]).

Penal Law § 220.77, which established the crime of operating as a major trafficker, was enacted as part of the Drug Law Reform Act of 2009 (*see* L. 2009, ch. 56, part AAA, § 29; *see generally* William C. Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 220.77, 2014 Pocket Part at 122–125). As pertinent here, a person commits the crime of operating as a major trafficker when he or she "acts as a director of a controlled substance organization" during a period of 12 months or less in which the organization sells a controlled substance or substances, and the proceeds due or collected from such sales have a total value of at least $75,000 (Penal Law § 220.77[1]). A controlled substance organization is defined as "four or more persons sharing a common purpose to ***1437** engage in conduct that constitutes or advances the commission of a felony under [Penal Law article 220]" (Penal Law § 220.00[18]), and a director is "the principal administrator, organizer[ ] or leader" of such an organization, or one of several such persons (Penal Law § 220.00[19]).

[2] **[3]** The People sought to prove that defendant acted as the director of a controlled substance organization for the requisite time period by presenting the testimony of a number of witnesses who had allegedly purchased heroin from defendant and/or worked for him by selling, distributing and delivering heroin, in addition to other testimony.[2] The broad outline of the ****789** operation revealed by the testimony was that defendant—located in New York City and using the nickname "Flip" instead of his real name—used throw-away cell phones with numbers that frequently changed to maintain contact with numerous individuals in the City of Oneonta, Otsego County, who followed his directions to sell heroin that he supplied to purchasers in that city, and who were paid for their efforts with heroin to support their drug habits. Oneonta narcotics detectives Branden Collison and Christopher Witzenburg testified to describe their lengthy investigation into defendant's Oneonta heroin operation, their encounters with the various witnesses and defendant's ultimate arrest. A confidential informant (hereinafter CI) testified that he cooperated with Collison by performing several controlled buys involving heroin supplied by defendant, including one in June 2010.

A female witness testified that before 2009, she had obtained heroin for her personal use by calling defendant—whom she knew as Flip—on a cell phone; he would then direct her to varying locations in Oneonta where she would be met by persons working for defendant who provided her with heroin and accepted her payments. In 2009, she began working for defendant in exchange for payments of heroin, and continued to do so "for ***1438** a year and a half ... almost two years" until she was arrested in February 2010. In this capacity, she received phone calls from defendant in which he told her where to meet buyers whom she would supply with heroin that she had obtained from defendant, either by traveling to New York City to pick it up or by receiving it from individuals who transported it from New York City at defendant's direction. This witness testified that she made at least 40 or 50 trips to New York City, generally met defendant at hotels in the Bronx, took between $2,000 and $5,000 in heroin payments to him on each trip and returned with 20 or 30 "bundles" of heroin for sale in Oneonta.[3] She also sometimes wired money to defendant via Western Union, using names and New York City addresses that he furnished. She testified that, during this period, she sold an average of 80 to 100 bags of heroin daily at $20 per bag; based on this testimony, the jury could have found that she sold over $150,000 worth of heroin at defendant's behest between November 2009 and February 2010.

A second female witness testified that she worked for defendant, whom she knew as Flip, during an 18–month period ending with her arrest in June 2010, by making approximately 30 to 40 trips to New York City to obtain heroin, meeting defendant or persons working for him at hotels in the Bronx, and transporting 10 to 20 bundles of heroin back to Oneonta after each trip. She stated that she did not handle money during these trips, which was carried by others with whom she traveled, including the first female witness. However, she said that she wired money on several occasions to defendant using Bronx addresses that he provided. This witness testified that she also acted as an intermediary for heroin buyers in Oneonta by calling defendant on their behalf and then following his instructions as to where to meet his agents to complete the sale. She testified that "maybe 15 different people" delivered ****790**

drugs to her from defendant during these transactions, and that she was paid for her activities in heroin.

A male witness testified that he first made telephone contact with defendant—whom he knew as Flip and never met in person—in early 2010 when he called what he believed to be the cell phone number of the first female witness, seeking to buy heroin, and defendant answered the phone. Thereafter, he spoke by telephone "almost every day" for "at least a month" with defendant, who would direct him to an Oneonta location where he would meet someone who would sell him heroin. After the male witness offered to work for defendant in exchange for ***1439** drugs, defendant had him pick people up at bus stations and transport them to Oneonta to sell heroin. At defendant's direction, the male witness also rented an Oneonta apartment used as a stash house, where he and other people stored heroin supplied by defendant and then sold it as defendant directed. The witness testified that the stash house arrangement lasted for several weeks until he was arrested in February 2010. During this period, the witness made approximately a dozen $8,000 to $10,000 wire transfers to New York City addresses supplied by defendant.

[4] [5] [6] Contrary to defendant's claim, there was adequate corroboration for the testimony of these accomplice witnesses. A defendant may not be convicted solely on the basis of accomplice testimony that lacks the support of "corroborative evidence tending to connect the defendant with the commission of [the charged] offense" (CPL 60.22[1]). Nevertheless, the People are not required to furnish independent evidence that establishes every element of the offense in question, or even a single element; instead, corroborative evidence need only "tend[ ] to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth" (*People v. Reome,* 15 N.Y.3d 188, 191–192, 906 N.Y.S.2d 788, 933 N.E.2d 186 [2010] [internal quotation marks and citation omitted]; *see People v. Lloyd,* 118 A.D.3d 1117, 1121, 987 N.Y.S.2d 672 [2014]; *People v. Forbes,* 111 A.D.3d 1154, 1156–1157, 975 N.Y.S.2d 490 [2013]). Here, the testimony of both female witnesses was corroborated by that of the narcotics detectives, who testified that they used CIs to make controlled heroin purchases from each of the women, and that these purchases were initiated by contact with defendant or his employees and conducted according to the procedures described by the witnesses. The testimony of the first male witness was corroborated by the same two detectives. Witzenburg testified that he arrested the witness after observing what appeared to be a drug transaction at a residence in Oneonta and found 56 bags of heroin in his car. After the witness stated that additional heroin could be found in the stash house, Collison searched it and found an additional 250 bags. Collison further determined that the stash house had been leased in the name of this witness shortly before his arrest. Corroborative evidence need not prove the commission of the crime, directly link a defendant to the crime or "lead exclusively to the inference of the defendant's guilt" (*People v. Medeiros,* 116 A.D.3d 1096, 1099, 983 N.Y.S.2d 329 [2014] [internal quotation marks and citations omitted]). Here, the police testimony confirming certain details of defendant's alleged operation as described by the accomplices was sufficient to support a reasonable inference that he was involved and to satisfy ***1440** the "minimal corroboration requirements" of CPL 60.22(1) (*People v. Lloyd,* 118 A.D.3d at 1121, 987 N.Y.S.2d 672; *see People v. Matthews,* 101 A.D.3d 1363, 1365, 956 N.Y.S.2d 317 [2012], *lvs. denied* 20 N.Y.3d 1101, 1104, 965 N.Y.S.2d 797, 988 N.E.2d 535 [2013]; *People v. Pagan,* ****791** 97 A.D.3d 963, 965, 948 N.Y.S.2d 757 [2012], *lv. denied* 20 N.Y.3d 934, 957 N.Y.S.2d 694, 981 N.E.2d 291 [2012]).

[7] Additionally, the People presented the testimony of two other witnesses who allegedly worked for defendant—whom they called Flip—by conducting heroin transactions in Oneonta. The testimony of these two witnesses is largely irrelevant to the trafficking charge, as they described actions occurring before November 2009. Nevertheless, among other details, these witnesses confirmed that defendant used the nickname Flip. Another male witness testified that between 2009 and approximately June 2010, while residing in the City of Albany, he assisted defendant—known to him as Flip —in expanding his heroin operation into the Albany area. This witness began the Albany operation by distributing free heroin samples furnished by defendant, and thereafter sold heroin supplied by defendant, following instructions conveyed by defendant over the phone. This witness testified that he was aware that defendant was conducting a similar operation in Oneonta, that he sometimes delivered heroin from defendant to Oneonta for use in that operation, and that he sometimes carried money from Oneonta to defendant in the Bronx. In July 2010, defendant asked this witness to relocate to Oneonta to oversee operations there. He testified that he did so, but was arrested almost immediately thereafter while trying to make a heroin sale. Defendant contends upon appeal that County Court lacked geographical jurisdiction over the activities of this witness in Albany. This issue was not preserved by an objection at trial; even if preserved, it is unclear how this would have affected the admissibility of the testimony, as defendant, not the witness, was the subject of the prosecution (*see People v. Banks,* 38 A.D.3d 938, 939, 830

N.Y.S.2d 839 [2007], *lv. denied* 9 N.Y.3d 840, 840 N.Y.S.2d 766, 872 N.E.2d 879 [2007]). Contrary to defendant's claim, no *Ventimiglia* hearing was required, as the testimony of this witness did not address uncharged crimes or bad acts and was not introduced to suggest propensity, but was instead relevant to the charge that defendant directed a controlled substance organization in Oneonta (*compare People v. Brown,* 114 A.D.3d 1017, 1019–1020, 981 N.Y.S.2d 154 [2014]). We reject defendant's claim that his counsel was ineffective for failing to raise these issues, as a defendant is not denied the effective assistance of counsel when counsel fails to raise issues that have little or no chance of succeeding (*see People v. Stultz,* 2 N.Y.3d 277, 287, 778 N.Y.S.2d 431, 810 N.E.2d 883 [2004]; *People v. Brock,* 107 A.D.3d 1025, 1029, 968 N.Y.S.2d 624 [2013], *lv. denied* 21 N.Y.3d 1072, 974 N.Y.S.2d 321, 997 N.E.2d 146 [2013]).

[8] **[9]** **[10]** Viewing the testimony in the light most favorable to the ***1441** People, we find a valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury (*see People v. Galindo,* 23 N.Y.3d 719, 724, 993 N.Y.S.2d 525, 17 N.E.3d 1121 [2014]). The testimony as to the monetary value of the heroin transactions during the pertinent time period—specifically, the testimony of the first female witness as to the amounts of heroin that she sold and, separately, that of the male witness as to the amounts of his wire transfers—was more than adequate to satisfy the monetary threshold of $75,000 (*see* Penal Law § 220.77[1]). Further, the testimony of the accomplice witnesses as to their own involvement, that of defendant, and that of multiple other persons who they testified also worked for defendant as sellers and drug couriers in the Oneonta heroin operation was sufficient to establish that a controlled substance organization existed that consisted of four or more persons, each of whom shared in a common purpose to commit drug felonies under Penal Law article 220 by selling heroin (*see* ****792** Penal Law § 220.00[18]; William C. Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 220.77, 2014 Pocket Part at 125). Finally, the witness testimony describing defendant's management of the Oneonta operation by, among other things, supplying the heroin, supervising and directing the workers, communicating with buyers and sellers to schedule heroin transactions, and collecting the proceeds sufficiently established that he was a "principal administrator, organizer [ ] or leader" of the organization (Penal Law § 220.00[19]). Notably, nothing in Penal Law § 220.77(1) requires a showing that an alleged director is the only administrator, organizer or leader of a controlled substance organization, nor does the statute require that he or she personally conduct each transaction, " or perhaps even know of a particular sale" (William C. Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 220.77, 2014 Pocket Part at 125). As to defendant's contention that most of the People's witnesses were unworthy of belief, in that they were former heroin users who cooperated with the People in exchange for less stringent treatment of their own illegal conduct, these issues were vigorously explored in cross-examination, and the jury was free to credit or discredit their testimony as it saw fit (*see People v. Anderson,* 118 A.D.3d 1138, 1142, 987 N.Y.S.2d 681 [2014]). Deferring to these credibility assessments and viewing the evidence in a neutral light, we are satisfied that the verdict convicting defendant of operating as a major drug trafficker was in accord with the weight of the evidence (*see* Penal Law 220.77[1]; *see generally People v. Danielson,* 9 N.Y.3d at 348–349, 849 N.Y.S.2d 480, 880 N.E.2d 1).

[11] Defendant's remaining four convictions for criminal sale of a ***1442** controlled substance in the third degree were based on controlled heroin buys from the female witnesses and an additional unidentified seller. As to each, defendant argues that the People failed to support their theory of accomplice liability by proving beyond a reasonable doubt that defendant knowingly and unlawfully "solicit[ed], request[ed], command[ed], importun[ed] or intentionally aid[ed]" in the transactions (Penal Law § 20.00; *see* Penal Law § 220.39[1]). We disagree. The first conviction was based upon a September 2009 controlled buy set up by Witzenburg, who testified that he used a CI to purchase $100 worth of heroin from the first female witness. While the female witness did not testify specifically about this transaction, she stated that she sold to the particular CI in question "quite often." The second challenged conviction involved a controlled buy involving a different CI, which was set up by Collison and took place in January 2010. The first female witness testified that she sold heroin to this CI near a school building in the Village of Cooperstown, Otsego County, and Collison confirmed that this was the location of the January 2010 purchase. Based upon the testimony of the female witness that defendant was the supplier of the heroin that she sold during the time periods in question, the jury could reasonably have inferred that defendant aided both sales by supplying the heroin (*see People v. Harris,* 288 A.D.2d 610, 617, 732 N.Y.S.2d 664 [2001], *affd.* 99 N.Y.2d 202, 753 N.Y.S.2d 437, 783 N.E.2d 502 [2002]).

The third criminal sale conviction involved a May 2010 controlled buy set up by Collison, who testified that he watched a CI send a text message to the second female

witness to arrange the purchase. Collison and the CI then traveled to the Oneonta home of this witness, where a third party sold heroin to the CI. The second female witness confirmed that she brokered such a deal at her home, explaining that the CI called her and asked her to contact defendant to arrange the sale, that she did so, and that defendant then sent the third party to her house—thus establishing **793 defendant's assistance in the sale. The final count was based upon a June 2010 controlled buy, as to which a CI testified that, while sitting in Collison's car, he arranged a heroin transaction by telephoning defendant—whose telephone number and voice he knew from previous heroin transactions-and then traveled with Collison to the location that defendant designated, where he purchased heroin from a seller whom the CI identified as Bobby Colone. Collison confirmed this account and further testified that, from the driver's seat of his car, he was able to overhear and understand defendant's side of the telephone conversation with the CI. Defense counsel vigorously challenged this testimony on cross-examination. Further, Colone testified for defendant and claimed that the transaction in question *1443 involved marihuana, rather than heroin. However, these issues presented credibility issues for the jury to resolve. According the jury's determinations appropriate deference, we find that the weight of the evidence supports all four convictions (*see People v. Wilson,* 100 A.D.3d 1045, 1046, 952 N.Y.S.2d 837 [2012], *lv. denied* 22 N.Y.3d 998, 981 N.Y.S.2d 4, 3 N.E.3d 1172 [2013]; *People v. Green,* 90 A.D.3d 1151, 1153–1154, 934 N.Y.S.2d 262 [2011], *lv. denied* 18 N.Y.3d 994, 945 N.Y.S.2d 649, 968 N.E.2d 1005 [2012]).

[12] [13] Defendant next contends that his sentence is harsh and excessive. However, the disparity between the sentence imposed by County Court and a shorter sentence offered by the People before trial, without more, does not demonstrate that defendant was improperly punished for exercising his right to go to trial, and nothing else in the record supports this claim or reveals any abuse of discretion or extraordinary circumstances warranting modification (*see People v. Acevedo,* 118 A.D.3d 1103, 1108, 987 N.Y.S.2d 660 [2014]; *People v. Olson,* 110 A.D.3d 1373, 1377–1378, 974 N.Y.S.2d 608 [2013], *lv. denied* 23 N.Y.3d 1023, 992 N.Y.S.2d 806, 16 N.E.3d 1286 [2014]). County Court was authorized to impose a maximum indeterminate life term with a minimum term of 15 to 25 years for defendant's conviction for operating as a major trafficker (*see* Penal Law §§ 70.00[2][a]; [3][a][i]; 70.71[5][b]), but instead elected to sentence defendant to a determinate term of 20 years, the maximum term permitted under this option (*see* Penal Law § 70.71[2][b][1]; [5] [c]). The court extensively discussed its reasons for rejecting defendant's plea for leniency and imposing a lengthy sentence, including the serious harm caused by defendant's conduct to the affected individuals and the community, his failure to show remorse or insight, his extensive prior criminal history—which included a previous conviction for selling heroin in Oneonta—and his criminal character as revealed by these factors. The court stated that its ultimate intent in imposing this lengthy sentence was to ensure that defendant would never have another opportunity to return to the community to sell heroin.

We note that in sentencing defendant to a determinate term on the trafficking conviction, County Court failed to set forth upon the record an express finding that it would have been unduly harsh to impose an indeterminate term, as required by Penal Law § 70.71(5)(c). Nevertheless, the only purpose that would be served by remitting for resentencing here would be "as a means of pointing out that the statute was not followed to the letter" (*People v. Esteves,* 41 N.Y.2d 826, 827, 393 N.Y.S.2d 389, 361 N.E.2d 1037 [1977]). It has been held in reviewing other sentencing provisions that statutory requirements of this nature are imposed "to aid the court in focusing upon the purpose of the sentence and as a method of explaining the sentence to the public and the offender" (*People* *1444 *v. Frey,* 100 A.D.2d 728, 728, 473 N.Y.S.2d 630 [1984], *lv. denied* **794 62 N.Y.2d 806, 477 N.Y.S.2d 1030, 465 N.E.2d 1273 [1984]; *see e.g.* Penal Law §§ 70.10[2]; 70.25[2–b]). Here, we find that these purposes were fulfilled by the court's detailed remarks, and the record was fully adequate to permit appellate review of defendant's claim that his sentence was excessive. Accordingly, upon the record presented, we need not vacate the sentence and remit for resentencing (*see People v. Rojas,* 42 N.Y.2d 1035, 399 N.Y.S.2d 210, 369 N.E.2d 766 [1977]; *People v. Esteves,* 41 N.Y.2d at 827, 393 N.Y.S.2d 389, 361 N.E.2d 1037; *People v. Adkins,* 298 A.D.2d 991, 991, 748 N.Y.S.2d 304 [2002], *lv. denied* 99 N.Y.2d 554, 754 N.Y.S.2d 206, 784 N.E.2d 79 [2002]; *People v. Riss,* 58 A.D.2d 697, 698, 396 N.Y.S.2d 89 [1977]).

ORDERED that the judgment is affirmed.

PETERS, P.J., STEIN, EGAN JR. and CLARK, JJ., concur.

All Citations

121 A.D.3d 1435, 995 N.Y.S.2d 785, 2014 N.Y. Slip Op. 07389

Footnotes

1 Defendant was charged with seven additional counts of criminal sale of a controlled substance in the third degree, but County Court dismissed one of these charges prior to the close of proof, and the jury acquitted defendant of the remainder.

2 At the close of proof, defense counsel pointed out that the indictment alleged that defendant operated as a major trafficker from September 1, 2009 to September 1, 2010, but Penal Law § 220.77 did not take effect until November 1, 2009. Accordingly, County Court instructed the jury to base its determination of the trafficking charge only upon evidence of acts transpiring between November 1, 2009 and September 1, 2010. As there was no objection to this charge, defendant's contention that the instruction was impermissible was not preserved (*see* CPL 470.05 [2]; *People v. Green,* 119 A.D.3d 23, 30, 984 N.Y.S.2d 680 [2014], *lv. denied* 23 N.Y.3d 1062, 994 N.Y.S.2d 321, 18 N.E.3d 1142 [2014]; *People v. Williams,* 28 A.D.3d 1005, 1009, 814 N.Y.S.2d 353 [2006], *lv. denied* 7 N.Y.3d 819, 822 N.Y.S.2d 494, 855 N.E.2d 810 [2006]). In any event, we would have found no error, as the instruction neither altered the theory of the prosecution nor prejudiced defendant on the merits (*see People v. Charles,* 61 N.Y.2d 321, 328–329, 473 N.Y.S.2d 941, 462 N.E.2d 118 [1984]; *People v. Ardrey,* 92 A.D.3d 967, 970–971, 937 N.Y.S.2d 693 [2012], *lv. denied* 19 N.Y.3d 861, 947 N.Y.S.2d 410, 970 N.E.2d 433 [2012]; *People v. Dorfeuille,* 91 A.D.3d 1023, 1024, 936 N.Y.S.2d 377 [2012], *lv. denied* 19 N.Y.3d 996, 951 N.Y.S.2d 472, 975 N.E.2d 918 [2012]).

3 A "bundle" of heroin was described in the course of other testimony as being comprised of 10 small glassine bags.

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Appendix - B

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 17, 2014 106274

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v

DECISION AND ORDER ON MOTION

JOSE A. RODRIGUEZ,
Appellant.

Motion by appellant for permission to file a pro se supplemental brief.

Upon the papers filed in support of the motion, and no papers having been filed in opposition thereto, it is

ORDERED that the motion is denied.

Peters, P.J., Lahtinen, Garry and Egan Jr., JJ., concur.

ENTER:

Robert D. Mayberger
Clerk of the Court

B-170

106274

3-14-1037

To be Argued by Matthew C. Hug, Esq.
Time Requested: 10 Minutes

New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOSE RODRIGUEZ,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

MATTHEW C. HUG, ESQ.
Attorney for Respondent
Rensselaer Technology Park
105 Jordan Road
Troy, New York 12180
Tel: (518) 283-3288

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

Notice of Motion

To File A Pro-se

supplemental Brief

JOSE A. Rodriguez,

Defendant, Pro-se

IND#: 2010-067

A.D.#: 106274

PLEASE TAKE NOTICE, that upon the attached affidavit OF JOSE A. Rodriguez, the above named defendant-appellant, duly SWORN to the 19 day of DECEMBER, 2013, and upon the documents attached thereto, the defendant, Proceeding Pro-se, will MAKE A MOTION before this APPELLATE DIVISION, THIRD Judicial DEPARTment Located at, Justice Bldg. EMPIRE STATE PLAZA, BOX 7288 CAPITOL STATION, CITY OF ALBANY, STATE OF NEW YORK, to be held on the ___ day of _____, 20__, at 10o' clock IN the forenoon of that or as soon thereafter as the MOTION MAY be Heard for and ORDER granting the Pro-se appellant Permission to File a supplemental Brief, and arguements MAY Be Heard FOR:

AN ORDER: Pursuant to title 22NYCRR 800.2, 800.14(a) granting THE Defendant Permission to File A supplemental Pro-se Brief, and

AN ORDER: Granting THE PRO-SE APPELLANT AN EXTENSION OF Time to File his supplemental brief, and

AN ORDER: FOR THIS COURT to NOTIFY superintendent OF THE FACILITY to Grant Appellant adequate weekly hours OF ACCESS to the LAW LIBARY which Include typewritter.

AN ORDER: Dispensing with the Printing and cost OF RE-Producing the record in this matter consistent with the needs OF this CASE, and

AN ORDER: For Any other further and other Relief as to This court MAY deem Just and Proper.

Dated: 12/19/2013

Respectfully submitted,

Jose Rodriguez

Jose A. Rodriguez #11B3913

Defendant-Appellant Pro-SE

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

Affidavit IN SUPPORT OF MOTION to File a Pro-SE SUPPLemental Brief.

JOSE A. Rodriguez,

DEfendant Pro-SE

IND#: 2010-067

A.D. #: 106274

STATE OF NEW YORK)

COUNTY OF Dutchess)

I, JOSE A. Rodriguez, being duly SWORN, deposes and says:

1. I am the defendant in the above caption matter Proceeding Pro-SE.

2. I was convicted IN THE SUPREME COURT OF OTSEGO county After a Jury Trial ON THE 25TH day OF August, 2011 and SENTENCE ON DECEMBER 22, 2011. THE conviction IS NOW ON appeal IN THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT.

3. I MAKE THIS affidavit IN SUPPORT OF MOTION FOR PERMISSION to File a supplemental PRO-SE brief, AN Extension OF TIME to PERFECT said BRIEF, and DOCUMENTS and/OR COPIES IF Need OF THIS CASE.

4. Additionally, An Order for this COURT TO NOtify THE SUPERINTEDENT OF Green HAVEN Corr. FACility to Grant APPEllant Adequate WEEKly Hours to Access the LAW Libary. THE APPEllant HAS had Numereous Problems IN the PAST with obtaining Access and Receiving Computer Access, TYpewritter, Notary services, LEgal and mailing supPlies, PHotocopying Services, Researching and trying to Perfect within this appeal and said Brief.

5. I THE DEfendant Received the Appeal Brief, By MY APPEllate Counsel ON DECEMBER 16, 2013, Through LEGAL MAIL officer at Green HAVEN corr. FAC. Post office stamp on the ENvelope states it WAS sHip out VIA MAIL to the Defendant ON December 12, 2013 at 03:33:16.

REASONS WHY THIS REQUEST SHOULD BE GRANTED

6. Although THE Points that the APPEllant's, APPEllate ATTORNEY, Matthew C. HUG, ESQ. Filed an appeal Brief Dated DECEMBER 9, 2013 ON behalf of the appellant ON appeal, It DOES NOT PLACE before the court these Following MERITORIOUS Arguements:

A. THE DEfendant-APPEllant WAS deprived OF His FUNdamental Right to A FAIR trial, DUE to Prosecutor's Misconduct Throughout trial By violating PRE-trial Ruling and IMPROPER Comments during Summation IN Violation OF U.S. Const., AMEND. 5, 14; N.Y. CONST. ART. 1, § 6.

b. THE Defendant-Appellant WAS seriously Prejudiced by TRial Court's FAilure to Provide Jury's Requested READ BACK OF RELavant testimony. The Court Also commited "mode of Proceeding Error" And Violated C.P.L. § 310.30, U.S. CONST., AMEND. 5, 6, 14; N.Y. CONST. ART. 1, § 6.

C. THE COURT SENTENCE the Defendant UNlawfully and Illegal By sentencing the Appellant CONSECUTIVELY To THE TOP COUNT IN violation OF PENAL LAW § 70.25 (2).

1. THIS MERITORIOUS ARGUEMENT SET FORTH ABOVE (C) WAS Address IN PAGE 2 of APPELlants Brief By APPELLATE counsel, But WAS NOT Included as A POINT, NOR WAS IT ARGued.

7. THE APPELlant NOW REQUEST to FILE IMMEDIATLY at THE COURT's direction and ORDER a PRO-SE supplemental Brief based ON these ISSUES OF MERIT.

8. MOREOVER, sufficient FACTS appear ON THE FACE OF THE RECORD to PERMIT adequate appellate REVIEW of said ISSUES which will RESULT IN EITHER REVERSAL OR modification ON my conviction.

9. NO Previous application for the RELIEF sought herein has been MADE.

WHEREFORE, I Respectfully Pray for and ORDER Granting Permission to File a Pro-se supplemental brief of the within appeal, and For any other and further Relief as to this COURT MAY deem Just and Proper.

Respectfully submitted,

Jose Rodriguez

JOSE A. Rodriguez #11B3913
DEFENDANT, Pro-SE
GREEN HAVEN CORR. FAC
P.O. BOX 4000
stormville, NY 12582

Matthew J. Farrand
Notary Public State of NY
No. 01FA6249046
Qualified in Dutchess County
My Comm. Expires 9/26/2015

SWORN to Before me this 19th
DAY OF Dec, 2013

Notary Public

Appendix - C

25 N.Y.3d 1076
(The decision of the Court of Appeals of New York is referenced in the North Eastern Reporter and New York Supplement in a table entitled "Applications for Leave to Appeal - Criminal.")
Court of Appeals of New York

People
v.
Jose Rodriguez

May 20, 2015

Synopsis

3d Dept.: 24 N.Y.3d 1122, 3 N.Y.S.3d 764, 27 N.E.3d 478 (Otsego)

Opinion

Pigott, J.

Denied Reconsideration.

All Citations

25 N.Y.3d 1076, 34 N.E.3d 379, 12 N.Y.S.3d 628 (Table)

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Appendix - D

2018 WL 6505808
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Jose A. RODRIGUEZ, Petitioner,
v.
Thomas GRIFFIN, Respondent.

9:16-CV-1037
|
Signed 12/11/2018

Attorneys and Law Firms

JOSE A. RODRIGUEZ, Petitioner, pro se, 11-B-3913, Green Haven Correctional Facility, P.O. Box 4000, Stormville, New York 12582.

HON. BARBARA D. UNDERWOOD, Acting New York State Attorney General, OF COUNSEL: DENNIS A. RAMBAUD, ESQ., Ass't Attorney General, The Capitol, Albany, New York 12224, Attorney for Respondent.

DECISION and ORDER

DAVID N. HURD, United States District Judge

I. INTRODUCTION

*1 Pro se petitioner Jose Rodriguez ("Rodriguez" or "petitioner") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Dkt. No. 2, Petition ("Pet."). [1]

On December 23, 2016, Rodriguez filed a motion to stay his habeas petition. Dkt. No. 17. In that filing, petitioner signaled his intent to raise additional habeas claims. Respondent Thomas Griffin ("Griffin" or "respondent") opposed the motion to stay. Dkt. No. 19. Upon review, the Court denied petitioner's motion to stay and ordered petitioner to file a motion to amend if he wanted to add new claims to his pending habeas petition. Dkt. No. 20.

On March 6, 2017, in accordance with the Court's direction, Rodriguez filed a motion to amend his habeas petition. Dkt. No. 26. Petitioner also filed a request to stay the habeas proceeding while his writ of *error coram nobis* was pending in state court. Dkt. No. 27. Respondent did not oppose either motion. Dkt. No. 28.

On March 12, 2018, before the Court acted on either the motion to amend or the motion to stay, Rodriguez filed a motion to compel. Dkt. No. 49. In the motion to compel, petitioner seeks the production of certain documents related to the police investigation, namely search warrant applications, search warrants, and premises records of the crime scenes. Dkt. No. 49 at 1.

On April 5, 2017, the Court granted Rodriguez's motions to amend and to stay the proceedings. Dkt. No. 30. Petitioner duly filed his amended petition on May 1, 2017. Dkt. No. 31, Amended Petition ("Am. Pet.").

Thereafter, Rodriguez complied with the Court's order to provide status reports on his state court proceedings and, on June 28, 2017, petitioner informed the Court that his state court remedies had been exhausted. Dkt. No. 35. In accordance with that development, the Court directed a response to the amended petition. *Id.*

Respondent has filed an opposition to Rodriguez's amended petition. Dkt. No. 42, Respondent's Answer ("Ans."); Dkt. No. 42-1, Respondent's Memorandum of Law ("R. Memo."); Dkt. Nos. 43-43-5, State Court Records ("SCR"); Dkt. Nos. 43-6-43-9, Transcripts ("T."). Petitioner has filed a reply. Dkt. No. 48, Traverse.

For the reasons that follow, Rodriguez's habeas petition and motion to compel are both denied and the petition is dismissed.

II. RELEVANT BACKGROUND

A. Overview

The basic facts underlying Rodriguez's criminal conviction are not in dispute. As stated by the Appellate Division:

> Following a lengthy police investigation, [petitioner], a resident of the Bronx, was charged with various crimes arising out of his alleged management of a heroin distribution ring in Otsego County. He was tried by a jury and convicted of the crime of operating as a major trafficker, as well as four counts of criminal sale of a controlled substance in the third degree. County Court denied [petitioner]'s motion to set aside the verdict and sentenced him to a prison term of 20 years with five years of postrelease supervision on the major trafficking count and four five-year prison terms, each with three years of postrelease supervision, on the criminal sale counts, all sentences to be served consecutively.

*2 ...

> The broad outline of the operation revealed by the testimony was that [petitioner]—located in New York City and using the nickname "Flip" instead of his real name—used throw-away cell phones with numbers that frequently changed to maintain contact with numerous individuals in the City of Oneonta, Otsego County, who followed his directions to sell heroin that he supplied to purchasers in that city, and who were paid for their efforts with heroin to support their drug habits. Oneonta narcotics detectives ... testified to describe their lengthy investigation into [petitioner]'s Oneonta heroin operation, their encounters with the various witnesses and [petitioner]'s ultimate arrest.

People v. Rodriguez, 995 N.Y.S.2d 785, 787-89 (3rd Dep't 2014).

B. Arraignment

On December 17, 2010, Rodriguez was arraigned in Otsego County Court. SCR 495-501. During the arraignment, the court briefly summarized the charges in the indictment and informed petitioner he had a right to be represented, that counsel could be appointed if he did not have the resources to retain an attorney, and that the proceedings could be adjourned in order for petitioner to secure counsel. SCR 496-97.

In response, Rodriguez indicated on the record that he wanted an attorney but did not have the means to retain one. SCR 497. The County Court stated it would assign petitioner counsel, entered a plea of not guilty on petitioner's behalf, and adjourned the matter to allow petitioner time to meet with his soon-to-be court-appointed attorney. SCR 497-98.

At that time, the People made an application to remand Rodriguez without bail given his risk of flight. SCR 498-99. Petitioner reserved his right to object until he was represented by counsel. SCR 499. Petitioner was remanded without bail pending further proceedings, which were then re-scheduled for January 14, 2011. SCR. 499-500.

On January 14, 2011, Rodriguez was arraigned. Dkt. No. 43-6 at 8-13. Petitioner's court-assigned counsel appeared and represented petitioner at the proceeding. *Id.* at 9-10. However, by that time petitioner had also retained his own attorney, who later served as petitioner's trial counsel. *Id.*

C. Pre-trial Matters

Based upon speculation that the People "may introduce ... recorded conversations," Rodriguez's retained counsel made a pre-trial motion for an audibility hearing. SCR 138. In opposition, the People indicated they had "no[ ] inten[tion of] introduc[ing] any recordings on their direct case." SCR 142. The trial court denied petitioner's motion based on the People's representation. SCR 153. The court concluded that any mention of the tapes on the People's direct case would be prohibited. *Id.*

Prior to jury selection, Rodriguez's counsel moved to dismiss based on the composition of the jury panel. T. 1-8. Petitioner's counsel also moved to change venue given the press attention surrounding petitioner's case. *Id.* The trial court denied both motions. As to venue, the trial court found it had no authority to grant the application—such applications must be submitted in writing directly to the appropriate appellate division. T. 9. As to the jury panel's composition, the trial court concluded petitioner failed "to show facts that demonstrate[d] ... there [was] ... a substantial deviation from the requirement[s] of the Judiciary Law." T. 9.

*3 During jury selection, Rodriguez's trial counsel utilized a jury expert. T. 47. After the jury was selected, the trial court asked the People and petitioner's trial counsel to hand in the jury questionnaires. T. 345-46, 356. Petitioner's trial counsel did not object to returning these questionnaires. At that time, petitioner's trial counsel also provided the court with notes, though it is unclear from the record whether those notes came from the petitioner, the jury expert, or possibly both. T. 357-360.

D. The People's Case

The People relied on the testimony of multiple confidential informants and other cooperating witnesses who made heroin purchases from Rodriguez's dealers in and around Oneonta. T. 694. Several of those dealers agreed to cooperate in the instant case for favorable treatment in their own pending criminal cases. *Id.*

One of the People's cooperating witnesses was Rebecca Kennedy. T. 691. Kennedy was incarcerated in the Lakeview Shock Program at the time of the trial. T. 691-92. Kennedy met Rodriguez in 2007 when she began buying heroin from him and his friends. T. 695-97. She would call petitioner on a cell phone, tell him what she wanted, and petitioner would direct her to someone in Oneonta that had drugs available. T. 698.

In 2009, Kennedy began working for Rodriguez. T. 698-99. Petitioner would call Kennedy and direct her to where someone was seeking heroin. T. 699. Kennedy was compensated for this work with drugs. *Id.* Kennedy also traveled to New York City to drop off cash – between $2,000 and $5,000 – and pick up bundles of heroin – usually twenty to thirty bundles per trip. T. 700-03. Kennedy estimates she completed this exchange approximately forty to fifty times. T. 700.

When she was in Oneonta, Kennedy estimated that she was personally selling an average of 80 to 100 bags of heroin per day, at $20 per bag. T. 704-05. She had between twenty and thirty regular customers in Oneonta, including confidential informants Chancy Couse, Mark Clark, and Justin Gage. T. 708-09. Kennedy would wire the money she received from the sales, via Western Union at various convenience and drug stores, to different names and addresses provided to her by Rodriguez. T. 705-06. Kennedy testified that every week or two she would wire one or two thousand dollars per petitioner's directions. *Id.*

On September 2, 2009, Kennedy sold five bags of heroin to confidential informant ("CI") Chancy Couse. T. 745-46, 755-61. CI Couse initiated the sale with a call to CI Mark Clark, the call went to voicemail, and then Kennedy returned the call and provided CI Couse with a location to receive the heroin. T. 755-56. CI Couse was given $100 for the buy, fitted with a listening device, and followed by police to the prearranged site. T. 756-58. The transaction was monitored: CI Couse was recorded saying "Here's the money" and Kennedy then exchanged five bags of heroin for the $100. T. 758. CI Couse provided the drugs to the police, which later tested positive for heroin. T. 759-761.

On January 21, 2010, Kennedy sold ten bags of heroin to CI Justin Gage. T. 746, 773-76. CI Gage contacted the police asking if he should set up a controlled buy between himself and Kennedy. T. 773-74. CI Gage was given $180 for the buy and outfitted with a listening device. *Id.* Police followed CI Gage to a parking lot where he awaited further instructions. T. 774. CI Gage then received a call from Kennedy, who gave him directions to a house, near the parking lot, where he could go to meet her and buy the heroin. *Id.* CI Gage, watched by the police, followed the instructions and arrived at the house. T. 775. Once he arrived, Kennedy came out of the house, approached the car, and, after a short negotiation, sold CI Gage ten bags of heroin for $180. T. 775-76. The drugs in the bag were later confirmed to be heroin. T. 834-35.

***4** During cross-examination of the police officer who arrested Kennedy, Rodriguez's trial counsel asked several questions about the officer's knowledge of alleged calls that a man known as "Flip" made to several people, and about the officer's familiarity with Flip's voice. [2] T. 781-82. This eventually led the officer to respond that "[he] recognized [Flip's] voice when [the police] did controlled calls [with Flip] in two [other] investigations." T. 782.

Rodriguez's counsel objected, which was overruled by the trial court because defense counsel had "asked the question." T. 782-83. Counsel continued questioning the officer on how he could recognize Flip's voice and the officer answered because "[i]t's a recorded phone call." T. 783. Petitioner's counsel moved for a mistrial based on the officer alluding to the existence of the recorded tapes, the mention of which had been prohibited during the People's direct case in the court's pre-trial ruling. T. 783; SCR 153. After hearing arguments on the matter (T. 782-87), the trial court denied the motion for a mistrial and opted to issue the following curative instruction:

> I'm going to strike th[e last] answer from the record. I've obviously sustained the objection.
>
> The answer dealt with a purported recording of a call. That answer was objected to and properly so and I ask you and direct you to strike from your mind any mention of there being a recorded telephone call. That is not evidence in this case before you. So as you sit here today, as you move forward in this case, well, as you sit here today there is no evidence before you of any type of recorded phone call.
>
> I don't know what the future will bring because I don't know the evidence, but as we sit here today I tell you there's no evidence before you of a recorded call involving Mr. Rodriguez. So completely put that out of your mind.

T. 792-93. [3]

Another cooperating witness was Jessica Gaston. Beginning in the spring of 2009, and lasting for approximately the next eighteen months, Gaston worked for Rodriguez, who she knew by the alias "Flip." T. 843-46. Gaston would drive down to New York City to pick up heroin and transport it back to Oneonta. T. 845-46. Gaston estimates she made thirty to forty trips to New York City where she would meet Flip, receive between ten to twenty bundles of heroin, and then transport them back to Oneonta with her. *Id.* Gaston generally traveled with someone, often Kennedy. T. 846. Gaston confirmed

that Kennedy would take money, specifically "thousands" of dollars, down to New York with her. T. 847.

*5 Gaston also wired money to the Bronx, via Western Union, to different names and addresses pursuant to Rodriguez's direction. T. 847-48. Gaston wired approximately $1,000 to $3,000 to petitioner on three different occasions. T. 848. While Gaston did not directly sell heroin, she acted as an intermediary, calling petitioner on the behalf of potential customers and relaying petitioner's instructions to the customers regarding where and from whom they could purchase heroin. T. 850-53. Gaston was compensated with heroin. T. 848.

On May 5, 2010, Gaston received heroin from one of Rodriguez's dealers for CI John Francis. T. 852-53, 888-892. CI Francis contacted Gaston and asked her to call petitioner and arrange a purchase for him. T. 853. Gaston called petitioner and he sent a dealer to Gaston's house with the heroin. T. 853, 889. Gaston received the heroin, then CI Francis arrived and exchanged $40 for two bags of heroin on Gaston's front porch. T. 853, 889-890. The drugs later tested positive for heroin. T. 891.

A third cooperating witness was Mark Rathburn, who worked briefly for Rodriguez until his arrest in February 2010.[4] T. 904-918. Rathburn first spoke with petitioner on the phone, when he was attempting to contact Kennedy to buy heroin. T. 904-05. Thereafter, Rathburn and petitioner spoke often when Rathburn would call seeking heroin. T. 905-06. Petitioner would direct Rathburn to different places where he was sold heroin by several different individuals. T. 906. Shortly thereafter, Rathburn offered to work for petitioner in exchange for drugs. T. 907-08.

Rodriguez directed Rathburn to pick people up at various homes and bus stations in Albany and Oneonta and give them rides in exchange for drugs. T. 908-910. Rathburn also wired money to different names and locations throughout the Bronx, per petitioner's direction, on approximately a dozen occasions. T. 916-17. During each transaction, Rathburn wired between $8,000 and $10,000 to petitioner. T. 917.

Rodriguez also directed Rathburn to rent an apartment. T. 910. The apartment was used as a stash house for drugs and money. T. 911-13. Petitioner would directly pay, or give money to Rathburn to pay, for the apartment's rent. T. 910-11. Petitioner would also compensate Rathburn $400-$500 per week for keeping the apartment in his name. T. 913.

The arrangement lasted until Rathburn's arrest three weeks later, which came after petitioner instructed Rathburn to go to a location to drop off heroin. T. 913-14. Rathburn was pulled over by police and, at the time, possessed fifty-six bags of heroin. T. 914. The heroin was from petitioner's stash house, about which Rathburn told the police and consented to its search. T. 914-16. Police obtained a warrant, searched the home, and found 250 bags of heroin inside. T. 956-57.

A fourth cooperating witness, Jordan Krone, worked for Rodriguez by attempting to expand petitioner's heroin operation into Albany, New York. T. 1151. Krone would hand out samples of petitioner's heroin in Albany until early 2009, when the demand increased enough that it became lucrative to begin distributing heroin there. T. 1151-53. Krone distributed the samples, and then sold the heroin, pursuant to direction he received from petitioner over the phone. T. 1153, 1158. At the peak of his business, Krone was selling 300-400 bags of heroin every other day. T. 1155.

Krone would replenish his supply by going to New York City, Queens, or the Bronx and meeting Rodriguez. T. 1155-56. While in the city, Krone would also provide petitioner with the money he earned from the drug sales. T. 1161-62. Krone estimated making between thirty and fifty trips to the city to replenish his drug supply (T. 1155) and estimated that he brought down over $100,000 in profit to petitioner in a six-month period (T. 1161-62). Krone also wired money to different names and addresses, provided by petitioner, on several occasions. T. 1169-1170. The most Krone wired at once was $5,000. T. 1170.

*6 On July 1, 2010, Krone left Albany, at Rodriguez's request, to move to Oneonta and take over petitioner's heroin sales there. T. 1159-60, 1165. However, Krone was arrested almost immediately thereafter while trying to make a sale in Oneonta. T. 1167.

Another cooperating witness, Leo Moore, was acting as a confidential informant on June 15, 2010. T. 1083-85. CI Moore called a man he knew as Flip and asked if he could purchase heroin. T. 1084-85. Flip told CI Moore to go to several locations before a person arrived in a truck. T. 966-68. CI Moore exchanged $100 for five bags of heroin. T. 968, 1085-86. CI Moore recognized the dealer as Bobby Colone, who would later be called to testify by the defense. T. 1086.

At the conclusion of the People's case, Rodriguez's trial counsel "move[d] to dismiss each and every count of the indictment [because t]he People ... failed to prove a prima

facie case, specifically as to counts three through 11 [sic]." T. 1221. The trial court reserved on the motion, taking the night to "go through ... notes carefully [to] make sure that there [was] sufficient corroboration of the testimony for each witness...." T. 1225. Ultimately, the court held that "there [was] sufficient evidence in the record ... for the jury to justify a guilty verdict...." T. 1240.

E. The Defense Case

Bobby Colone testified that, on June 15, 2010, he sold five bags of marijuana to Leo Moore, who was acting as a confidential informant at the time. T. 1228-29. Colone testified that in his sixty arrests, four felony convictions, and fourteen misdemeanor convictions, he had never been arrested or convicted of possessing or selling heroin. T. 1219-33. Colone also stated that he did not have a nickname or alias and did not know, nor had he ever worked for, Rodriguez. T. 1231-32.

F. The People's Rebuttal

Krone, a cooperating witness, identified Colone (the defense's witness) and testified that he also knew him by the street aliases of "Ricky Bobby" and "Shake and Bake." T. 1250. Krone testified that he knew Colone because he had "seen him with [Rodriguez] quite a few times when [he] went down to see him [in New York] and when [Krone] was living in Albany [Colone] came to visit [Krone and] ... stayed [in Krone's apartment] ... for a few days." T. 1250.

G. Charge Conference, Deliberations, Verdict and Sentence

Prior to summations, Rodriguez's trial counsel made several motions to dismiss. First, he moved to dismiss all counts in the indictment, "specifically as to count one [because ... every person who testified ... was ... a co-conspirator[; thus] ... the People ... failed to present credible, believable evidence beyond a reasonable doubt as to counts one through 11." T. 1252. Additionally, petitioner's trial counsel moved to dismiss counts two, three, and four of the indictment because those counts charged conduct that occurred "before ... the date the [major drug trafficking] law [under which petitioner was charged] had[ ] been passed." T. 1253.

The trial court heard extensive argument on the issue. T. 1253-55. After a short recess, the court denied Rodriguez's trial counsel's motion. T. 1255. The court explained that the effective date of the major drug trafficking statute was November 1, 2009. *Id.* Because two counts in the indictment preceded the effective date, the court decided "not ... to amend the indictment, but ... to ... instruct the jury the only time [frame it may consider] is November 1st, 2009 to September 1st ... [2010]." T. 1256. Notably, the trial court concluded that while "[t]he jury obviously can't consider those counts as evidence supporting the major trafficker [law], ... they're still separate crimes in their own right and they can consider them as such." *Id.*

*7 Specifically, the trial court instructed the jury that:

> to find [petitioner] guilty of operating as a major trafficker, [the jury] must find beyond a reasonable doubt that between November 1st, 2009 and September 1st, 2010, [petitioner] ... acted as a director of a controlled substance organization and during this period the controlled substance organization sold ... one or more controlled substances and that the proceeds collected ... had an aggregate total value of $75,000.00 or more.

T. 1332.

Summations followed. Prior to Rodriguez's trial counsel's closing statement, the trial court read its instructions to the jury. As relevant here, the instructions stated that:

> Summations provide each lawyer an opportunity to review the evidence and to submit for your consideration the facts, inferences and conclusions that they contend you may properly draw from such evidence.
>
> If you find that a lawyer has accurately summarized and analyzed the evidence and if you find that the inferences and conclusions the lawyer asks you to draw from the evidence are reasonable, logical and consistent, then you may adopt those inferences and conclusions.
>
> But please bear in mind the following. You are the finders of fact. It's for you and you alone to determine the facts from the evidence that you find to be truthful and accurate, so please remember, no matter what the lawyers say to you in their summations, no matter how they say it, these are simply arguments submitted to you for your consideration.

> Remember that the lawyers are not witnesses in the case. If a lawyer during his summation asserts as a fact something that you find was not based on the evidence, then you must disregard it. You have heard the evidence and you must decide this case based on the evidence as you find it to be and the law as I explain it.

T. 1257-58.

Rodriguez's amended habeas petition alleges that several of the prosecutor's statements made during summation improperly vouched for the credibility of the People's witnesses. Am. Pet. at 13.

In particular, the People made statements about whether Flip was, as characterized by Krone, a "criminal master mind" (T. 1289-90); about what Rodriguez's trial counsel would have the jury believe (T. 1292, 1295-96); about whether a conspiracy theory existed (T. 1293); about whether the People's witnesses were telling the truth (T. 1296); about whether Flip kept drug records (T. 1298); and about how petitioner's trial counsel prepared witnesses (T. 1300).

Rodriguez's trial counsel objected to all these statements. T. 1289-90, 92-93, 1295-96, 1298, 1300. The trial court overruled several of the objections as argument, but also cautioned the prosecutor to be precise with his language (T. 1295-96) and sustained the objections about the drug records and about how Rodriguez's trial counsel prepared his witnesses (T. 1298, 1300).

After deliberating for a day, the jury sent out a note. T. 1340. It is unclear whether the trial court discussed or contemplated with counsel how the note should be handled. However, it is clear that counsel and petitioner had an opportunity to read the note. T. 1340 (petitioner's counsel asking the court to "[g]ive [him] a minute to show the [petitioner] the note" and the court announcing to the jury that the note has been "share[d] ... with the attorneys").

***8** The note requested a read-back of a portion of the testimony. T. 1340. The portion of the testimony elicited on direct examination was read back and then the trial court asked the jury to consider whether it also wanted to hear a read-back of the cross-examination portion of the testimony. T. 1340-41. No objections or further conversation on this point were had.

Soon thereafter, the trial court received a second note from the jury, this time requesting more read-backs. T. 1342. This time, Rodriguez's trial counsel requested that the entire questioning, both direct and cross, be read as "[i]t [wa]s not proper to stop after direct and ask [the jury] do you want more[?]". *Id.* The court agreed and this time read back both the direct and cross-examination testimony from the two witnesses requested in the note. T. 1342-43.

Ultimately, the jury found Rodriguez guilty of operating as a major trafficker and of four counts of third-degree criminal sale of a controlled substance. T. 1356-59. In particular, petitioner was convicted of the sales that occurred with (1) Rebecca Kennedy on September 2, 2009 and January 21, 2010; (2) Jessica Gaston on May 4, 2010; and (3) Bobby Colone on June 15, 2010.

On December 22, 2011, Rodriguez was sentenced to a consecutive prison term of twenty years for his conviction for operating as a major trafficker and five years for each third-degree sale, to be followed by an aggregate term of five years post-release supervision. S. 17-18. Further, the trial court ordered petitioner to pay fines of $80,000 for his conviction for operating as a major trafficker and $5,000 for each of his third degree sale convictions. *Id.* The Uniform Sentence & Commitment Order, filed by the Clerk of the Court, stated that "[e]arnings are to be withheld from state prison wages for payment of surcharge and fees. Civil judgments to be entered for fine." T. 358

H. CPL § 330.30

On November 30, 2011, Rodriguez filed a counseled motion to set aside his verdict pursuant to New York Criminal Procedure Law ("CPL") § 330.30. SCR 1-11. Petitioner's CPL § 330.30 motion claimed that (1) his conviction was based on legally insufficient evidence; (2) the trial court erred by denying petitioner's oral objection to the composition of the jury panel; (3) the trial court erred in denying petitioner's motion to change venue; (4) the trial court erred by truncating the time it provided petitioner's trial counsel to voir dire prospective jurors; and (5) the trial court erred by seizing the jury notes and jury sheets created by the defense team during jury selection. SCR 7-10.

On December 22, 2011, the Otsego County Court denied Rodriguez's CPL § 330.30 motion. SCR 17-20. The court held that petitioner's renewed motion to set aside the verdict for insufficient evidence was denied for the same reasons stated at the close of the People's case. SCR 17-18. Specifically, viewing the evidence in the light most favorable to the prosecution, there was "a valid line of reasoning and permissible inferences from which the jury could rationally

conclude that [petitioner] committed the offenses for which he was convicted." *Id.*

The court denied the motion to set aside the verdict as being against the weight of the evidence because "[a] trial judge does not have the power to change a guilty verdict to a not guilty verdict based on a reassessment of the facts." SCR 18. The court also denied the motion to set aside the verdict based on Rodriguez's objection to the jury panel because the challenge was not in writing, a statutory prerequisite. SCR. 18-19 (citing CPL § 270.10(2)).

*9 Similarly, the court denied Rodriguez's motion regarding the change of venue because it too did not fulfill the statutory prerequisites of being timely, in writing, and submitted to the appellate division. SCR 19 (citing CPL § 230.20(2)). Finally, the court denied petitioner's motions with respect to his jury complaints. First, the court held that the voir dire time limitation was proper because petitioner failed to object to the limitation when it was imposed, rendering the issue unpreserved for review. SCR 19 (citing *People v. Smith*, 89 A.D.3d 1126, 1131 (3rd Dep't 2011)). It also found that petitioner's trial counsel did not object at the time the court collected the jury questionnaires and notes. *Id.* Accordingly, that issue was also not properly preserved for further review. *Id.*

I. Direct Appeal

On December 11, 2013, Rodriguez filed a counseled brief on direct appeal to the Appellate Division, Third Department. SCR 28-107. Petitioner's brief on direct appeal alleged: (1) his conviction for operating as a major trafficker was not supported by legally sufficient evidence and was against the weight of the evidence; (2) the other four crimes of which he was convicted (criminal sale of a controlled substance in the third degree) were not supported by legally sufficient evidence and were against the weight of the evidence; (3) Jordan Krone's testimony should not have been admitted at trial without a prior *Ventimiglia* ruling because it related to uncharged bad acts and was unrelated to any of the charges in the indictment; (4) the trial court erred by effectively amending the indictment with its instruction to the jury about petitioner potentially operating as a major trafficker; (5) his trial counsel was ineffective; and (6) the sentence was harsh and excessive. SCR 28-107.

The Third Department rejected these arguments and affirmed Rodriguez's conviction. *People v. Rodriguez*, 121 A.D.3d 1435, 1444. First, the appellate division found that petitioner's contentions that his conviction were not supported by legally sufficient evidence and were against the weight of the evidence were only preserved "as to the charge of operating as a major trafficker, as [petitioner] specifically raised that claim when he moved to dismiss the trafficking charge at the close of proof, but did not include it in his more general motion to dismiss the other charges." *Id.* at 1436. Despite the failure to preserve the claim, the court went on to address the merits. *Id.* at 1436-1441.

The Third Department explained that a person is guilty of operating as a major trafficker where "he ... acts as a director [or leader] of a controlled substance organization [of four or more people] during a period of 12 months or less in which the organization sells a controlled substance ... and the proceeds due or collected ... have a total value of at least $75,000." *Rodriguez*, 121 A.D.3d at 1436-37. Through the witness testimony, the Third Department concluded "there was adequate corroboration for the testimony of these accomplice witnesses ... [which] connect[ed] the [petitioner] with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice was telling the truth." *Id.* at 1439. Specifically, the appellate division found that

> the testimony of both female witnesses was corroborated by that of the narcotics detectives, who testified that they used CIs to make controlled heroin purchases from each of the women, and that these purchases were initiated by contact with [petitioner] or his employees and conducted according to the procedures described by the witnesses.
>
> The testimony of the first male witness was corroborated by the same two detectives. [One officer] testified that he arrested the witness after observing what appeared to be a drug transaction at a residence in Oneonta and found 56 bags of heroin in his car. After the witness stated that additional heroin could be found in the stash house, [another officer] searched it and found an additional 250 bags. [That officer] further determined that the stash house had been leased in the name of this witness shortly before his arrest.
>
> *10 Corroborative evidence need not prove the commission of the crime, directly link [the petitioner] to the crime or lead exclusively to the inference of the [petitioner]'s guilt. Here, the police testimony confirming certain details of [petitioner]'s alleged operation as described by the accomplices was sufficient to support a reasonable inference that he was involved and to satisfy the minimal corroboration requirements of CPL 60.22(1).

Rodriguez, 121 A.D.3d at 1439-1440 (internal quotation marks and citations omitted) (some paragraph breaks added).

Further, the Third Department noted that testimony from another witness (1) confirmed Rodriguez's nickname as "Flip"; (2) confirmed petitioner's operational method of giving instructions to various parties via cell phones; (3) acknowledged the drug ring in Oneonta; and (4) confirmed the method for exchanging drugs and money in New York City and via Western Union wires. *Rodriguez*, 121 A.D.3d at 1440.

Accordingly, "[v]iewing the testimony in the light most favorable to the People, [the appellate court] f[ound] a valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury." *Rodriguez*, 121 A.D.3d at 1440-41. The testimony regarding the profits from the heroin proceeds "was more than adequate to satisfy the monetary threshold of $75,000. Further, the testimony of the accomplice witnesses as to their own involvement, that of [petitioner], and that of multiple other persons who they testified also worked for [petitioner] ... was sufficient to establish ... a controlled substance organization existed...." *Id.* at 1441.

Lastly, the testimony regarding Rodriguez's "management of the Oneonta operation by ... supplying the heroin, supervising and directing the workers, communicating with buyers and sellers to schedule heroin transaction, and collecting the proceeds sufficiently established that he was a ... leader of the organization." *Rodriguez*, 121 A.D.3d at 1441. Allegations that the witnesses were not credible "were vigorously explored in cross-examination, and the jury was free to credit or discredit their testimony as it saw fit," which is a determination that the Third Department held required deference as it "was in accord with the weight of the evidence." *Id.*

With respect to each individual sale, the Third Department also held that each of these four convictions were supported by sufficient evidence. *Rodriguez*, 121 A.D.3d at 1441-42. The first two convictions were supported by testimony regarding the September 2009 and January 2010 controlled buys. The witness stated "that [petitioner] was the supplier of the heroin that [the witness] sold during [the two controlled buys] ... [thus] the jury could reasonably have inferred that [petitioner] aided both sales by supplying the heroin." *Id.* at 1442.

The third conviction arose from the May 2010 controlled buy whereupon the witness testified that she sold a CI drugs at her home after she "contact[ed petitioner] to arrange the sale ... and ... [petitioner] then sent a third party to her house – thus establishing [petitioner's] assistance in the sale." *Rodriguez*, 121 A.D.3d at 1442.

The fourth conviction stemmed from the June 2010 controlled buy where the jury believed the credibility of a CI and officer who testified to a phone call to petitioner to arrange to buy heroin, and a subsequent sale, which the jury determined to be true. *Rodriguez*, 121 A.D.3d at 1442. Giving "the jury's determinations appropriate deference, [the court] f[ound] that the weight of the evidence support[ed] all four convictions." *Id.* 1443.

***11** Next, with regard to the *Ventimiglia* claim, the Third Department found Rodriguez's contentions meritless as "no ... hearing was required ... as the testimony of [Krone] ... did not address uncharged crimes or bad acts and was not introduced to suggest propensity, but was instead relevant to ... [petitioner's] ... direct[ion of] a controlled substance organization in Oneonta." *Rodriguez*, 121 A.D.3d at 1440. Further, to the extent petitioner alleges an ineffective assistance of counsel claim based on the failure to protest not having such a hearing, such claims are also meritless "as a [petitioner] is not denied the effective assistance of counsel when counsel fails to raise issues that have little or no chance of succeeding." *Id.*

The Third Department also denied Rodriguez's allegations about the trial court improperly amending the indictment. When the trial court "instructed the jury to base its determination of the trafficking charge only upon evidence of acts transpiring between November 1, 2009 and September 1, 2010 ... there was no objection to this charge;" accordingly, the claim is unpreserved, "the instruction neither altered the theory of prosecution nor prejudiced [petitioner] on the merits," and it was harmless at best. *Rodriguez*, 121 A.D.3d at 1437 n.2.

The Appellate Division also rejected Rodriguez's contention that his sentence was harsh and excessive. First, the appellate court observed that "the disparity between the sentence imposed ... and a shorter sentence offered by the People ... without more, does not demonstrate ... improper[ ] punish[ment] for exercising [petitioner's] right to go to trial." *Rodriguez*, 121 A.D.3d at 1437.

Further, the court noted that the "[trial c]ourt was authorized to impose a maximum indeterminate life term with a minimum of 15 to 25 years ... but instead elected to sentence [petitioner] to a determinate term of 20 years, the maximum term permitted under th[at statutory option]. *Rodriguez*, 121 A.D.3d at 1437. This decision came after the trial court provided extensive rationalization for why it rejected petitioner's plea for leniency "including the serious harm caused by [petitioner's] conduct to the affected individuals and the community, [petitioner's] failure to show remorse or insight, his extensive prior criminal history – which included a previous conviction for selling heroin in Oneonta – and his criminal character as revealed by these factors." *Id.* Any mistake the trial court made in not putting express findings on the record was rectified by "the court's detailed remarks," resulting in the Third Department's decision refusing to vacate the sentence. *Id.* at 1443-44.

On November 17, 2014, Rodriguez sent a counseled application seeking leave to appeal the Third Department's ruling to the New York Court of Appeals. SCR 193-200. According to the application, leave to appeal further was "being sought on the grounds that the lower court misapplied the law with respect to the need to corroborate accomplice testimony[.]" SCR 194.

On January 24, 2015, the Court of Appeals denied leave to appeal. SCR 203; *see also* 24 N.Y.3d 1122 (2015). A subsequently filed motion for reconsideration (SCR 204-06) was also denied by the Court of Appeals on May 20, 2015. SCR207; *see also People v. Rodriguez*, 25 N.Y.3d 1076 (2015).

M. CPL § 440.20

Rodriguez, by now acting *pro se*, moved in Otsego County Court to vacate his sentence pursuant to CPL § 440.20 on the grounds that (1) the trial court erred, pursuant to Penal Law § 80.25(1) and CPL § 380.20, in failing to specify which counts or charges were to run consecutively or concurrently; (2) the trial court erred in ordering that the criminal sale counts to run consecutively; (3) petitioner's due process rights were violated when the court clerk entered information onto the Uniform Sentence and Commitment Order; (4) the trial court erred in relying on incorrect information provided by the People during petitioner's sentencing; (5) double jeopardy was violated when petitioner was twice-punished for the same crimes; and (6) the fines were excessive. SCR 243, 245-265.

***12** The court denied the motion. SCR 385-89. First, the court held that "the sentencing minutes ... make clear that the [trial] court complied with the statutory requirements governing sentences for convictions upon multiple counts of an accusatory instrument." SCR 385-86.

Further, the court found "[t]he People have met their burden of establishing the legality of sentence by relying on facts adduced at trial which establish ... that [Rodriguez] orchestrated sales of a narcotic drug ... to convict[ ] him as a major trafficker independent of the evidence upon which he was convicted of the sales in the other four counts." SCR 387.

Next, the court denied Rodriguez's claims of an invalid sentence based on the court clerk's notation. The notation, despite defendant's argument to the contrary, makes clear "that civil judgments would be entered for the fines ... [which] should not be collected from [petitioner's] wages in prison." SCR 388. Accordingly, the notation is correct and "[a]ny erroneous withholding by the Department of Corrections is outside th[e] court's purview." *Id.*

Moreover, the court found that Rodriguez's arguments that the sentence violated his due process rights were meritless. "As [petitioner] concedes, the [c]ourt made clear that it was not considering the advocacy of the District Attorney, but was instead relying on the memoranda which had been submitted." SCR 388.

Lastly, the court found that Rodriguez's arguments that the imposition of a fine and sentence of imprisonment violated double jeopardy were also meritless given the statutory provisions of the Penal and Criminal Procedure Law. SCR 388. "Further, the amounts of the fines were not excessive and were well within the limits set by law." SCR 389.

On October 2, 2015, Rodriguez filed for leave to appeal this unfavorable decision. SCR 390-409.

On November 24, 2015, the Third Department denied Rodriguez's application. SCR 410. Petitioner subsequently requested, and was denied, reconsideration of the application. SCR 411-14.

N. First Coram Nobis Petition

On January 6, 2016, Rodriguez filed a *pro se* coram nobis petition with the Third Department alleging that his appellate counsel was ineffective. SCR 415-640. Specifically, petitioner contended appellate counsel was ineffective for failing to argue that: (1) petitioner was denied his due

process rights by not having counsel at his arraignment; (2) the trial court erred in its response to a jury note; and (3) the prosecutor committed various forms of misconduct by withholding information, ignoring pre-trial rulings on evidence admissibility, and making improper statements during his summation. SCR 415-640.

Rodriguez further argued that his appellate counsel's performance was deficient when he failed to argue that petitioner's trial counsel was ineffective for (1) failing to challenge, through timely objection, the trial court's instruction on accessorial liability; (2) failing to request a missing witness charge; (3) failing to argue that admission of the narcotic laboratory reports violated petitioner's right to confront his accusers; (4) failing to adequately prepare for the trial; and (5) failing to object to a variety of alleged errors at sentencing. *Id.*

On March 11, 2016, the Third Department summarily denied Rodriguez's *coram nobis* petition. SCR 641.

***13** On April 4, 2016, Rodriguez sought permission to appeal the denial of his *coram nobis* petition from the Court of Appeals. SCR 642-650. The Court of Appeals denied petitioner's application on July 28, 2016. SCR 651.

O. Motion To Vacate Pursuant to CPLR §§ 317 and 5015(a)(4)

On March 16, 2016, Rodriguez filed a *pro se* motion seeking to vacate the civil judgments entered on the fines imposed by the sentencing court. SCR 652-661. Petitioner alleged he was never served with written notice of the entry of judgments by the County Clerk on January 13, 2012. *Id.*

On May 5, 2016, the Otsego County Court denied Rodriguez's motion. SCR 726-27. The court held "that the motion ha[d] absolutely no basis in fact or law [as petitioner] was present at all times throughout the [sentencing] proceedings ... wherein the District Attorney was authorized by the court to submit civil judgments on the fines for each conviction.". SCR 726. Entry of the judgment was compliant with the Criminal Procedure Law. *Id.* Thus, petitioner's motion was denied and dismissed. SCR 727.

Rodriguez then filed a counseled appeal of this decision to the Third Department, along with a *pro se* supplemental brief. SCR 728-743. The Third Department rejected the appeal and affirmed. *People v. Rodriguez*, 158 A.D.3d 956, 957 (3rd Dep't 2018).

In affirming, the Appellate Division found that "CPL § 420.10 provides a mechanism by which a criminal fine may be collected in the same manner as a judgment in a civil action." *Rodriguez*, 158 A.D.3d at 957. To the extent that Rodriguez alleges he was unable to challenge what happened during his sentencing hearing, the court held such contentions were unpreserved as he failed to timely object. *Id.*

Further, the Third Department held such matters to be "ministerial matter[s] required by statute and any purported failure to serve [petitioner] with a copy of the judgments and notice of their entry does not warrant vacatur of those judgments." *Rodriguez*, 158 A.D.3d at 957. Lastly, the court held Rodriguez "failed to demonstrate ... how County Court lacked personal or subject matter jurisdiction to impose the fines and order that they be entered as civil judgments or to establish any other basis [for] ... vacatur of the ... judgments." *Id.*

P. Second *Coram Nobis* Petition

On December 15, 2016, Rodriguez filed a second *pro se* writ for *coram nobis* with the Appellate Division. SCR 749-760. Petitioner alleged that his appellate counsel was deficient in failing to challenge the trial court's denial of petitioner's CPL § 330.30 motion when appellate counsel (1) failed to challenge the perceived deficiencies in jury selection and (2) failed to object to trial counsel's failure to contest the deficiencies. *Id.*

The Appellate Division summarily denied this second *coram nobis* petition. SCR 815. Rodriguez sought reargument (SCR 816-823), which was request denied (SCR 824), and then petitioner appealed the denial to the Court of Appeals (SCR 825-832), which denied his application for leave to appeal (SCR 833). Having completed all of his state court proceedings, petitioner returned to this Court for habeas review.

III. THE PETITION

Rodriguez seeks habeas relief on the following grounds: (1) his convictions were secured with legally insufficient evidence and the verdicts were against the weight of the evidence; (2) the trial court erred in admitting evidence of uncharged crimes and his trial counsel was ineffective for failing to object to the admission of such evidence; (3) the trial court erred in instructing the jury regarding the applicable time period to consider for petitioner's drug trafficking charge, which improperly and unilaterally amended the

indictment; (4) the prosecutor engaged in misconduct by (a) withholding *Brady/Rosario* material, (b) ignoring a pretrial ruling about the admissibility of pre-recorded phone calls, and (c) making improper remarks throughout his summation; (5) the trial court erred in its handling of a jury note; (6) petitioner's sentence was excessive, illegal, and imposed in violation of due process, double jeopardy, and excessive fines clauses of the Constitution; and (7) petitioner was deprived of the effective assistance of appellate counsel. Am. Pet. at 6-32.

IV. LEGAL STANDARD

*14 Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas corpus relief with respect to a claim adjudicated on the merits in state court only if, based upon the record before the state court, the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1), (2); *Cullen v. Pinholster*, 563 U.S. 170, 180-81, 185 (2011); *Premo v. Moore*, 562 U.S. 115, 120-21 (2011); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

This standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted)). The Supreme Court has repeatedly explained that "a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents.' " *Nevada v. Jackson*, 569 U.S. 505, 508-09 (2013) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)); *see Metrish v. Lancaster*, 569 U.S. 351, 358 (2013) (explaining that success in a habeas case premised on § 2254(d)(1) requires the petitioner to "show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement' ") (quoting *Richter*, 562 U.S. at 103).

Additionally, the AEDPA foreclosed "using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Parker v. Matthews*, 567 U.S. 37, 38 (2012) (per curiam) (quoting *Renico*, 559 U.S. at 779). In other words, a state court's findings are not unreasonable under § 2254(d)(2) simply because a federal habeas court reviewing the claim in the first instance would have reached a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010). Rather, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable–a substantially higher threshold." *Schriro*, 550 U.S. at 473.

Federal habeas courts must presume that the state courts' factual findings are correct unless a petitioner rebuts that presumption with "clear and convincing evidence." *Schriro*, 550 U.S. at 473-74 (quoting 28 U.S.C. § 2254(e)(1)). "A state court decision is based on a clearly erroneous factual determination if the state court failed to weigh all of the relevant evidence before making its factual findings." *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015) (internal quotation marks omitted). Finally, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits[.]" *Johnson v. Williams*, 568 U.S. 289, 301 (2013).

V. DISCUSSION

A. Weight of the Evidence

Rodriguez asserts that all of his convictions are against the weight of the evidence. Am. Pet. at 6-8. Respondent contends that petitioner has f ailed to allege a cognizable habeas claim. R. Memo. at 16.

"It is well-settled that claims attacking a verdict as against the weight of the evidence are not cognizable in a federal habeas proceeding." *Kimbrough v. Bradt*, 949 F. Supp. 2d 341, 360 (N.D.N.Y. 2013); *see also McKinnon v. Superintendent, Great Meadow Corr. Facility*, 422 Fed. App'x 69, 75 (2d Cir. 2011) ("[T]he argument that the verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus.") (citing cases). Accordingly, petitioner's claims regarding the weight of the evidence are dismissed.

B. Legal Sufficiency

*15 Rodriguez asserts that the evidence was legally insufficient to support his convictions. Am. Pet. at 6-8. Specifically, petitioner contends that the only evidence available to convict him was from accomplices, without corroboration, and the prima facie elements of all claims were not satisfied. *Id.* Respondent opposes petitioner's claims

by arguing they are procedurally barred and substantively meritless. R. Memo. at 16-21.

1. Procedural Default

Substantive review of a habeas claim is prohibited if the state court rested its decision on " 'a state-law ground that is independent of the federal question and adequate to support the judgment.' " *Walker v. Martin*, 562 U.S. 307, 315 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 55 (2009)) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)).

To qualify as an "adequate" ground, the state law rule must be "firmly established and regularly followed." *Walker*, 562 U.S. at 316 (quotation marks and citation omitted); *Downs v. Lape*, 657 F.3d 97, 101 (2d Cir. 2011) (explaining that habeas review of a state court's application of its own rules is deferential and is focused on whether the challenged ruling "falls within the state's usual practice and is justified by legitimate state interests, not whether the state court ruling was correct."). A rule can be firmly established and regularly followed "even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Kindler*, 558 U.S. at 61.

As relevant here, New York law requires defendants to preserve challenges to a state court's legal rulings by objecting at a time when the trial court may act to correct the error. CPL § 470.05(2) (providing that a question of law is presented when "a protest thereto was registered, by the party claiming error, at the time of such ruling ... or at any subsequent time when the court had an opportunity of effectively changing the same."); *People v. Luperon*, 85 N.Y.2d 71, 78 (1995) (the preservation rule requires, "at the very least, that any matter which a party wishes the appellate court to decide have been brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error."). "The chief purpose of demanding notice through [specific] objection or motion in a trial court ... is to bring the claim to the trial court's attention. A general motion fails at this task." *Gray*, 86 N.Y.2d at 20.

The Third Department rejected Rodriguez's legal sufficiency claims, with the exception of his contentions surrounding his conviction under the major trafficking law, as unpreserved and procedurally barred. *Rodriguez*, 121 A.D.3d at 1436.

By way of review, at the close of the People's case Rodriguez's trial counsel "move[d] to dismiss each and every count of the indictment [because t]he People ... failed to prove a prima facie case, specifically as to counts three through 11 [*sic*]." T. 1221. And prior to summations, petitioner's trial counsel made another motion to dismiss all counts in the indictment, "specifically as to count one [because] ... every person who testified ... was ... a co-conspirator[; thus] ... the People ... failed to present credible, believable evidence beyond a reasonable doubt as to counts one through 11." T. 1252.

The Third Department found the first motion to be a "general motion to dismiss the other charges," *Rodriguez*, 121 A.D.3d at 1436, which was insufficient to preserve such claims. *Gray*, 86 N.Y.2d at 20; *see also Calderson v. Perez*, 1:10-CV-2562, 2011 WL 293709, at *24 (S.D.N.Y. Jan. 28, 2011) (explaining the "boilerplate" language within such motions to dismiss, "without [further] explanation" fails to satisfy the preservation requirement) (citing cases).

***16** This finding by the Third Department constitutes an independent and adequate state ground. *Downs*, 657 F.3d at 104; *Richardson v. Greene*, 497 F.3d 212, 219 (2d Cir. 2007) ("[A]pplication of the state's preservation rule is adequate – i.e. firmly established and regularly followed."); *Santana v. Lee*, No. 9:11-CV-0105 (NAM/TWD), 2015 WL 4207230, at *20 ("The New York preservation rule has been determined to be an adequate and independent state law ground precluding federal habeas review."). Accordingly, Rodriguez's habeas claim regarding the sufficiency of the evidence of his four individual drug sale convictions is denied as procedurally barred.

The Second Circuit has long held "that the contemporaneous objection rule is a firmly established and regularly followed New York procedural rule ... [and] constitutes an independent and adequate state law ground for disposing of a claim...." *Downs*, 657 F.3d at 104. However, in "exceptional cases," the "exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002); *see Cotto v. Herbert*, 331 F.3d 217, 239 (2d Cir. 2003) (quoting *Lee*, 534 U.S. at 376).

In determining whether the application of an independent state rule was "exorbitant," a reviewing court should consider: (1) whether the alleged procedural violation was actually relied upon by the trial court and whether perfect compliance with the state rule would have changed the trial court's decision; (2) whether state case law required compliance with the rule in the specific circumstances; and (3) whether petitioner had "substantially complied" with the

rule given the "realities of trial," and whether demanding perfect compliance with the rule would serve a legitimate governmental interest. *Garvey v. Duncan*, 485 F.3d 709, 714 (2d Cir. 2007) (quoting *Cotto*, 331 F.3d at 240). [5]

Upon review of these factors, the application of this procedural bar was not exorbitant in Rodriguez's case. On the contrary, the Appellate Division's application of the preservation rule to bar petitioner's legal sufficiency claims was consistent with the state's usual practice, [6] and the record supports the appellate court's conclusion that these claims were not properly raised in the trial court. T. 1221, 1252; *see Sanchez v. Lee*, 1:10-CV-7719, 2011 WL 924859, at *18 (S.D.N.Y. Mar. 16, 2011) ("[D]istrict court decisions within the Circuit have upheld as an adequate and independent state ground New York's rule that general motions to dismiss that do not set forth the specific grounds for the alleged insufficiency of the evidence fail to preserve the issue[.]") (citing cases). Accordingly, petitioner's cause of action is not appropriately classified as an exceptional case.

***17** Further, because the Appellate Division also invoked this preservation rule with respect to Rodriguez's challenges to four of his convictions, federal habeas review of these convictions is barred unless he can show (1) cause for the default and (2) actual resulting prejudice, or petitioner can show that the denial of habeas relief would result in a fundamental miscarriage of justice, i.e., that he or she is actually innocent. *House*, 547 U.S. at 536-39; *Schlup*, 513 U.S. at 327.

To establish cause, a petitioner must show that some objective external factor impeded his ability to comply with the relevant procedural rule. *Maples*, 565 U.S. at 280; *Coleman*, 501 U.S. at 753. If a petitioner fails to establish cause, a court need not decide whether he suffered actual prejudice, because federal habeas relief is generally unavailable as to procedurally defaulted claims unless both cause and prejudice are demonstrated. *See Murray*, 477 U.S. at 496 (referring to the "cause-and-prejudice standard"); *Stepney*, 760 F.2d at 45. Rodriguez has not asserted that cause for the default exists or that he is actually innocent and therefore review is barred. [7]

Notably, even if the state court proceeds to consider the merits of an unpreserved claim, as it did here, its reliance on a procedural ground as one basis for the denial of the claim still operates to preclude habeas review. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an alternative holding" because "the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.") (emphasis in original); *Fama v. Commissioner of Corr. Servs.*, 235 F.3d 804, 810-11 & n. 4 (2d Cir. 2000) ("[W]here a state court says that a claim is 'not preserved for appellate review' and then ruled 'in any event' on the merits, such a claim is not preserved"). Accordingly, petitioner's claim with regard to his four drug convictions is procedurally barred and habeas relief is precluded.

2. Merits

Regardless of whether Rodriguez could overcome the procedural bar just discussed or whether he continued with only a habeas challenge to his major drug trafficker conviction, all of petitioner's habeas claims would still fail because they are meritless.

"[T]he critical inquiry on [the] review of the sufficiency of the evidence ... [is] whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). The reviewing court must determine if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original).

In so doing, the reviewing court must be mindful that, when "faced with a record of historical facts that supports conflicting inferences [it] must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (internal quotation marks and citations omitted). In seeking habeas corpus review, a petitioner who claims that the evidence was insufficient to sustain a conviction bears a "very heavy burden." *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 811 (2d Cir. 2000).

***18** Rodriguez claims that his major drug trafficking conviction was not supported by legally sufficient evidence because the prosecution failed to establish the requisite monetary element for the crime and all of the proof came from accomplices without any other independent corroboration. Am. Pet. at 6.

In order to prove that Rodriguez was a major drug trafficker, the jury was required to find, beyond a reasonable doubt, that petitioner "act[ed] as a director of a controlled substance organization [of four or more persons engaged in a common

felonious purpose] during a period of 12 months or less in which the organization sells controlled ... substances, and the proceeds due or collected ... have a total value of at least $75,000." *Rodriguez*, 121 A.D.3d at 1436.

The Appellate Division found that the collective testimony of "witnesses who had allegedly purchased heroin from [Rodriguez] and/or worked for him by selling, distributing and delivering heroin," established sufficient evidence to sustain the conviction. *Id.* at 1437, 1440-41. Specifically, with regard to the monetary component, one witness's testimony could have led the jury to find "that she sold over $150,000 worth of heroin at [petitioner's] behest between November 2009 and 2010." *Id.* at 1438. Another witness testified that he "made approximately a dozen $8,000 to $10,000 wire transfers to New York City addresses supplied by [petitioner]." *Id.* at 1439.

Of course, the jury has the ability to, and ultimately did, credit this witness testimony and the Third Department reasonably and correctly deferred to the jury's decision in concluding that this "was more than adequate to satisfy the monetary threshold of $75,000." *Rodriguez*, 121 A.D.3d at 1441.

Given that there is no clear and convincing evidence presented to disturb these credibility determinations, they will retain their presumption of correctness and remain. *See e.g., Huber v. Schriver*, 140 F. Supp. 2d 265, 277 (E.D.N.Y. 2001) ("[U]nder both ... state law ... and federal law, issues of credibility, as well as the weight to be given to evidence, are questions to be determined by the jury.").

Concerning the controlled substance organization component, trial testimony came from multiple users and employees of Rodriguez, outlining how they would travel to exchange heroin and money, deliver the drugs to various parties in Oneonta, and arrange for drug transactions by phone – deferring to the petitioner regarding who could and could not be a customer and where and between whom such transactions would take place. T. 698-708, 755-761, 773-76, 845-853, 905-916, 1083-86, 1151-1170. T he Third Department reasonably concluded that

> the testimony of the accomplice witnesses as to their own involvement, that of [petitioner], and that of multiple other persons who they testified also worked for [petitioner] as seller and drug couriers in the Oneonta heroin operation was sufficient to establish that a controlled substance organization existed [of] ... four or more persons, each of whom shared in a common purpose to ... sell[ ] heroin.

Id. at 1441.

The Appellate Division further reasonably concluded that testimony "describing [Rodriguez's] management of the Oneonta operation by, among other things, supplying the heroin, supervising and directing the workers, communicating with buyers and sellers to schedule heroin transactions, and collecting the proceeds sufficiently established [petitioner] ... was a 'principal administrator, organizer or leader of the organization." *Rodriguez*, 121 A.D.3d at 1441. Accordingly, "[v]iewing the testimony in the light most favorable to the People, [there was] ... a valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury." *Id.* at 1440-41.

***19** Similarly, the Third Department reasonably concluded that, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to establish that Rodriguez "knowingly and unlawfully solicited, requested, commanded, importuned or intentionally aided in the [heroin] transactions." *Rodriguez*, 121 A.D.3d at 1442.

The first two of these convictions arose from controlled buys where "the testimony of the female witness [established] that [Rodriguez] was the supplier of the heroin that she sold during the time periods in question, [thus] the jury could reasonably have inferred that [petitioner] aided both sales by supplying the heroin." *Rodriguez*, 121 A.D.3d at 1442; *see also* T. 699-703 (discussing how the witness would travel to New York City to exchange money for heroin for her to sell in Oneonta at petitioner's direction).

The next of these convictions arose out of a transaction to buy heroin brokered by the witness between the CI and the Rodriguez. *Rodriguez*, 121 A.D.3d at 1442; *see also* T. 852-53 (describing how the deal was brokered). Because petitioner "sent the third party to her house – thus establishing [petitioner's] assistance in the sale," it was reasonable for a jury to convict, and the Third Department to give deference to and affirm that conviction *Rodriguez*, 121 A.D.3d at 1442.

Lastly, the fourth conviction arose from a CI speaking with Rodriguez and listening to petitioner's directions as to where

and how much the heroin transaction would be. *Rodriguez*, 121 A.D.3d at 1442; *see also* T. 1083-86. Ultimately, the Third Department concluded that the testimony "presented credibility issues for the jury to resolve [and a]ccording [to] the jury's determinations [and] appropriate deference, [the Third Department] f[ound] the weight of the evidence support[ed] all four convictions." *Id.*

Second-guessing such credibility determinations made by the jury is inappropriate and not cognizable on habeas review. *Huber*, 140 F. Supp. 2d at 277; *see also Maldonado v. Scully*, 86 F.3d 32, 35 (2d Cir. 1996) ("[A]ssessments of the weight of the evidence or the credibility of witnesses are for the jury and not grounds for reversal on appeal[.]").

Rodriguez has advanced two additional arguments in addition to his general legal insufficiency claims, both of which are unavailing. First, petitioner contends that "[t]he prosecutor relied upon uncorroborated accomplice testimony without any independent evidence to corroborate the witnesses' testimony to classify petitioner as a kingpin." Am. Pet. at 6. However, the "federal rule is well established that a defendant may be convicted upon the uncorroborated testimony of an accomplice." *United States v. Gordon*, 433 F.2d 313, 314 (2d Cir. 1970).

The evidence presented at trial was sufficient to support Rodriguez's convictions, particularly given the aforementioned deference required. Moreover, petitioner's contentions that "[t]he only evidence against [him] was the incredible testimony ... from [the] alleged accomplice witnesses[,]" is also unpersuasive. As previously stated, re-examining the credibility determinations made by the jury is inappropriate and not cognizable on habeas review. *Huber*, 140 F. Supp. 2d at 277; *also Maldonado*, 86 F.3d at 35. Accordingly, the petition is denied and dismissed.

C. IMPROPERLY ADMITTED EVIDENCE

***20** Rodriguez next contends that the trial court erred in allowing Krone to testify. Am. Pet. at 9. Specifically, petitioner alleges that "Krone['s] testimony about uncharged crimes committed in Albany County [was improper] ... without [first holding] a *Ventimiglia* hearing," and contends the court lacked jurisdiction over the uncharged crimes as they occurred in Albany, not Otsego County. *Id.* Respondent alleges that these claims are procedurally defaulted and meritless. R. Memo. at 22-26.

1. Exhaustion & Default

Rodriguez's contentions are procedurally barred for two reasons. First, the Third Department found that petitioner did not lodge any specific objections to the trial court's exercise of jurisdiction over him during any of the court's proceedings and therefore the issue was not preserved. *Rodriguez*, 121 A.D.3d at 1440.

As discussed above, the denial of a claim by a state court for failure to comply with the preservation rule is an independent and adequate state procedural bar to petitioner's habeas petition. *Downs*, 657 F.3d at 104; *Richardson*, 497 F.3d at 219; *Santana*, 2015 WL 4207230, at *20.[8] Application of this preservation rule is consistent with the state's usual practice and the record supports the appellate court's conclusion that the claims were not raised in the trial court. T. 1253. Accordingly, application of the procedural bar is appropriate. *See Sanchez*, 2011 WL 924859, at *18.

Rodriguez has not asserted that cause for the default of this claim exists or that he is actually innocent on this basis. Notably, a petitioner seeking federal habeas review must utilize the appropriate state-provided procedural vehicles to exhaust his claims. *Dean*, 753 F.2d at 241.

Throughout the state appellate process, the federal nature of the claims must be identified. *Daye v. Attorney General of State of N.Y.*, 696 F.2d 186, 191 (2d Cir. 1982). As the Second Circuit has explained:

> [T]he ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. at 194. If a claim is not "fairly presented," it is unexhausted. Where federal courts have found a failure to

exhaust, a petitioner's claims are considered procedurally defaulted. *Clark*, 510 F.3d at 390.

Rodriguez's arguments that the trial court erred in failing to hold a *Ventimiglia* hearing, improperly admitted testimony of prior bad acts, and presided over a trial in which it did not have jurisdiction, were all presented to the state court as alleged violations of state law. SR 98-100. Petitioner's presentation did not included any citation to federal cases, did not rely on state cases utilizing a constitutional analysis, and did not assert the claim or pattern of facts in a way to call to mind a federal right. Instead, petitioner relied upon the state's criminal procedure law and cases discussing state jurisdictional concerns at the county level. *Id.* Accordingly, the claims remain unexhausted because the state courts were never alerted to the constitutional nature of the claims.

***21** Even on the merits, Rodriguez's claim that the trial court erred in admitting Krone's testimony is meritless. "Generally, evidentiary rulings in a state court do not warrant habeas corpus relief, and such relief is available 'only where petitioner can show that the error deprived h[im] of a fundamentally fair trial.' " *Wright v. Duncan*, 31 F. Supp. 3d 378, 416 (N.D.N.Y. 2011) (citing *Taylor v. Curry*, 708 F.2d 886, 891 (2d Cir. 1983)). Accordingly, to succeed on this claim petitioner must demonstrate "that an evidentiary error amounted to a deprivation of due process ... so pervasive as to have denied him a fundamentally fair trial." *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 108 (1976)); *accord Collins v. Scully*, 755 F.2d 16, 18 (2d Cir. 1985).

"In determining whether a state court's alleged evidentiary error deprived a petitioner of a fair trial, federal habeas courts engage in a two-part analysis [first] examining (1) whether the trial court's evidentiary ruling was erroneous under state law, and [then] (2) whether the error amounted to the denial of the constitutional right to a fundamentally fair trial. *Taylor v. Connelly*, 18 F. Supp. 3d 242, 257 (E.D.N.Y. 2014) (citing *Wade v. Mantello*, 333 F.3d 51, 59-60 & n.7 (2d Cir. 2003)).

Under New York State law, evidence demonstrating an individual's criminal propensity is generally inadmissible; however, "New York courts frequently admit evidence of prior bad acts, including uncharged crimes, as background material and to complete the narrative of events." *Rodriguez v. Superintendent, Collins Corr. Facility*, 549 F. Supp. 2d 226, 244 (N.D.N.Y. 2008) (internal quotation marks and citations omitted).

As outlined by the Third Department in Rodriguez's case, "no *Ventimiglia* hearing was required, as [Krone's] ... testimony ... did not address uncharged crimes or bad acts and was not introduced to suggest propensity, but was instead relevant to the charge that [petitioner] directed a controlled substance organization in Oneonta." *Rodriguez*, 121 A.D.3d at 1440. Since the admission of the testimony was to further clarify and expand upon petitioner's operations as a major drug trafficker, the evidence was properly admitted, and habeas relief is inappropriate.

Furthermore, because a petitioner is "entitled to one (and only one) appeal to the Appellate Division and one request for leave to appeal to the Court of Appeals," Rodriguez cannot now return to the state courts in an attempt to exhaust his claim. *Aparcio v. Artuz*, 269 F.3d 78, 91 (2d Cir. 2001). Accordingly, "[b]ecause [petitioner] failed to raise his claim in the ordinary appellate process and can now no longer do so, it is procedurally defaulted." *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 170 (2d Cir. 2000).

Rodriguez contends that regardless of the reason for this procedural default, he has demonstrated cause—the ineffectiveness of his trial counsel. However, as discussed below, this ineffective-assistance claim is without merit and thus insufficient to establish cause. Accordingly, petitioner's petition must be dismissed.

2. Not Cognizable

Even if his petition were properly exhausted, the requested relief to remedy the trial court's decision to admit Krone's testimony would still be barred.

> The Supreme Court has declined to take a position as to whether admission of prior bad acts, even if probative only of the [petitioner]'s propensity to commit a crime, violates due process. *Estelle*, 506 U.S. at 75. In the absence of any clearly established law by the Supreme Court, [petitioner] may not rely on § 2254(d)(1) to save his procedurally barred claim.

***22** *Poquee v. Ercole*, No. 9:06-CV-0045 (LEK/DRH), 2007 WL 1218722, at *3 (N.D.N.Y. April 25, 2007). Accordingly, the petition must also be dismissed for this reason.

D. CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

Rodriguez alleges that the trial court violated his rights to due process when it improperly amended the indictment by instructing the jury "not [to] consider any evidence related to the two months before the enactment of the statute." Am. Pet. at 10. Specifically, the petitioner contends that "the judge's instructions altered an essential element of the charge ... [and] the court failed to examine the grand jury transcript to ensure that [it] ... had sufficient evidence before them to deliver an indictment...." *Id.* Respondent argues that petitioner's claims are procedurally defaulted or alternatively barred and, in any event, meritless. R. Memo. at 26-29.

This argument is also rejected. As the Appellate Division correctly noted, Rodriguez failed to preserve an objection to the trial court's alleged constructive amendment of the indictment. Accordingly, an independent and adequate state procedural bar precludes habeas relief. *Downs*, 657 F.3d at 103.

Specifically, at the close of proof, Rodriguez's counsel drew the trial court's attention to the fact that the law under which petitioner was being prosecuted actually went into effect two months after the time period alleged in the indictment began. T. 1253. After hearing arguments, the trial court held that it would instruct the jury to disregard proof during that two month time period and clarify that the time in question for petitioner's alleged drug trafficking was from November 1, 2009 to September 1, 2010. *Id.* at 1256. Petitioner's trial counsel did not object to this ruling.

When Rodriguez raised this ground on his direct appeal, the Third Department held that because "there was no objection to this [jury] charge, [petitioner]'s contention that the instruction was impermissible was not preserved." *Rodriguez*, 121 A.D.3d at 1437 n.2.

"Because petitioner's failure to comply with section CPL 470.05(2) is an independent and adequate state law ground," the Third Department's decision appears to bar federal habeas review of this claim. *Ortiz v. New York*, No. 1:12-CV-1116, 2013 WL 1346249, at *8 (E.D.N.Y. Mar. 31, 2013). And as application of the preservation rule is consistent with the state's usual practice, and the record supports the court's conclusion that the claims were not raised in the trial court, the application of the procedural bar is appropriate. T. 1253; *Sanchez*, 2011 WL 924859, at *18.

As with his other claims, habeas relief could issue even in the face of the procedural bar, if Rodriguez could show cause for the default and actual resulting prejudice, or that the denial of habeas relief would result in a fundamental miscarriage of justice, i.e., that he is actually innocent. *House*, 547 U.S. at 536-39; *Schlup*, 513 U.S. at 327.

But Rodriguez has not asserted that cause for the default exists or that he is actually innocent. Although petitioner raises an ineffective assistance of counsel claim as possible "cause," for the reasons discussed *infra* any ineffective-assistance claim is without merit. For these reasons, the petition must be denied.

E. PROSECUTORIAL MISCONDUCT & THE JURY'S NOTE

***23** Rodriguez alleges that he was deprived of a fair trial because the trial court erred in its response to the prosecutor's misconduct and to a jury note it received. Specifically, petitioner contends that the prosecutor committed misconduct by withholding *Brady/Rosario* material, ignoring pretrial rules, and making improper comments during summations. Am. Pet. at 12-13. Moreover, petitioner contends that when the jury asked for a read back of certain testimony, the trial court failed to first allow counsel to inspect the note outside the presence of the jury, failed to read the note into the record, and inappropriately (and independently) decided which excerpts of the testimony to read back. *Id.* at 15. Respondent contends that petitioner's arguments are unexhausted and procedurally defaulted, as well as meritless. R. Memo. at 29-38.

Rodriguez alleged in his first *error coram nobis* petition that his appellate counsel was ineffective for failing to argue that the trial court erred in its response to the prosecutorial misconduct (SR 432-37) and the aforementioned jury note (SR 427-432).

However, Rodriguez never asserted an independent claim for relief on these grounds in state court during his *direct* appeal. Thus, "in the *error nobis* motion, petitioner's [aforementioned claims] w[ere] subsumed within a broader claim of ineffective assistance of appellate counsel." *Attawwab v. Gurdich*, No. 1:04-CV-3889, 2007 WL 2120405, at *6 (E.D.N.Y. July 23, 2007).

Importantly, though, the "filing of the *coram nobis* petition did not exhaust [petitioner's] challenge[s] to the[se] underlying state court error[s]." *Miller v. Chappius*, No. 9:16-

CV-0512 (TJM/CFH), 2018 WL 2709228, at *8 (N.D.N.Y. Apr. 2, 2018) (citing *Turner v. Artuz*, 262 F.3d 118, 123 (2d Cir. 2001)); *see also Zimmerman v. Burge*, 492 F. Supp. 2d 170, 189 (E.D.N.Y. 2007) ("[A] petition for a writ of error *coram nobis* does not exhaust the underlying claims advanced to support the claim of ineffective assistance of appellate counsel."). Accordingly, the claims are unexhausted.

Furthermore, because such claims were available on the record, the appropriate place to argue those claims was during the course of Rodriguez's direct appeal. *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997) (explaining "New York's Criminal Procedure Law mandates that the state court deny any [collateral attack] where the [petitioner] unjustifiably failed to argue such constitutional violation on direct appeal despite a sufficient record").

It bears repeating that Rodriguez is "entitled to one (and only one) appeal to the Appellate Division and one request for leave to appeal to the Court of Appeals," and therefore he cannot return to the state courts in an attempt to exhaust this claim. *Aparcio*, 269 F.3d at 91; *Rush v. Lempke*, 500 F. App'x 12, 15 (2d Cir. 2012) ("The petitioner's failure to raise the claim on direct review also forecloses collateral review in state court."). Accordingly, "[b]ecause [petitioner] failed to raise his claim in the ordinary appellate process and can now no longer do so, it is procedurally defaulted." *Spence*, 219 F.3d at 170.

As with his other claims, Rodriguez appears to contend he has demonstrated "cause" via the ineffectiveness of his appellate counsel. However, as discussed below, this ineffective-assistance claim is without merit and is thus insufficient to establish cause. Accordingly, petitioner's petition must be dismissed.

F. SENTENCING

Rodriguez makes several arguments dealing with various sentencing issues. Petitioner alleges that the sentencing court erred in (1) failing to specify whether his convictions ran concurrently or consecutively and (2) imposing illegally consecutive sentences when they were supposed to be concurrent. Am. Pet. at 16-19. Petitioner also contends that his sentence, both the time he was to be incarcerated and the amount of his corresponding fine, was harsh and excessive. *Id.* at 23, 30-31. Further, petitioner contends that a civil judgment was wrongly imposed upon him without the appropriate notifications, in violation of his Due Process rights and double jeopardy protections, allowing DOCCS to wrongly withhold his prison wages in satisfaction of the judgment pursuant to an unauthorized notation by the court clerk. *Id.* at 21-22. Respondent contends that petitioner's sentencing arguments are not cognizable and meritless. R. Memo. at 38-45.

***24** Rodriguez's first contention, that the sentencing court failed to specify whether his convictions ran concurrently or consecutively, is flatly refuted by the sentencing transcript. In the denial of petitioner's 440 motion, the court held that petitioner's "[a]rgument is not supported by the sentencing minutes which make clear the court complied with the statutory requirements....". T. 385; *see also* S. 17-18. Accordingly, such claims are meritless.

Rodriguez's remaining contentions regarding the concurrence or consecutiveness of his sentence are inadequate to trigger habeas relief. First, petitioner's argument that the sentencing court erred in imposing consecutive sentences is not cognizable on federal habeas review. *See United States v. McLean*, 287 F.3d 127, 136 (2d Cir. 2002) ("[T]here is no constitutionally cognizable right to concurrent, rather than consecutive, sentences.") (internal quotation marks omitted).

Second, Rodriguez's argument that his sentence is harsh and excessive fails because "no federal constitutional issue is presented where, as here, the sentence is within the range prescribed by state law." *White v. Keane*, 969 F.2d 1381, 1383 (2d Cir. 1992); *see also Mayerhofer v. Bennett*, No. 9:02-CV-0074 (LEK/VEB), 2007 WL 1624767, at *7 (N.D.N.Y. June 6, 2007) (same); *Taylor v. Connelly*, 18 F. Supp. 3d 242, 268 (E.D.N.Y. 2014) ("An excessive sentence claim may not provide grounds for habeas corpus relief where a petitioner's sentence is within the range prescribed by state law.").

Rodriguez also argues that his sentence was harsh and excessive because the sentence he received after going to trial and being convicted was considerably longer the sentence offered to him during plea negotiations. However, as the Appellate Division observed:

> County Court was authorized to impose a maximum indeterminate life term with a minimum term of 15 to 25 years for [petitioner]'s conviction for operating as a major trafficker (see Penal Law §§ 70.00(2)(a); (3)(a)(i); 70.71(5)(b)), but instead elected to sentence [petitioner] to a determinate term of 20 years, the maximum term

> permitted under this option (see Penal Law § 70.71(2)(b)(i); (5)(c)).

Rodriguez, 121 A.D.3d at 1443. The trial court was also authorized to impose a determinate prison term of between one and nine years for each of the third-degree drug sale convictions. Penal Law § 70.70(2)(a)(i). Regardless of what was offered to Rodriguez during his plea deal, or the sentence any other individuals received, petitioner's sentence is only unconstitutional if it falls outside the range prescribed by state law. *White*, 969 F.2d at 1383.

Rodriguez's consecutive sentences of twenty years for operating as a major trafficker – even if representing the maximum amount of time permissible – along with the five years for each drug sale, fall within the limits set by New York law and therefore petitioner's claim provides no grounds for federal habeas relief. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) ("The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus.").

The same holds true for Rodriguez's allegations about the fine assessed. The County Court was authorized to impose a fine of up to $100,000 or, alternatively, up to twice petitioner's monetary gain, for his conviction of operating as a major trafficker, as well as $30,000 for each criminal sale conviction. Penal Law §§ 60.04(4), 60.05(7), 80.00.

***25** Rodriguez was actually fined $80,000 for operating as a major trafficker and $5,000 for each criminal sale, both well below the statutory limits allowed. Accordingly, petitioner's claims provide no grounds for federal habeas relief. *See Townsend*, 334 U.S. at 741.

To the extent Rodriguez has attempted to allege that his sentence violated the Eighth Amendment clause against cruel and unusual punishment, such contentions would also be deemed insufficient to warrant habeas relief.

The Eighth Amendment forbids only extreme sentences which are "grossly disproportionate" to the crime of conviction. *Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2003); *accord, Harmelin v. Michigan*, 501 U.S. 957, 995 (1991); *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

A sentence that is within the limits of a valid state statute is not cruel and unusual punishment in the constitutional sense. *See White*, 969 F.2d at 1383; *accord, Todd v. Superintendent*, No. 9:08-CV-1209 (NAM), 2009 WL 5216944, at *7 (N.D.N.Y. Dec. 30, 2009) ("A sentence of imprisonment which is within the limits of a valid state statute is simply not cruel and unusual punishment in the constitutional sense."). Accordingly, because Rodriguez's sentence is within the statutory range, it does not offend the Eighth Amendment.

Rodriguez's double jeopardy argument is meritless for similar reasons. Where state lawmakers allow for "a single criminal offense [to] be punished by both a monetary fine and by a term of imprisonment ... imposition of both a fine and a prison sentence in accordance with such a provision constitute[ ] a[ ]permissible punishment." *Whalen v. United States*, 445 U.S. 684, 688 (1980). Conversely, where the law provides for one or the other, imposition of both "run[s] afoul of the double jeopardy guarantee of the Constitution." *Id.*

In this case, the Penal Law expressly authorized the imposition of both a fine and sentence of imprisonment, and the Criminal Procedure Law permitted the entry of a civil judgment to collect said fines. *See* Penal Law § 60.04(4); CPL § 420.10(6)(a). Therefore, because Rodriguez's sentence is within the scope of punishments statutorily permitted, it does not offend the double jeopardy clause.

Rodriguez's last two contentions—that the court clerk included unauthorized notations and failed to properly notify him of the civil judgment—are meritless, as the prior state court decisions in this matter conclusively demonstrate. *See* T. 440, 387-88 ("The order makes clear that only the surcharge and fees were to be withheld by [DOCCS] and that civil judgments would be entered for the fines ... [and] the fines should not be collected from [petitioner]'s wages in prison."); SR 726-27 (holding that petitioner "was present at all times throughout the proceedings wherein the [court] ... authorized ... the ... civil judgments," and noting that "the judgments were entered in compliance with [the Criminal Procedure Law]."). Whether petitioner has misunderstood or misrepresented the relevant facts, the state court transcripts demonstrate that no violations of state, let alone federal, law have occurred.

G. INEFFECTIVE ASSISTANCE OF COUNSEL

To demonstrate constitutionally ineffective assistance of counsel, a petitioner must show that counsel's performance fell below an objective standard of professional reasonableness, and but for counsel's alleged errors, the result of the proceedings would have been different. *Premo v. Moore*, 562 U.S. 115, 121-22 (2011); *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

*26 This standard "must be applied with scrupulous care" in habeas proceedings, because such a claim "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial] proceedings[.]" *Premo*, 562 U.S. at 122. "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687) (internal quotation marks and further citation omitted).

A petitioner must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ... [and] that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Even if petitioner can establish that counsel was deficient, he still must show that he suffered prejudice. *Id.* at 693-94.

1. Trial Counsel

Rodriguez contends his trial counsel was ineffective for failing to object to the admissibility of Krone's testimony and for failing to challenge the court's jurisdiction. Am. Pet. at 11. Respondent argues that petitioner's contentions are meritless. R. Memo. at 26.

For the reasons previously discussed above in part C.1, Rodriguez's allegations that his trial counsel should have made arguments regarding Krone's testimony and the County Court's exercise of jurisdiction over him were unavailing. Representation is not rendered ineffective merely because counsel refuses to make meritless motions. *See United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995) ("[T]he failure to make a meritless argument does not rise to the level of ineffective assistance...."). Accordingly, petitioner is not entitled to habeas relief on this basis.

2. Appellate Counsel

Rodriguez also contends that his appellate counsel was ineffective for several reasons. Specifically, petitioner contends counsel was ineffective for failing to challenge the (1) fact that petitioner's constitutional rights were violated when he was arraigned without counsel; (2) trial court's errors in handling the jury note; (3) prosecutorial misconduct which occurred when the People failed to produce relevant *Brady/Rosario* material, violated the court's prior ruling on discussing recorded conversations, and improperly vouched for witnesses during his summation; (4) ineffective assistance of trial counsel because trial counsel (a) did not object to the fact that lab experts were not testifying to validate the scientific findings and (b) had a delayed realization that the statute pursuant to which petitioner was being prosecuted became effective two months after the indictment; and (5) manner in which the jury was picked. Am. Pet. at 24-28. The Third Department summarily denied both of petitioner's writs for *error coram nobis*. SR 641, 65, 815, 824, 833.

Upon review, the state court did not unreasonably or incorrectly apply the *Strickland* standard to petitioner's numerous challenges to his appellate representation. In order to prevail on a claim of ineffective assistance of counsel, "petitioner [must] ... show[ ] that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994).

Rodriguez adopted all four of the arguments that his appellate counsel advanced in his seventy-one page brief to the Appellate Division. By expressly adopting all of these claims in the present petition, it can be inferred that petitioner believed, at a minimum, the representation he received and the claims that were advanced during the course of his appeal were in fact competent and effective. *See Kollar v. Smith*, No. 1:04-CV-10175, 2005 WL 1653883, at *10 (S.D.N.Y. July 12, 2005) (holding that "[n]othing ... suggest[ed] that [counsel's] ... efforts were outside the range of professionally competent assistance [where] ... petitioner reiterate[d] many of the same arguments made by appellate counsel on appeal").

*27 Further, a review of Rodriguez's ineffective-assistance arguments reveal that they are overwhelmingly frivolous and weak. For example, petitioner asserts that he did not have counsel at arraignment. But that claim is only partially accurate. At the time he was unrepresented, a plea of not guilty was entered and the proceedings were adjourned until petitioner could meet with counsel. SR 497-500; Dkt. No. 43-6 at 8-13.

When evaluating the entire factual record, it is clear that Rodriguez's constitutional rights were not violated by this delay. Petitioner was able to have the benefit of counsel's advice and advocacy at that critical stage in his trial. Nor is there any evidence that the slight delay caused any prejudice. *See People v. Young*, 35 A.D.3d 958, 960 (3rd Dep't 2006) ("[W]hile it was error to arraign [a defendant] in the absence of counsel, this error had no impact on the case as a whole.").

With respect to Rodriguez's prosecutorial misconduct claims, his claim that exculpatory evidence was hidden totally fails

to identify how the allegedly "hidden" evidence would have helped him or how this "hidden" evidence was actually unavailable during trial.

With respect to the challenged comments made during the People's summations, even assuming they amounted to improperly vouching for the prosecution's witnesses, those comments were preceded by clear jury instructions that the jury alone determines credibility. Importantly, the law presumes the jury obeyed the trial court's instruction, making these frivolous arguments to advance on appeal. *Weeks v. Angelone*, 528 U.S. 225, 226 (2000).

Similarly meritless is Rodriguez's complaint about his counsel's failure to object to the admission of certain *stipulated* evidence. *See Mills v. Lempke*, No.1:11-CV-0440, 2013 WL 435477, at *56 (W.D.N.Y. Feb. 4, 2013 (holding it was "not ineffective [assistance of counsel] for failing to make a pointless objection to the admission of petitioner's statements which ... were admitted through stipulation.").

Rodriguez's challenge to the composition of his jury is also deficient. It was not appropriately asserted and, even if it was, it failed to contain the content necessary to find any sort of bias or discrimination. *See People v. Branch*, 244 A.D.2d 262, 262 (2d Dep't 1997) (holding the "challenge to the racial composition of the jury panel was waived by [the] failure to make th[e] challenge in writing to the trial court prior to the commencement of jury selection," and that, regardless, the merits were still lacking as the "failure to demonstrate that the claimed underrepresentation of blacks and Hispanics was the result of systematic exclusion ... would require rejection of [the] challenge")

As previously discussed, counsel is neither incompetent nor ineffective for refusing to advance meritless arguments. *Kirsh*, 54 F.3d at 1071. Moreover, to the extent one or more of Rodriguez's proffered arguments about his trial counsel may have been non-frivolous, it remains appellate counsel's job to cull out the weaker arguments and to choose among them. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Stated another way, a petitioner may not establish ineffective assistance of counsel solely by alleging "that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made." *Mayo*, 13 F.3d at 533 (citing *Barnes*, 463 U.S. at 754); *see also Figueroa v. Grenier*, No. 1:02-CV-5444, 2005 WL 249001, at *18 (S.D.N.Y. Feb. 3, 2005) ("[C]ounsel is not required to present every claim on behalf of a [petitioner] appealing his or her conviction."). What is important is that the state court reasonably and correctly found counsel's performance satisfied the *Strickland* standard given the arguments that counsel did choose to advance.

***28** Equally important, Rodriguez has failed to show that any of the alleged errors by counsel prejudiced him. As previously noted, most of the arguments that petitioner contends should have been advanced were weak or even totally meritless. Pursuing such claims would have been prejudicial, as well as improper, because "rais[ing] every colorable issue runs the risk of burying good arguments ... in a verbal mound made up of strong and weak contentions." *Jones*, 463 U.S. at 753. Accordingly, the Appellate Division did not unreasonably apply clearly established federal law in deciding that appellate counsel had not been ineffective and the petition is, therefore, denied.

VI. MOTION TO COMPEL

Rodriguez filed a motion to compel seeking disclosure of several documents he contends the police have kept from him. Dkt. No. 49. Specifically, petitioner seeks "Search Warrants (sic) Application (sic), ... all Search Warrants, ... [and] all premises records of [the] crime scene (During Drug buy and Search & Seizure)," as well as "all Notes and Rathburn['s] (sic) statement," alleging that these documents contained material evidence. *Id.* at 1. Petitioner states these documents could reveal the identity of a third party or another confidential informant who may "reveal that CI Couse was playing a double agent (working for the police - working for drug dealers) ...." *Id.* at 2.

Habeas petitioners are generally "not entitled to discovery as a matter of ordinary course ... [unless there has been] a showing of good cause." *Drake v. Portuondo*, 321 F.3d 338, 346 (2d Cir. 2003) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)) (internal quotation marks omitted).

"In order to show good cause, a petitioner must set forth specific allegations that provide reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." *Cobb v. Unger*, 1:09-CV-0491, 2013 WL 821179, at *2 (W.D.N.Y. Mar. 5, 2013) (internal quotation marks omitted).

Upon review, Rodriguez has failed to establish the good cause required to permit the unusual granting of a discovery request in a habeas petition. Petitioner's argument is based on nothing but speculation and conjecture. He has failed to specifically identify the reasons to believe that these papers exist or would give rise to the information, if the facts were

more fully developed, he is hypothesizing he may find within them. Accordingly, petitioner's motion to compel discovery is denied.

VII. CONCLUSION

Therefore, it is

ORDERED that

1. Petitioner's motion to compel (Dkt. No. 49) is **DENIED**;

2. The amended petition (Dkt. No. 31) is **DENIED AND DISMISSED IN ITS ENTIRETY**;

3. No Certificate of Appealability ("COA") shall issue because petitioner failed to make a "substantial showing of the denial of a constitutional right" as 28 U.S.C. § 2253(c)(2) requires; [9]

4. Any further request for a Certificate of Appealability must be addressed to the Court of Appeals (Fed. R. App. P. 22(b)); and

5. The Clerk of the Court shall serve a copy of this Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 6505808

Footnotes

1 On August 17, 2016, the petition was transferred from the Southern District of New York to the Northern District of New York because petitioner's underlying criminal conviction and sentence came from Otsego County, which is located within the Northern District. Dkt. No. 5.

2 Evidence introduced at trial established that other individuals knew Rodriguez by the moniker "Flip."

3 A similar exchange later occurred between the police officer and petitioner's counsel when he asked several questions about the officer's knowledge of the content of a controlled call placed by a CI while in the presence of the officer. T. 1133-34. The officer clarified that at the time the call was made, he heard the parties talking, and he "listened to the [contents of the] call later." T. 1134. Counsel made a motion for sanctions based on the officer's mention of a recorded phone conversation. T. 1135-36. The trial court heard arguments on the matter and reserved decision for after lunch. T. 1136-38. The court explained that a prior ruling prohibited reference to the calls, the first reference was rectified with a curative instruction; however, the second reference was more complex. T. 1139-1140. Accordingly, the court ordered, as a sanction, that count 12 of the indictment be dismissed. T. 1140.

4 It is unclear exactly when and for how long Rathburn engaged in certain of these activities.

5 The *Cotto* factors are not all determinative, but are a guide to evaluate the state's interest in a particular rule in the circumstances of a particular case. *Garvey*, 485 F.3d at 714.

6 "New York courts have consistently held that a general motion to dismiss does not preserve a challenge to the legal sufficiency of the evidence[.]" *Brito v. Phillips*, 485 F. Supp. 2d 357, 363 (S.D.N.Y. 2007) (citing New York cases holding the same with regard to depraved indifference convictions; *see also People v. Hawkins*, 11 N.Y.3d 484, 492 (2008)) (explaining the preservation rule requires a "specifically directed [argument] at the error being urged [because] ... general motions simply do not create questions of law for th[s] Court [of Appeal]'s review").

7 With respect to the bar of procedural default, cause can be demonstrated, "in certain circumstances[, by] counsel's ineffectiveness in failing [to] properly preserve [a] claim for review in state court...." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (citations omitted). Although petitioner contends that his trial counsel was ineffective, this claim is without merit for reasons discussed *infra* and is thus insufficient to establish cause.

8 In any event, petitioner's contentions that the trial court lacked jurisdiction are meritless. Krone's testimony was relevant to demonstrate the operations occurring in Otsego county and, as such, the County Court had jurisdiction over the crime. *See People v. Guzman*, 153 A.D.3d 1273, 1274-75 (2d Dep't 2017) (explaining that both common law and the New York State Constitution require a defendant "to be tried in the county where the crime was committed....") (citing CPL § 20.40(2)(c)). Accordingly, the Third Department correctly noted that no evidentiary law was improperly applied.

9 *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *see Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007) (holding that if the court denies a habeas petition on procedural grounds, "the certificate of appealability must show that jurists of reason would find debatable two issues: (1) that the district court was correct in its procedural ruling, *and* (2) that the applicant has established a valid constitutional violation" (emphasis in original)).

End of Document

Appendix - E

MANDATE

N.D.N.Y.
16-cv-1037
Hurd, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of August, two thousand nineteen.

Present:

José A. Cabranes,
Debra Ann Livingston,
Raymond J. Lohier, Jr.,
Circuit Judges.

Jose A. Rodriguez,

Petitioner,

v. 19-79

Thomas Griffin,

Respondent.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, to extend time, and to compel discovery. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 12/23/2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jose A. Rodriguez,
Petitioner,

V. **No: 19-79**

Thomas Griffin,
Respondent.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

After a jury trial in Otsego County Supreme Court, Petitioner was sentence at the age of 27 to forty (40) years for a Drug Crime. Petitioner before this Court is the first defendant in New York State to have been convicted under Penal Law § 220.77 (1), Operating as a Major Trafficker, requiring a close look. ***People v. Rodrifguez,*** 121 A.D. 3d 1435 (3rd. Dept. 2014).The above statue was enacted by then, Governor Paterson, as the so called Kingpin Law. Petitioner here appeals the Decision and Order filed on December 11th, 2018, by the Northern District Court. ***Rodriguez v. Griffin***, 2018 WL 6505808. Petitioner further request for this Court to consider the Memorandum of Law (traverse) that was submitted in support of his amended petition. Petitioner Jose A. Rodriguez now moves the Second Circuit Court of Appeals for Certificate of Appealability, granting of his Motion to compel a discovery, and in support states:

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

Congress mandates that a petitioner seeking post conviction relief under 28 U.S.C. § 2253 (c)(2) has no automatic right to appeal a district court's denial or dismissal of the petition, Fed .R, App. P. 22(b). On the other hand, petitioner is entitled to a Certificate of Appealability if he can demonstrate "a substantial showing of the denial of a constitutional right" 28 U.S.C. § 2253 (c)(2).

In ***Barefoot v. Estelle***, 463 U.S. 880, held that appellant need not show that he should prevail on the merits, but must demonstrate that the issues are debatable among jurist of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. ***Lozada v. Deeds***, 498 U.S. 430, 431-32 (using the Barefoot Standard in a noncapital case).

This standard does not require the petitioner to show that he is entitled to relief:

> **"we do not require to prove... that some jurist would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that petitioner will not prevail"**

Miller-El V. Cockrell, 537 U.S. 322, 338 (2003). Therefore, doubts as to whether to issue a certificate of appealability should be review in favor of the petitioner.

If a ground was dismissed by the district court on procedural ground, a certificate of appelability must be issued if the petitioner meets the *Barefoot* standard as to the procedural question, and shows, at least, that jurist of reason would find it debatable whether the ground of the petition at issue states a valid claim of a constitutional right. ***Slack v.McDaniel***, 529 U.S. 473, 483-84 (2000). This very same Court applied the same standard in ***Matias v. Artuz***, 8 Fed. Appx. 9, 11-12 (2nd Cir. 2001)

STANDARD OF *DE NOVO* REVIEW

This Court must engage in a *de novo* review of the District Court ruling on questions of Law and mixed questions of fact and Law. See ***Elder v. Hollaway***, 510 U.S. 516 [1994] ("question[s] of law... must be resolved de novo on appeal."). In particular, the denial of a petition for a Writ of habeas corpus brought under 28 U.S.C. 2254 is subject to *de novo* review by this court.

ISSUES AS TO WHICH A CERTIFICATE OF APPEALIBILITY SHOULD BE GRANTED

1). THE DISTRICT COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR IN *NOT* ADDRESSING OR REVIEWING EXHAUSTED U.S. CONSTITUTIONAL CLAIMS RAISED IN THE STATE COURTS AND IN PETITIONER AMENDED PETITION:

Prior to seeking review in Federal Court, petitioner must exhaust all State remedies. 28 U.S.C. 2254 (b) (1) (A); ***O'Sullivan v. Boerckel*** 526 U.S. 838, 842 (1999); ***Rose v. Lundy*** 455 U.S. 509, 515 (1982). A claim will be deemed exhausted only after the appellant fairly presents the same claim that he now urges upon the federal courts to the highest State Courts which can hear his claim. *O'Sullivan*, 526 U.S. at 848; ***Picard v. Connor*** 404 U.S. 270, 275-76 (1971).

Appellant followed United State precedents, but the District Court troublesome and premature Decision failed to address and conduct a thorough review-independent analysis of the Pro-Se Amended Petition, although Federal Constitutional claims were squarely exhausted in the State Courts and subsequently the Federal District Court. ***Smith V. Dignon*** 434 US 332, 333-34(1978).

A. *Direct Appeal- Supplemental Brief*

On December 19, 2013 appellant filed a Motion to file a pro-se brief-asserted that:

> "a.) The Defendant-Appellant was deprived of His Fundamental Right to A Fair Trial, Due to Prosecutor's Misconduct throughout trial by Violating Pre-trial Ruling and Improper comments during summation In Violation of **U.S. Const., Amend.5,14**; N.Y.Art. I §6"
>
> "b.) The Defendant-Appelant was Seriously Prejudiced by trial court's Failure to Provide Jury's Requested Read Back of Relevant testimony. The court Also Committed "mode of proceeding Error" And Violated C.P.L § 310.30, **U.S. Const. Amend. 5,6,14**; N.Y. const I §6.

The District Court stated in its decision and order, pertaining to the "PROSECUTORAL MISCONDUCT & THE JURY'S NOTE" claim, that "Rodriguez never asserted an independent

claim for relief on these grounds in state court during his ***direct appeal***...Accordingly, the claim are unexhausted."See ***Rodriguez v. Griffin 2018 WL 6505808*** **at *23.** The U.S. Supreme Court confirms that "pro-se complaints must be liberally construed" See ***Williams v. Kullman*** 722 f2d. 1048, 1050-51 (1983). The District Court failed to do so. Had the District Court taken a peak at the amended petition, memorandum of law (traverse), and State Court records filed by a pro-se prisoner with a lenient eye, it would have noticed that appellant filed for permission to file a pro-se application, thus alerting state courts of a substantial denial of a "federal" constitutional right. **28 U.S.C**. § 2253 (c)(2); ***Baldwin v. Reese***, 541 US 27, 32 (2004).

It is clear that appellant is not procedurally defaulted. **SCR. 024-027, 200, 203.** It is unclear as to why the District Court overlooked appellant's claim when it further claimed that appellant was trying to exhaust his claim via an Error Coram Nobis. The Second Circuit has held that a single citation to a Constitutional provision in a point heading is enough to alert the State court to the federal constitutional nature of appellant's claim. ***Davis v. Strack*** 270 f.3d 111 (2nd cir. 2001). Second Circuit has also held that a claim of Prosecutional Misconduct "clearly falls within the mainstream of Constitutional litigation, thereby satisfying the exhaustion requirement. See ***Chisholm v. Henderson*** 736 F.supp. 444, 446 (E.D.N.Y 1990) aff'd, 953 f.2d 635 (2nd cir. 1991). In so doing, the mixed claims below were exhausted, except for the Brady claim.

(i) <u>The *Brady* Claim</u>

Materiality is a question of law and appellant request for the *Brady* claim to be review *de novo*. Although the sub claim was raised in appellant's amended petition at 13, it was not raised independently in the State Courts- but through the first Error Coram Nobis. However, this Court has the Jurisdictional Power to consider the merits, as the district court failed to "determine whether the interest of comity and federalism will be better served by addressing the merits

forthwith or by requiring a series of additional State...Court proceedings before reviewing the merits of the petitioner's claim. See ***Plunkett v. Johnson,*** 828 f.2d 954, 956 (2nd Cir. 1987). The reason for not bringing such claim in the lower court is that after his direct appeal became final, appellant made a FOIL request to the District Attorney's (DA) office on 3/18/15. It was then revealed that the DA did not turn over certain material related to his witness, Mark Rathbun, relating to the events of what happened *after* his arrests which was not documented in the officer's report and the same reason why appellant submitted a motion to compel. **See.** Memorandum of law *(traverse)* at 15-18 *and Exhibits B&C* (FOIL) *therein.* In any event, Respondent did not expressly waived appellant claim, but heard it on its merits.

Even if this Court still finds appellants claim procedurally defaulted, the District Court still abused its discretion in not holding appellant's amended petition in abeyance while he exhaust his State remedies pursuant to ***Rhines v. Weber*** 544 US 269 (2005) as appellant had tolling time left on his clock. What's more, appellant has not filed **CPL** 440.10 motion in the State Court containing on and off the records allegations, as he still has the remedy to do so because the within amended petition contained unexhausted claim . The State failure to disclose were the following: 1). Police report of what occur after Rathbun arrest; 2). Consent search and Statement by Rathbun; 3). Relating to the DA response, appellant FOIL response admits that they possessed "none"-suppressing certain materials. **See**, FOIL 45, 54, 48. More importantly, appellant did not received nor knew anything about foil request #98 which states "Mark Rathbun (accomplice) incident report of his arrest" in which the DA responded that it "would disclose the identity of confidential sources". Appellant was not aware that there was any confidential sources relating to Mark Rathbun, which was another reason why appellant submitted the Motion to Compel to the District Court. Appellant is entitled to this unknown information about confidential sources. ***Roviaro v.***

U.S. 353 U.S. 53, 60-61; ***Pennsylvania v. Rithie*** 480 U.S. 39-60 (1987). COA should be issue as the above can be debatable among a reasonable jurist or is adequate to deserve encouragement to proceed further as the material evidence would show a substantial showing of a denial of his Constitutional Right.

Moreover, there is nothing in the initial police report of 256 bags of heroin seized at the apartment, aside from the "fifty –six packets of heroin [that] were seized from the vehicle", nor was there any mention of a search warrant application, Statements or any other withheld information of the events ***after*** Rathbun arrest, *not before the arrest as asserted by the respondent.* (**See. SCR** 550-554, 557, 559-560) - ***U.S. ex rel. Marzenno V. Gengler*** 574 f2d. 730 (3rd cir. 1978). **See** Police Report at *Exhibit A* found in Appellants Traverse. Meaning the DA's Foil response as "none" exist is refuted by the State Court's Record. A reasonable probability subsist that the jury used the uncharged crime of Rathbuns' possession and its monetary value for the elements of Operation as Major Trafficker, although petitioner was not charged. **SCR** 561 Thus, evidence that was withheld would have undermined the testimony of the prosecution witness. ***Wearry v. Cainn*** 136 S.ct 1002 (2016). It should be noted that appellant ask the Northern District Court to hear said claim alternatively as ineffective assistance of Counsel trial pursuant to *Travino v. Thaler* or *Martinez v Ryan*, to no avail. See Appellant Traverse at 17.

(ii) *Pre-trial* Ruling (Recorded Conversation)

At the pretrial stages, appellant's trial counsel submitted an Omnibus Motion relating to the introduction of "recorded conversation". The people reply "that they do ***not*** intend to introduce any recordings" on their direct case. The lower Court then stated that the State is "prohibited from so doing". See SR 138,142, 153. A prosecutor's disregard of the Court's Order is not only contemptuous behavior [N.Y. Jud. Law §750; ***Locken v.U.S*** 383 f.2d 340 (9th Cir. 1967)] but also

figures prominently in a harmless error calculus. The aggravating blunted impact of such conduct cannot be overestimated; improper conduct that might merit judicial rebuke but affirmance of a conviction often becomes prejudicial error requiring reversal, especially after repeated warnings. The district Court further erred to "look through" lower court's decision. ***Wilson v. Seller***, 138s.ct 118 (2018)-See ***People v. Rosenfeld*** 11 N.Y.2d 290, 297 (1962); ***People v. Heckstall*** 90 A.D.2d 835 (2nd Dept. 1982); ***People v. Calabria***, 94 A.D. 519, 522 (2000).

For example, in ***United States v. Jackson***, prior to a tax evasion trial, the Court held an "Omnibus hearing" after which the prosecutor agreed that he would **not,** unless subsequent development disclosed use prior acts and convictions of a similar nature to prove guilt. At trial, however, the prosecutor violated pre-trial agreement by introducing considerable evidence of prior similar acts and offences. Although defendants are ordinarily entitled to rely upon such an agreement in preparing for trial, situations may arise that require that the prosecutors be released from a pre-trial agreement. Two factors usually are cited in determining whether deviation from such an agreement is warranted. First, the Court should inquire whether the defendant had reasonable notice and, second, whether the reason for the release outweighs the potential for prejudice. ***U.S. v. Seeright*** 978 f.2d 842, 36 Fed. R. Evid. Serv. 1399 (4th Cir. 1992). Due to the district court abusing its discretion, appellant is asking this court to adopt said standard.

In *Jackson*, however, the defendant had no notice that the prosecutor was going to breach the agreement until the middle of the trial, nor did the trial Court balance the prosecutor's reason for the breach against the obvious potential for Prejudice. 621 f.2d at 220-26. Accordingly, the conviction was reverse in *Jackson.* In the appellant's case before this Court, the first questions are whether the witness, as stated by the District Court "can testify as to what he heard over that telephone call during the course of a criminal transaction" although the lower Court stated it

couldn't at the pre-trial stage. Second whether the officer's testimony of allegedly speaking to appellant was from another uncharged crime in which the State must had purposely failed to vigilant aware its witnesses because the State had assumed that the Lower "Court hasn't ruled on " the Omnibus motion yet. Third, as stated by the lower Court - whether "there is a difference between a person testifying as to what they heard and playing (the actual recording) what they heard in Court"? **T.** 782-791; **SCR.** 563-581. Appellant was certainly prejudiced, requiring an evidentiary hearing which the District Court did not act.

In fact, the curative instruction that was stricken from the first sin, none was given for the second sin (not mentioned by the District Court –see T. 815-833), leaving the jury to believe that an officer spoke to appellant on an uncharged crime. Nor was a curative instruction given for the third sin although count twelve was dismiss. Also, the curative instruction was confusing when the lower court stated to disregard the "recorded telephone calls" but the state- "I don't know what the future will bring" when it had already ruled during pre-trial that they were prohibited. But even if the curative instruction were to be given for the State having committed the sin, it is doubtful it had the desired effect in the matter as a hole – **it would have been like telling the Jurors to disregard the pink elephant that just ran across the Courtroom.** Curative instruction have been long been characterized by Courts as a "Judicial lie", "a fiction" and a "mere placebo". ***U.S. v. Grenwald*** 233 f.2d 556, 56-1 U.S. Tax Cas (CCH) p. 9452, 56-2 U.S. Tax Cas (CCH) p. 9647, 49 A.F.T.R. (p-h) P.1270 (2nd. Cir. 1956); ***Krulewitch v. U.S.*** 336 U.S. 440 (1949) [Jackson, J., concurring]; ***United States v. Delli Paoli***, 229 f.2d 319 (2nd Cir. 1956). In doing so, as a matter of law the instruction did not cure the prejudice. See ***Bruton v. U.S.*** 392 U.S. 123 (1968).

(iii) Jurors Note

Moreover, again the District Court failed to hear this next Due Process claim although it was raised in the Lower Courts (**SCR** 025, 200).The Lower court gave the trial jury specific instructions whether they wanted to hear any testimony read back "in whole or in part". **SCR** 505-06,550. The jury presumed to have obeyed when they requested read back of testimony (kennedy-Collison) ,the alleged accomplice and officer. **SCR** 508. **See** Prejudice at SCR 465-468. Nevertheless, appellant was fundamentally deprived of a fair trial, harmed, and prejudiced by the lower courts direct response, excluding the cross-examination. In so doing, the lower Court did not give the jurors a meaningful response and the District court failed to hear the mentioned claim although it was preserved and further erred in its Core responsibility in the matter it handled the jury note when received. ***US v. Criollo*** 962 f2d 241 (2nd Cir 1992).

(iv). Summation

A prosecutor is not allowed to express his personal opinion as to the truth or falsity of witnesses' testimony. ABA Standards for criminal Justice §306.8(b) (4th ed. 2015); ABA Code of Professional Responsibility DR7-106(4). The Second Circuit articulated the following:

> "The prosecutors is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, But rather of a federal Official duty-bound to see that justice is done. The jury knows that he has prepared and presented the case and that he has completed access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be. Personal expression of opinion are especially improper if phrased to leave the impression that the prosecutor opinion is based on matters in the investigate file and not in the trial evidence"

U.S. v. Modica,663 f.2d 1173 (2nd Cir. 1981). See ***U.S. v. Young*** 470 U.S. 1 (1985);***U.S. v. Murphy*** 768 f.2d 1518,1534 (7th Cir. 1985). *Young* and *Murphy* also condemned prosecutors, but

did not reverse the convictions because there was no objection and found no "plain error". A similar statement to the truthfulness of the government's main witness was criticized in ***U.S v. Wallace*** 848 f2d. 1464, 1473 (9th Cir. 1988), but again there was no reversal because trial counsel had not objected and the appellate Court again held that it was not a "plain error". Moreover, prosecutor has "a special duty not to mislead" ***U.S. v. Myerson***, 18 f.3d 153, 40 **Fed. R. Evid**. 601 (2nd Cir 1994) or become an unsworn witness.

In the present case, timely objections were made. For example, characterizing appellant as a "criminal master mind" **SCR**. 585-586. Reversing the burdened of proof and vouching: "their testimony is consistent with each other... and Mr. Slovis would have you believe it's one lie corroborating another" **SCR** 588. "Conspiracy Theory" 589. Demeaning counsel: as "mislead" in impeaching the State witness. Again, reversing the burden of proof: "You're being asked to view the evidence as it is **NOT**, as is **NOT** in the record. The defendant wants to believe". The appellant did not take stand. SCR 591. More vouching: "the witness are telling the truth for him, but not for the defendant?... Because he's Flip, because they're telling the truth" **SCR** 592. Matters not in Evidence and personal opinions: "trail they traced"(**SCR** 593), " I guaranteed you back in to Bronx he had [drug] records of what was going on", " I submit to you that someone who is this careful would have kept records" (**SCR** 594-595). Preparation of defense witness: "Even without the defense conceding he had and knew the defendant, how would he know to call him as a witness if he did know"? (SCR 596). Reasonable Doubt: "There is no doubt" that defendant sold a mostly $ 75, 000 between" relating to an element of Operating as a Major Trafficker, but the sales charges appellant was convicted did not exceed $400.

No curative instruction was given after, since the court overruled the prosecutor's statements. Trial counsel did not have to go any further and request a curative instruction since

such instruction was clearly called for after the objection was made. ***US v. Roberts***, 618 f2d 530, 534 (9th Cir. 1980). *Trial counsel was thereby damned by his valid and proper objections.* Case after case criticizes trial counsel for not objecting to Prosecutorial Misconduct and affirming based on the "plain error" doctrine. It is submitted that a reasonable jurist...would find that the State committed prosecutional misconduct that resulted in prejudice thus depriving appellant of fair trial. ***US v. Wilkins*** 754 f2d 1427, 1435 (2nd Cir. 1985); Criteria to consider, see ***US v. Pena*** 793 f2d 486 (2nd Cir. 1986). Hereto, this Claim was exhausted.

B). The *CPL* 440.20 Motion

The Otsego County Supreme Court Sentence appellant consecutively to 40 years for a Drug Crime of Operating as a Major Trafficker (20 years) and four Counts of Criminal sale of a controlled substance in the third degree (5 Years on each count), respectively. After appellant direct appeal, a CPL 440.20 motion was filed in the State Courts and subsequently in the Northern District Court amended Petition at 18. Amongst other claims, the District Court Stated that "the concurrence or consecutiveness of his sentence are inadequate to trigger habeas relief... and not cognizable".

That above Statement was on the issue of Penal Law 70.25, thus overlooking ***Blockburger v. United States*** 284 US 299 (1932) in which appellant raised a federal issue in a sub-heading at section B found in the CPL 440.20 State motion [**SCR** 251-53] challenging the consecutive sentence on a **Double Jeopardy** – continuous crime claim. The same was raised in the Amended Petition Federal District Court citing *Ex Parte Snow*, 128 US 274 (1887), but ignored. In truth, the other reason for bringing the claim was because the State had conceded that "Count one [operating as a major trafficker] is just a culmination of all the other counts" [criminal sale of controlled substance], "all tied in" to the indictment and a "continuous crime" **SCR** 310-13. Even their very

own Bill of Particular confirmed that "Count one: Unknown...in connection with count two through twelve in the indictment" (which are lesser or latter counts of the sales charged) [**SCR** 306]. If the controlled substance Sales is not related to Operating as Major Trafficker, then there is no evidence to convict. If one cannot happen without the other, should sentences be consecutive?

Based on the *Blockburger* test in which the Northern District Court abused its discretion and erred in not addressing the claim. It is obvious that Jurist of reason would conclude that penal law 220.39 (1), while "acting in concert", was used as one of the underling offenses in penal law 220.77 (1) while sharing a common purpose ("Organization"), requiring the latter of offenses as well as needed proof of several additional element that are reproduced to make out the offense. The question is whether (with the State conceding) appellant could be punished separately for two offenses steaming from the same fact or continuous crime? ***Jeffers v. United States*** 423 US 137 (1997).**See** Petitioners Traverse at 20-22.

Alternatively, appellant claim should be review *de novo* because the state court (**SCR** 385-389), nor the Federal district Court adjudicated appellant claim on the merits, and in any event were based on an unreasonable application of *Blockburger* - 28 U.S.C. §2254 (d)(1)(2). By its AEDPA terms, the statue calls for deferential treatment only when the appellant claim was "adjudicated on the merits" by the State Court. If the State Court failed to do so, Federal Courts apply the pre-AEDPA standard and review *de novo* appellant constitutional claim. ***Aparico v. Artuz***_269 f.3d 78, 93 (2nd Cir. 2001) citing ***Washington v. Schriver*** 255 f.3d 35, 55 (2nd Cir 2001); accord ***Eze v. Senkowski***, 321 f3d 110, 121 (2nd Cir. 2003). A State Court renders an adjudication on the merits when it disposes the claim and reduces the disposition to Judgment, ***Sellan v. Kuhlman*** 261 f3d 303, 312 (2nd Cir. 2001), even if does not explicitly refer to the federal basis of the claim, *Eze* at 121. Because the State motion Court, the State appellate Courts, and the

Federal District Court failed reached the merits of appellant's complete continuous crime/double jeopardy claim, a reasonable jurist would remain that this Court should review said claim *de novo.*

C. The Second Error Coram Nobis (Appellate Counsel)

The District Court stated that the "third department summarily denied both of petitioner's writ for error coram nobis". It is explicitly clear that the second Error Coram Nobis was not heard on its merits by the District Court. In fact, the District Court numbered appellant challenges to ineffective assistance of appellate Counsel on the first Error Coram Nobis citing **"Am. Pet 24-28"** *Rodrigues v. Griffin*, at *26. But the claims not heard were: Impartial jury, jury selection, prospective jurors having a relationship with the District Attorney office, other officials, witnesses, and Ineffective assistance of trial counsel for not objecting to the same- raised at page 32 in the Amended Petition as Ground 16 which are in fact U.S. Constitutional Violations originated in the second error coram nobis. Amended petition at pages 24-28 considered was actually Ground 13 (the first error coram nobis), not the Second error coram nobis.

(i) Impartial Jurors during Voir dire

The State failed to disqualify the jurors, regardless of clear assurance of fairness in which it bears a likely hood that such prospective juror will render an impartial verdict. **T.** 70-74, 154-157, 245-251. The trial transcript excerpts during Jury Selection during the first, second, and third panel reveals that some jurors who were selected to serve at appellant's trial had Social Relationship with the District Attorney, Police Officers (witnesses), and other Officials from the District Attorney's office which mandated automatic exclusion.. The District Court failed to hear the merits of appellants claim or conduct an evidentiary hearing on undoubtedly suspect relationships with officials (*US v. Vitale* 459 F.3d 190 [2006]). ***People v. Clark*** 125 AD2d 868 (3rd

Dept. 1986); ***People v. Bedford*** 132 AD 1070 (3rd Dept. 2015). See ***Smith v. Phillips*** 455 US 209, 221-22 (1982). This claim was also exhausted.

(ii). Trial Defense

Disturbingly, trial counsel defense at opening statements, trial, and a dead bang winner for the State at summation, were for sex crimes although appellant was on trial for a drug crime. The respondent waived this claim, the District Court failed to hear it, the appellate counsel ignored the record. **SCR.** 608, 613, 610-612, 614-628, 583, 598-599) ***Eze v. Sendowski***, 321 F3d. 110, 134 (2003).

2). THE DISTRICT COURT *UNREASONABLY* APPLIED THE *JACKSON* (Insufficiency of Evidence) STANDARD OR WAS *CONTRARY JACKSON* OR WHETHER THE DISTRICT COURT FACT FINDING FAIRLY SUPPORTED THE RECORD:

Unfortunately, appellant was the first defendant in New York State to get convicted after trial for Penal Law §220.77 Subdivision (1). It is submitted that the State Courts, and the Northern District Federal Court have failed to apply with explicit references, the essential elements of the criminal offences in appellants case as enunciated ***Jackson v. Virginia*** 443US 307 (1979). Pertaining to the *elements,* the crime found in Penal Law 220.77(1)-Operating as Major Trafficker... and Penal Law 220.39(1)-"Criminal Sale of a controlled Substance in the third degree when he knowingly and unlawfully sells: a narcotic drug" and other elements cannot stand:

- Penal Law §220.00[1]: "Sells" means to sell, exchange, give or dispose of to another, or to offer or agree to do the same.
- Penal Law §220.00[2]: "*unlawfully*" means in violation of article thirty-three of the public health law.
- Penal Law §220.00[18]: "*Controlled substance organization*" means **four or more** persons sharing a common purpose to engage in conduct that constitute or advances the commission of a felony under this article.
- Penal Law §220.00[19]: "*Director*" means a person who is the principal administrator, organizer, or leader of a controlled substance organization or one of several principal administrators, organizers, or leader of a controlled substance organization.

- Penal Law §15.05[2]: "*Knowingly*" A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature of that such circumstance exist. **SCR** 301-302
- Penal Law §20.00: "*Criminal liability for conduct of another*"... . Acting in Concert.

Instead of following the *Jackson* standard, the District Court adopted the Respondents answer and Copy & Paste the State Appellate Division assertions therein and emphasized what the lower court assumed was correct. ***Rodriguez v. Griffi***n, supra at *17-19. In consequence, failing to conduct an independent determination in reviewing the elements. ***Wainwright v. Sykes,*** 433 U.S. 72, 87 (1977). There is substantial showing of a Federal Constitutional Violation that a reasonable jurist would agree that the question of insufficiency of evidence deserves encouragement to precede further. ***United States v. Macklin***, 671 F.2d 60, 65 (2nd 1082); ***U.S. v. D'Amato***, 39 F.3d 1249, 1256 (2nd Cir. 1994). The COA should be granted and reviewed *de novo*.

Again, the Operating as Major Trafficker cannot stand. For example, Jessica Gaston, an alleged accomplice, was held to be one of the "four or more". However, as she would have had to "constitute or advances the commission of a felony under this article" to be liable, she testify that she "never sold" drugs for appellant (an essential element) and the drugs she would receive from an intermediary was not from petitioner [T. 850-851]. Thus, there was no common purpose that held Gaston as an accomplice as she was not charge or convicted of any crimes.SCR 229, T. 891, 893. See. ***US v. Casamento***, 887 f.2d1141, 1162 (2nd Cir.1989). Appellant was not charged for Gaston alleged acts, nor was Gaston charged for any crimes regarding the Operating as a Major Trafficker charge, but for Count 9- the Sale Count in which Appellant was sentence consecutive to, having nothing to do with the top Count. **SCR** 267-68

As for Mark Rathbun, another alleged accomplice, he never saw or met appellant (T. 904). Nonetheless, facts are entitled to deference and actuality into a ***dispute.*** The District Court Stated that in was "unclear exactly when and for how long Rathbun engaged in certain of these events:"

But the evidence is clear and the events of Rathbun testimony are clearly false (See Appellants' Travers at 5-8 or T. 904-917) mandating an evidentiary hearing and another reason why the Motion to Compel Discovery ought to be heard. Not only has this Court been suspicious with such testimonies as the record shows events which could not have occurred, but has also condemned the State for failing to correct such false testimony. Concerning the monetary element, Rathbun testify that he wired $10.000 a dozen times. Either the Western Union processor committed a Federal Crime or Rathbun deceived the State as there was never an Internal Revenue Service form or subpoena filled out. Cf ***US v Herron*** 97 F3d 234, 237 (1996). ***See- Su v. Fullion***, 335 f3d 119, 126 (2nd Cir. 2003); ***U.S. v. Taylor***, 816 f3d 12, 23 (2nd Cir. 2016). It should be noted that appellant was not charged for any of Rathbun events as he was charged for possession, an element **NOT** found in appellants indictment. SCR 116-119, 228.

Jordan Krone, like Rathbun, was also charged for Possession, an element **NOT** found in appellants indictment. (**SCR** 116-119, 228). As conceded by the respondent "Krone was arrested almost immediately thereafter while trying to make a sale in Oneonta" T.1167. It should also be noted that Krone's testimony of committing crimes started in 2008 (before the Statue went into effect) and could not remember any dates or timeline of the alleged funds he wired or transported. (T,1159-62). At the very least, the element of "four or more" cannot stand and because of it, the conviction was insufficient, based on speculation and conjecture.

As for the controlled substance sale counts, the appellate court stated that appellant was barred for review because of the New York Preservation Rule found in **CPL 470.05(2). SCR 183.** However, there was a sufficient protest multiple times thus satisfying the preservation rules, requiring the presumption of correctness analysis. **T**.1224-1225,1240-1241,1252-1253, SCR-208-234. The repetition of protest serve as the same purpose as appellants' claim is in all actuality

preserved. ***Alburquerque v. Bara***, 628 f.2d 767, 772 (2nd Cir. 1980). Relating to the element of PL 220.39 [1], there was no evidence that appellant "knowingly" knew that the alleged accomplices were making "sales".

3). THE APPELLANT INDICTMENT WAS ERRONEOUSLY- CONSTRUCTIVELY AMENDED AND THE INSTRUCTIONS TO THE JURORS ALTERED AN ESSENTIAL ELEMENT TO THE CRIME:

The indictment charged the appellant for Operating as a Major Trafficker from September 1st, 2009 to September 1st, 2010 [1] (**SCR** 116). The time "period twelve months or less" is an essential element to the offense and prejudice testimony solicited from most of the witnesses were from making "sales" or working for appellant before November 1st, 2009, before the statue went into effect. Appellant could have been convicted of a difference offense such as conspiracy, which is a B felony, instead of the A-1 felony if the indictment would have been re-submitted to the Grand Jury.

Constructively amending the indictment and altering an essential element of the charge of Operating as a Major Trafficker is a Federal Violation. **See** U.S. Const. Amend V. It is submitted that "once the grand jury returned by an indictment, only the grand jury may lawfully amend the indictment" and ***United States v. Mucciante*** 21 f3d1228, 1233 (2nd Cir. 1994). In appellant's case, he alerted the State Courts of a Federal claim by citing ***People v. Perez*** 83ny2d 269 (1984), citing therein ***Ex Parte Brain*** 121 US 1, 6 . **SCR** 273.

As for being Procedural Defaulted as stated by the District Court, the records reveal that there was a "protest" by trial counsel; thereafter there was a ruling by the court. Trial counsel protest is the same as a 'strong objection' by definition. Even after the Protest, the State requested to amend the indictment, but instead the lower Courts gave instructions to the jurors' not to

[1] Operating as a Major Trafficker went into effect on November 1st, 2009.

consider the 2 months time period before the statue went into effect. See T.1253-56. This is sufficient in complying with the New York State Preservation Rule found in **CPL 470.05(2).**

Accordingly, the lower Court erroneously used the Preservation Rule to not hear appellants' claim and the District Court precluded it from being heard. In any event, a substantial US Constitutional Violation has occurred. Ambiguously, the State Courts adjudicated appellants claim on the merits. **SCR** (184). Appellant request for this violation to be heard *de novo* as reasonable jurist could concluded that there was in fact a substantial Constitutional violation and could be debatable and resolved in a different manner. ***Stirone v. US*** 361 US 212, 217.

4) THE DISTRICT COURTS' REJECTION OF APPELLANTS' CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL WERE UNREASONABLE APPLICATION OR CONTRARY TO *STRICKLAND*:

The District Court held that, "to demonstrate constitutionally ineffective assistance of counsel, a petitioner must show that counsel's performance fell below an objective standard of professional reasonableness, and but for counsel's alleged error, *the results of the proceeding would have been different*" (emphasis added). ***Rodriguez v. Grifin***, supra at *25-26. Not one time did the district court mentioned the reasonable probability, reasonable possibility or preponderance of the evidence and also reduced the prejudice Standard. It could not have evaluated the "entire factual record" since as shown throughout, the district court has omitted the record, thus overlooking several claim. More importantly, it failed to examine <u>*independently*</u> the "contrary to" and "unreasonable application" to ***Strickland***.

Even if this Court implies that the statement made by the district court such as "the results of the proceeding would have been different" is an indication that it was referring to the "reasonable probability" standard. A reasonable jurist could differ about this conclusion. In order to find *Strickland* prejudice, the court need not find that it is more likely then not that the

defendant would have been acquitted absent the ineffective assistance of counsel. As the U.S. Supreme Court put it in ***Williams (Terry) v. Taylor***, 529 U.S. 362, 405-406 (2000):

> **If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in Strickland that prisoner need only demonstrate a "reasonable probability that... the results of the proceeding would have been different."**

[Citation omitted]. The prejudice determination must be based on *all* of the *evidence* available to the Court, not simply the evidence supporting the verdict. Again, *Williams (Terry)* is instructive on this point: "[T]he State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-in reweighing it against the evidence in aggravation." ***Williams (Terry) v. Taylor***, Supra at 397-398.

More disturbing, the district court adopted all of the respondent's claims and failed to hit upon the ***prejudice*** prong. ***Rodriguez v. Griffin*** supra at *27. It further stated that: "By adopting all of these claim in the present petition, it can be inferred that petitioner believed, at a minimum, the representation he received and the claims that were advanced during the course of appellants exhaustions throughout were in fact competent and effective." **That statement is unreasonable or contrary to *Strickland.*** Furthermore, ***Koller v. Smitch***, should be distinguish as appellant (pro-se) should be allowed to pursue defenses in a federal court he believes are United States Constitutional Violations. In any event, criminal defendants may maintain inconsistent defenses. ***Mathews v. U.S.*** 108 S.ct 883, 887-888 (1988). A reasonable jurist could differ and find

questionable the district court account as appellant contends the Northern District Court determination continues to be unreasonable application or contrary to *Strickland*.

TRIAL COUNSEL INEFFECTIVENESS

The District Court in ***Rodriguez v. Griffin*** at *26 did not independently adjudicate appellants dispute that trial counsel was ineffective for not objecting to the admissibility of Jordan Krone testimony of uncharged Crimes committed in Albany County and the jurisdiction infringement thereof or at the very least, in failing to seek a curative instruction. However, an appropriate factual rendition of even may suffice as example in ***Cornell v. Kirkpatrich***, 655 f.3d 369, 375-378 (2nd Cir. 2001) where "State Court's determination that petitioner was not prejudiced by Counsel's ineffective assistance of Counsel was contrary to clearly establish federal law". ***Kimmelman v. Morrison***, 477 US 365 (1986) [Petitioner convicted after attorney failed to make obvious and meritorious objection to tainted evidence forming basis of State case].

Krone detailed testimony of conspiring with petitioner was principal to the State case and its prejudicial effect spilled over as a Golden Egg at the States' summation. [T. 1250-1251,1300-1301]. ***Crotts v. Smith*** 73 f.3d 891 (9th Cir. 1995) [trial counsel was ineffective in failing to object to highly prejudicial evidence which likely would have been excluded if objection had been made].

As a result, Krones' testimony of uncharged crimes (in different County's), although nobody was charged for them,-nor there was any testimony from any agency, certainly was extensive and violated appellants Due Process (T. 1144-1223). Without Krone - appellant could not have been convicted of the crime of Operating as a major trafficker as he would not have been included as one of the "four or more" element found therein. Because of its decencies, there is a reasonable probability that the "results of the proceeding would have been different", ***Strickland***

466 US at 694. Appellant request to be heard as Court after Court continues to pass on the baton on said issue mentioned above concerning whether uncharged crime prejudices defendants. Hereto, the District Court applied an unreasonable application or contrary to *strickland* standard.

APPELLATE COUNSEL INEFFECTIVENESS

It is well settled that every State Criminal defendant has a due process right to effective assistance of counsel on direct appeal. This requires appellate counsel to act as an advocate, not merely as a amicus curie, and to marshal legal arguments on appellant behalf in order that he may have a full and fair resolution and consideration on his appeal. ***Evitts v. Lucey,*** 469 U.S. 387 (1985); ***Anders v. California***, 386 U.S. 738, 7430758 (1967).

The District Court stated in appellants decision and order at *28-29 that "petitioner [must]... show [] that counsel omitted significant and obvious issues while pursuing issues that were clearly and significant weaker", citing *Mayo v. Henderson.* Appellant could not have had a full and fair resolution or consideration of the brief submitted since appellate counsel raised (4) four grounds at the direct appeal in which (3) three were not preserved according the appellate division, third department. *People v. Rodriguez*, supra. In point of fact, is Mayo v. Henderson, which actually favors appellant. As recently mentioned by the U.S. Supreme Court in *Davlla v. Davis;* "**In most cases, and unpreserved trial error would not be a plainly stronger ground for appeal then preserved errors.**" 137 S.Ct 2058, at 2067 (2017). There is a reasonable probability that had appellate counsel raised the grounds below which were ripe for review due to trial ineffectiveness and/or because those issues were on the record, appellant direct appeal result would have been different. *Strickland* at 694-695.

Additionally, a reasonable jurist would find debatable or question the Northern District Court in the manner it cited *Jones* 463 U.S. at 753 as it relates and in conflict with appellant case

or *Davila v. Davis.* It stated, in a nutshell, that the unpreserved arguments raised by appellate counsel, if not raised, he would have been " burying good arguments" and if the arguments appellant are NOW raising, if raised, would have been "prejudicial" and "improper" Were the unpreserved arguments-"good arguments" as declared by the district court? That statement is erroneous, unreasonable, and contrary to *Strickland.*

Lastly, appellant urge the Second Circuit Court of Appeals to hear the ***Brady*** Claim mentioned above due to fact that while the District Court did not hear it on the merits because it was not exhausted, it paid a slight attention to the claim in ineffective assistance of appellate counsel column. Consequently, the District Court further failed to take a sneak a quick look at the Memorandum of Law (traverse) in which appellant "identify" the need for the "hidden" substance. See. ***Rodriguez v. Griffin***, supra at *27.

A. Jury Selection

The main concern in a trial by a jury is that the prospective Jurors must give an unequivocal assurance that he or she can be fair and impartial. ***People v. Johnson***, 94 NY2d 600, 610 (2000), citing ***Duncan v. Louisiana*** 391 US 145 (1968). In the instant case, the challenge of prejudice was notice by the appellant jury expert, Marshall Hennington –PH.D., was raised in the lower Court and in a Personal Affirmation by Mr. Hennington (**SCR** 771-773). The same was raised in the Federal District Court. As the claim was fairly presented, among other things, the jury expert stated that the lower Court limited the defense time to select possible Jurors to "about 1 minute to reach a decision" **SCR** 753-759 also see prejudice at **T.**148-149, 233-235, 240-242, 439, 337-342. Unable to explore jury bias. See ***Turney v. Murray*** 476 US 28, 37, 39 (1986). It should also be noted that the District Court Stated in appellant's case at *3 that it was unclear from whom the juror notes were taken from by the court or who were the jury came from. But the affirmation

from the jury expert and the record are clear as day: "the judge physically took away the jury notes and the jury sheets of the defense attorney, Mr. Rodriguez, and my self. I have never had this happen in 15 years of practicing jury psychology. SCR 772. Fact are in dispute and COA should be granted. T.357-341

Next, whether the change of venue and the challenge of the jury panel were waived by not putting the claim in writing, deferred appellant from the guarantees of US Constitutional 6th Amendment? – is a question that should not by pass this court. See; ***People v. Prim*** 47 A.D. 2d 409, 414-15 (1975). The Due Process clause suffice to bring this claim to the Federal Courts in which trial Counsel objected to the jury panel, demographic data, along with jury expert assertion in his personal affidavit, alerted the lower Court to prejudice that tainted the jurors. See T.1-10. ***Irvin v. Dowd*** 366 US 717, 724-25; ***Cambell v. Louisiana*** 523 US 392, 398 (1998). (**See** Exhibit D at appellants Traverse)

B. <u>Confrontation Clause</u>

The Confrontation Clause guarantees face-to-face meeting in Court. ***Coy v. Iowa***, 487 U.S. 1012 (1998). At appellant's drug trial, testimonial statements concerning narcotics were entered without the forensic analyst having to testify. (See SCR 374-377-Lab Reports). Nor did the Confidential Informants called to testify although they made the Drug Buys on behalf of the Police concerning the sale counts in which appellant was convicted and initiated the lab reports to exist. (SCR 478). Appellant was prejudiced, received a fundamentally unfair, and unreliable trial because trial Counsel decided to enter into stipulation with the State in introducing sworn certification without the authors.

In so doing, the parties in appellant case cannot create a case by stipulating to facts or evidence that does not exist. ***Sincicropi v. Milone***, 915 f.2d 66, 68 (2nd Cir. 1990); ***PPX***

Enterprise Inc. v. Audio Fidelity, Inc, 746 f.2d 120, 123 (2nd Cir. 1984). The District Court cited Respondents' citation of *Mills v. Lempke*, should be set apart as that case facts were certainly different. In appellants case, as conceded by the Respondent memorandum at page 5, "subsequent laboratory testing confirmed that the bags contained a mixture of heroin and cocaine" **SCR**. 375.

Entering into stipulations was poor preparation from trial counsel and was objectively unreasonable as the testing method shows discrepancy and unreliability as appellant was on trial for sales of **Heroin** not **Cocaine**. SCR 307. This is just one sufficient reason why the witnesses face-to-face testimony was needed as the forensic testing method is questionable, non-factual and should have been explore. See ***Melendez v. Diaz***. 557 U.S. 305, 320-21 (2009). Thus, a jurist of reason could find debatable that appellant was prejudice by the same evil the confrontation clause was designed to prevent, as the Confidential Informants and the forensic analysis should have been cross-examine or at the very least, trial counsel should have address or objected their absence. ***People v. Smith*** 140 A.D.3d 1403, 1405 (3rd. Dept. 2016).

C. Arraignment at a Critical Stage *without* Counsel

Petitioner was indicted on October 1st, 2010 (**SCR** 493). While detained in Rikers Island since that day, appellant was arrested on November 17th, 2010 for an unrelated matter that was subsequently dismissed. Otsego County Sheriff then picked-up appellant from Rikers on December 17th, 2010 and transported him to Otsego County, Supreme Court to be arraigned on a sealed indictment. Contrary to Respondent and the District Court, is not what happened at the second arraignment, but the need for counsel that without, prejudiced and harm appellant at his first arraignment. ***Rothgery v. Gillespi Cnty***., Tex., 554 U.S. 191, 192, 212 (2008).

Moreover, the District Court *circumvented* and debased the structural error in failing to follow Supreme Court precedent in which it stated that: "Petitioner was able to have the benefit of

counsel's advice and advocacy at that critical stage in his trial" and cited State common law in ***People v. Young***, 35 Ad.3d 958, 960 (3rd Dept. 2006), stating that the "error had no impact on the case as a whole". ***Rodriguez v. Griffin*** supra at *27. First, appellant did not benefit from counsel's advice at that "critical stage" [first arraignment] because the record show that there was no counsel in attendance to benefit from (**SCR** 495-501). Second, it relied on a State case in which *Young* allege that he was not " represented by counsel at this second arraignment" unlike appellant case before this Court in which he alleges a U.S. Constitutional Violation because he did not have the right to Counsel representation at his *initial* arraignment-a critical stage. ***Gideon v. Wainwright 372 U.S. 335 (1963)***; ***White v. Maryland,*** 373 U.S. 59 (1963); ***Hamilton v. Alabama***, 368 U.S. 52, 54 (1961); ***Hurrell-Harring v. State of New York***, 2010 N.Y. LEXIS 635 (May 6th, 2010). By its very nature, critical stage (arraignments) should never be considered harmless, nor the need to show prejudice.

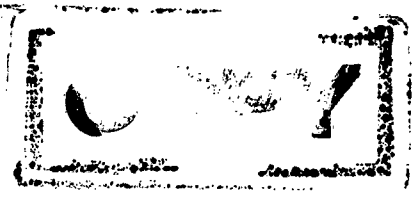
At that first arraignment, appellant could have copped out to a favorable plea like he had done in the past. For example, in 2007 appellant was before that very same Otsego County Court under indictment 2007-032 in which he was initially arranged on April 27th, 2007, facing a sentence of 18 years, but accepted a favorable plea bargain of 2 years on the day of arraignment and sentence within 28 days (May 25th, 2007). The difference between that 2007 indictment and the indictment at hand (2010) is that appellant had counsel representation at that initial arraignment that was capable of negotiating a favorable plea right there and then with the State, while in the 2010 indictment there was no Counsel available to negotiate any plea offers with anyone. Coincidentally, the 28 days that appellant was without counsel in the indictment at hand was the same amount of days (28) that it took appellant to dispose and get sentence in the 2007

indictment. This gap without Counsel culminated to a 40 years sentence, instead of 12 to 24 years if counsel would have been available in which appellant would have taken a plea.

5) THE MOTION TO COMPEL SHOULD HAVE BEEN GRANTED AS THE DISTRICT COURT ABUSED ITS DISCRETION ON APPELLANTS' CLAIM - WAS INCORRECT:

The Northern District Court in appellant's case at *28, regarding the Motion to Compel Discovery stated that appellant argument was "based on nothing but speculation and conjecture...if the facts were more fully developed, he is hypothesizing he may find within them". Its short and blanket un-factual denial was an abused of discretion pursuant to ***Bracy v. Grameley*** 117 S.ct 1793, 1796 (1077). The officer testimony reveals that the FOIL request #45-all search warrant, #46-all search warrants, #48- all premises records of crime scene (During Drug buy and search & seizure). This material information is real and actually exists. **See,** SCR 557-560, T. 954.

We now know that the district court statements regarding the material suppressed as being "speculation" or" hypothesizing" within them are inaccurate. Next, we also know that the State suppressed the requested material, since their very own reply to appellants FOIL say that they possessed "none". So what we got here: *the officer saying the above exist and the State saying they don't exist.* The Discovery requested reveal suppression. ***US v. Weintraub*** 871 f.2d 1257, 1259 (1989) **See** Exhbit B and C at the appellants Traverse. In any event, if this court do not find the above foil request to be suppressed or questionable, FOIL #98 is a question of law and fact as appellant was not aware that there were "confidential sources" relating to Rathbuns' and only became aware upon receiving the State's Foil. ***Roviario v. U.S.*** 356 U.S 53, 60-63 (1967). Glimpse in detail the Motion to compel to discovery dated March 1st, 2018.



Appendix - F

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of December, two thousand nineteen.

Jose A. Rodriguez,

Petitioner,

v.

Thomas Griffin,

Respondent.

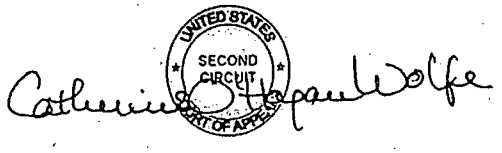
ORDER

Docket No: 19-79

Petitioner, Jose A. Rodriguez, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request as a motion for reconsideration, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jose A. Rodriguez		
	Petitioner,	
V.		No. 19-79
Thomas Griffin		
	Respondent.	

PETITION FOR REHEARING AND/OR PETITION FOR REHEARING EN BANC WITH SUGGESTION IN SUPPORT:

REASONS MERITING REHEARING AND/OR REHEARING EN BANC

Jose A. Rodriguez, pro-se, and pursuant to rule 35 (A); (B) and 40 of the Federal Rules of Appellate Procedure; Respectfully petitions this Honorable Court for a hearing en banc and suggestion rehearing *en banc* of the panel silent decision in the above-captioned matter filed on August 14th, 2019.

Rodriguez is the first individual to get convicted at trial of the new crime Operating as Major Trafficker [PL 220.77]) in NY, sentence thereafter to 40 years at the age of 27. **People v. Rodriguez**, 121 A.D.3d 1435 (3rd Dept. 2014); **Rodriguez v. Griffin**, 2018 WL 6505808. The contradictory ruling is in conflict with U.S. Supreme Court and Second Circuit Court precedence and compulsory questions of exceptional importance. In Support of petition, Mr. Rodriguez states the following:

FIRST: The panel's decision is in conflict with **O' Suvillan v. Boerckel**, 526 U.S. 838 (1999) and **Daye v. Attorney General**, 696 F.2d 186 (2nd Cir. 1980) (en banc), emphasizing that petitioner (as did) must present their federal claims for one complete round of review in State Court in order for those claims to be deemed

exhausted for federal review. To satisfy the exhaustion requirement, the claim raised in the state court must be the "substantial equivalent" of the claim raised in the Federal Petition. Alerting both, the State and Federal system has precluded reviewing Mr. Rodriguez claim. **Picard v. Connor**, 404 U.S. 279 (1971).

a) According to State Court Records (SCR)[1], subsequently raised in Federal Court, Mr. Rodriguez filed a Motion to file a Pro-Se brief to the Appellate Division, Third Department asserting U.S. Constitutional Violations on December 19th, 2013:

> "The Defendant-Appellant was deprived of His Fundamental Right to A Fair Trial, Due to Prosecutor's Misconduct throughout trial by Violating Pre-trial Ruling and Improper comments during summation In Violation of **U.S. Const., Amend.5,14**; N.Y.Art. I §6"
>
> "The Defendant-Appellant was Seriously Prejudiced by trial court's Failure to Provide Jury's Requested Read Back of Relevant testimony. The court Also Committed "mode of proceeding Error" And Violated C.P.L § 310.30, **U.S. Const. Amend. 5,6,14**; N.Y. const I §6.

Both State Appellate division and Court of appeal affirm **SCR 024-027,200,203.** But the Northern District Court stated the following: that the "PROSECUTORIAL MISCONDUCT & THE JURY'S NOTE" claim, was "never asserted an independent claim for relief on these grounds in state court during his ***direct appeal***...Accordingly, the claim are unexhausted."See **Rodriguez v. Griffin** *2018 WL 6505808* at *23. Contrary to the above ruling, appellant fairly presented those claims. Compare; **Chisholm v. Henderson**, 736 F. Supp. 444, 446 (1990).

[1] SCR reflect the 'State Court Records' submitted by the Respondent to the Northern District Federal Court in response to the appellant Writ of Habeas Corpus Amended Petition.

Later, Mr. Rodriguez filed a Post-Judgment motion to set-aside his sentence under criminal procedural law 440.20, among other things, based on Double Jeopardy Clause (**SCR** 250-252). Claiming that Penal Law 220.77 (1), Operating as Major Trafficker, is a continuous crime which requires proof of several additional elements and statues such as Penal Law 220.39 (1) to make out the crime. Requiring a 20 years sentence, instead of the 40 year sentence imposed. .

Rodriguez did cite U.S. Constitutional Federal Law in his CPL 440 motion: **Blockburger V. United States** 284 U.S. 299 (1932); **Jeffers V. United States** 423 U.S. 137 (1977); **In re Snow** 120 U.S. 274 (1887). However, the lower court totally overlooked the above sub-claim in its decision (**SCR** 385) and the Federal Court has also failed to adjudicate appellant claim on the merits.

c). Concerning the above Prosecutional Misconduct, Mr. Rodriguez trial counsel submitted an Omnibus Motion relating to the introduction of recorded conversation. The State was "prohibited from so doing". **SCR** 138,142,153. The aggravating blunted impact of such conduct cannot be overestimated; improper conduct that might merit judicial rebuke but affirmance of a conviction often becomes prejudicial error requiring reversal, especially after repeated warnings. No "look through" was done. **SCR 473-474. *Wilson v. Seller***, 138s.ct 118 (2018); See ***People v. Rosenfeld*** 11 N.Y.2d 290, 297 (1962); ***People v. Heckstall*** 90 A.D.2d 835 (2nd Dept. 1982); ***People v. Calabria***, 94 A.D. 519, 522 (2000).

For example, in ***United States v. Jackson*** 621 F.2d 220, the Court held an "Omnibus hearing" after which the prosecutor agreed that he would **not**, unless subsequent development disclosed use prior acts and convictions of a similar

nature to prove guilt. At trial, however, the prosecutor violated pre-trial agreement by introducing considerable evidence of prior similar acts and offences. Two factors usually are cited. First, the Court should inquire whether the defendant had reasonable notice and, second, whether the reason for the release outweighs the potential for prejudice. ***U.S. v. Seeright*** 978 f.2d 842, 36 Fed. R. Evid. Serv. 1399 (4th Cir. 1992). This court should adopt the above standard.

Like *Jackson,* Mr. Rodriguez's was not breach against obvious prejudice. The questions of importance are whether the witness "can testify as to what he heard over that telephone call during the course of a criminal transaction" although the lower Court stated it couldn't at the pre-trial stage. Second, whether the officer's testimony of allegedly speaking to appellant was from another uncharged crime, was erroneously accepted. Third, whether "there is a difference between a person testifying as to what they heard and playing (the actual recording) in Court"? **T.** 782-791[2]; substantial prejudice not mentioned **T.** 815-833; **SCR.** 563-581. See **Bruton v. U.S.** 392 U.S. 123 (1968). Even with the State having committed the sin, it is doubtful if any instructions had the desired effect in the matter as a hole, especially after failing to strike the first part of the answer – **it would have been like telling the Jurors to disregard the pink elephant that just ran across the Courtroom.**

d). Moreover, the Due Process claim concerning the Jury notes was also raised in the Lower Courts (**SCR** 025, 200). The court gave the trial jury specific instructions whether they wanted to hear any testimony read back "in whole or in part**". SCR** 505-06,550. The jury presumed to have obeyed when they requested read back of

[2] **"T" are Records / Trial Transcripts of appellants Criminal Trial.**

testimony (kennedy-Collison), the alleged accomplice and officer. **SCR** 508. Prejudice at **SCR** 465-468. Nevertheless, Mr. Rodriguez was fundamentally deprived of a fair trial, harmed, and prejudiced by the response, due to its exclusion of said cross-examination. **US v. Criollo** 962 f2d 241 (2nd Cir 1992).

e). Further the Second Circuit has articulated the following:

"The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, But rather of a federal Official duty-bound to see that justice is done. The jury knows that he has prepared and presented the case and that he has completed access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be. Personal expression of opinion are especially improper if phrased to leave the impression that the prosecutor opinion is based on matters in the investigate file and not in the trial evidence"

U.S. v. Modica,663 f.2d 1173 (2nd Cir. 1981). Compare **U.S. v. Young** 470 U.S. 1 (1985);**U.S. v. Murphy** 768 f.2d 1518,1534 (7th Cir. 1985). *Young* and *Murphy* also condemned prosecutors, but did not reverse the convictions because there was no objection and found no "plain error. Similarly criticized in ***U.S v. Wallace*** 848 f2d. 1464, 1473 (9th Cir. 1988), but again there was no reversal because trial counsel had not objected and the appellate Court again held that it was not a "plain error". Moreover, prosecutor has "a special duty not to mislead" ***U.S. v. Myerson***, 18 f.3d 153, 40 **Fed. R. Evid**. 601 (2nd Cir 1994) or become an unsworn witness.

Timely objections were made here. For example, *characterizing* Mr. Rodriguez as a "criminal master mind" **SCR**. 585-586. *Reversing the burdened of proof and vouching:* "their testimony is consistent with each other... and Mr. Slovis would have you believe it's one lie corroborating another" **SCR** 588. "Conspiracy

Theory" **SCR** 589. Demeaning counsel: as "mislead" in impeaching the State witness. Again, reversing the burden of proof: "You're being asked to view the evidence as it is **NOT**, as is **NOT** in the record. The defendant wants to believe". The appellant did not take stand. SCR 591. Further vouching: "the witness are telling the truth for him, but not for the defendant?...Because he's Flip, because they're telling the truth" **SCR** 592. Matters not in evidence and personal opinions: "trail they traced"(**SCR** 593),"I guaranteed you back in to Bronx he had [drug] records of what was going on", "I submit to you that someone who is this careful would have kept records" (**SCR** 594-595). Preparation of defense witness: "Even without the defense conceding he had and knew the defendant, how would he know to call him as a witness if he did know"? (**SCR** 596). Reasonable Doubt: "There is no doubt" that defendant sold a mostly $ 75, 000 between", but the actual sales charges appellant was convicted did not exceed $400 dollars.

No curative instructions were given after. Counsel did not have to go further and request a curative instruction since such instruction was clearly called for after the objections. ***US v. Roberts***, 618 f2d 530, 534 (9th Cir. 1980). ***Trial counsel was thereby damned by his valid and proper objections.*** Case after case criticizes trial counsel for not objecting to Prosecutorial Misconduct and affirming based on the "plain error" doctrine. ***US v. Wilkins*** 754 f2d 1427, 1435 (2nd Cir. 1985); Criteria to consider, ***US v. Pena*** 793 f2d 486 (2nd Cir. 1986). The State motion court, the State Appellate Court, the Federal Court, and the Second Circuit Court of Appeals has abortive to reach the merit of appellants exhausted claims.

SECOND: The panel's decision is in conflict with **Rose v. Lundy** 455 U.S. 509, 515 (1982) and **Zarvela v. Artuz** 245 F.3d 374, 379-382 (2nd Cir. 2001) emphasizing that a federal district court must dismiss State prisoners habeas corpus 'mixed petition' containing both unexhausted and exhausted claims. Materiality and exculpatory are a question of exceptional importance and Mr. Rodriguez had requested for the unexhausted ***Brady*** claim to be reviewed *de novo* although the sub claim was raised in Mr. Rodriguez Amended Petition at 13 as prosecutorial misconduct but not raised independently in the State Courts. **Rodriguez v. Griffin,** 2018 WL 6505808 at *23. Reason for not bringing such claim in the lower court is because appellant made a FOIL request to the District Attorney's (DA) office on 3/18/15. It was revealed that the DA did not turn over certain material related to a testifying witness, Mark Rathbun, relating to the events of what happened *after* his arrests not documented in the initial police report and the same reason why appellant submitted a motion to compel. **See.** Memorandum of law *(traverse)* at 15-18 *and Exhibits B&C* (FOIL #45, 46, 48, 98). In any event, Respondent did not expressly waived appellant claim, but heard it on its merits so should have the Federal Court.

Federal Court had a lot of different options but to relinquish Mr. Rodriguez *Brady* claim. The petition could have been held in abeyance pursuant to **Rhines v.Weber** 544 US 269 (2005) or dismiss pursuant to ***Rose v. Lundy*** *supra.* What's extra, Mr. Rodriguez has not filed **CPL** 440.10 motion in the State Court containing on and off the records allegations, as he still had the remedy to do so. **People V. Taylor,** 156 AD3d 86 (3rd Dept. 2017).

The search warrant application, consent search by Rathbun, search warrant, and premise records of the crime scene are exculpatory and impeachment by nature. **SCR** 469-474. Evenly importantly, Rodriguez did not receive any documents concerning Foil request #98 in which the DA responded that it "would disclose the identity of confidential sources". Mr. Rodriguez was not aware that there were any confidential sources relating to Mark Rathbun which was another reason why appellant submitted the Motion to Compel to the District Court and request for this Court to Compel and consolidate the matter. Mr. Rodriguez is entitled to this unknown information about confidential sources, especially since he was never charged for that crime, but used to enhance elements (four or more). **SCR** 561. **Roviaro v. U.S.** 353 U.S. 53, 60-61; **Pennsylvania v. Rithie** 480 U.S. 39-60 (1987).

Further attestation, there is nothing in the initial police report of 256 bags of heroin seized at the apartment, aside from the "fifty –six packets of heroin [that] were seized from the vehicle", nor was there any mention of a search warrant application, Statements or any other withheld information of the events ***after*** Rathbun arrest, *not before the arrest as asserted by the respondent.* (**See. SCR** 550-554, 557, 559-560) **See** Police Report at Exhibit A in the Memorandum of Law.

THIRD: The panel's decision is in conflict with **Jackson v. Virginia** 443 US 307 (1979) and **Wainwright v. Sykes,** 433 U.S. 72, 87 (1977) which enunciated that a Court will overturn a jury verdict only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt and for failing to conduct an independent determination in reviewing the *elements.* The essential

element "four or more" (Penal Law § 220.[18]) under the Charged Operating as major trafficker cannot stand. Penal Law 220.77 (1). Particularly, Mr. Rodriguez "was convicted of sales that occurred with (1) Rebecca Kennedy on September 2, 2009 and January 21st, 2010; (2) Jessica Gaston on May 4 2010 and (3) Bobby Colone on June 15, 2010". See Rodriguez v. Griffen, supra. But Leo Moore, the only Confidential Informant, was the author of the June 15. 2010 sale, not an accomplice. Bobby Colone was not an accomplice as he testified for the defense stating that he sold five bags of marijuana to Leo Moore. T.1228.

Nevertheless, Jessica Gaston would have to "constitute or advance the commission of a felony under this article" to be liable. But she testified that she "never sold drugs". **T.** 850-851, 891. Thus, there was no common purpose and she was never charge or convicted. **SCR**. 229, 267-68. Mark Rathbun was not celebrated in the Northern Disctrict opinion. ***Roriguez v. Griffin*** *8. Rathbun never met appellant. (T:904) and Mr. Rodriguez was not charge for any of Rathbun "events". Maybe because he was charged for possession, an element not found in this indictment. Jordan Krone, like Rathbun, was charged for possession. Rodriguez was not charge for any of Krone crimes. **SCR** 116-119, 228. While Rodriguez request for all of the elements to be reviewed, again, the four or more elements cannot stand. The same floats for the controlled substance sale (PL 200.39 [1]) counts (5,6,9,11) as the essential element of "Knowingly "is insufficient as there was no evidence that Mr. Rodriguez knew that the alleged accomplices were going to make "sales". Conviction was based conjunctive and speculation.

FOURTH: The panel's decision is in conflict with **Stirone v. United States**, 361 U.S. 212 (1960) and **United States v. Dove**, 884 F.3d 138, 145 (2nd Cir. 2018), emphasizing that "once the grand jury returned by an indictment, only the grand jury may lawfully amend the indictment". Constructively amending the indictment and altering an essential element is a Federal Violation. See **U.S. Const. Amend V**. It is submitted that the indictment charged Mr. Rodriguez for Operating as a Major Trafficker, and other dated drug sales from September 1st, 2009 to September 1st, 2010 (**SCR** 116). The time "period twelve months or less" is an essential element to the offense and prejudice testimony solicited from most of the witnesses were from making "sales" and working for appellant previous to November 1st, 2009, before the statue went into effect. See Penal Law 220.77 (1). **SCR** 040-047.

Without first re-submitting to the Grand Jury, it instructed the jurors, not to consider September and October as evidence. **T.** 1254, L.3. Mr. Rodriguez asserts that the deviation between the text of the Indictment and jury instructions affected the "core of criminality" at trial and modify an "essential element" of the crime. Mr. Rodriguez certainly could have been indicted on a difference offense such as conspiracy, a B felony, instead of the A-1 felony.

FIFTH: The panel's decision is in conflict **Jackson v. Leonardo** 162 F.3d 81, 85 (2nd Cir. 1998) and **Williams v. (Terry) Taylor**, 592 U.S. 362, in determining *Strickland* Prejudice, the Court must examine both the trial testimony and the post-conviction (*Habeas Corpus proceeding*) to determine whether, had the omitted evidence been presented there is a reasonable probably of a different outcome.

The District Court while correctly citing "reasonable probability" as the standard for determining prejudice under **Strickland v. Washington**, 466 U.S. 668, 687-699 (1984); it's analysis and silent opinion adopted by this Court, shows that it misapplied the prejudice standard. In point in fact, the U.S. Supreme Court recently mentioned in ***Davilla v. Davis*** 137 S.CT. 2058 (2017), that "In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors".

Mr. Rodriguez raised <u>two</u> post-conviction motions of ineffective assistance of Appellate Counsel via an Error Coram Nobis. (**SCR** 445- and 737-). Due to the limited pages set by federal rules, appellant will touch on strongest grounds but is requesting for the other grounds in the Error Coram Nobis to be reviewed. *Rodriguez v. Griffin* *25-28. The Second has not been considered by the Federal Court. The District Court erroneously stated that "Mr. Rodriguez adopted all four of the argument...in the present petition...inferred that petitioner believed, at a minimum, the representation he received...were in fact competent and effective." *Koller V. Smitch* should be distinguishing as appellant (pro-se) should be allow to pursue defenses he believes are U.S. Constitutional even if they are inconsistent **Matthew v. U.S.** 108 S.CT. 883, 887-88 (1988).

A. <u>Arraignment at a Critical Stage *without* Counsel</u>

Legally and factually, Courts have *circumvented* and debased the structural error in failing to follow Supreme Court precedent. The District Court stated that: "Petitioner was able to have the benefit of counsel's advice and advocacy at that critical stage in his trial" and cited State common law in ***People***

v. Young, 35 Ad.3d 958, 960 (3rd Dept. 2006), stating that the "error had no impact on the case as a whole". ***Rodriguez v. Griffin*** supra at *27. ABSOLUTELY not, the record show that there was no counsel in attendance to benefit at that "critical stage" [first arraignment] (**SCR** 495-501). Second, it relied on a State common law case in which *Young* allege that he was not "represented by counsel at this second arraignment" while Mr. Rodriguez alleges a U.S. Constitutional Violation because he did not have the right to Counsel representation at his *initial* arraignment-a critical stage. ***Gideon v. Wainwright 372 U.S. 335 (1963)***; ***White v. Maryland,*** 373 U.S. 59 (1963); ***Hamilton v. Alabama***, 368 U.S. 52, 54 (1961); ***Hurrell-Harring v. State of New York***, 2010 N.Y. LEXIS 635 (May 6th, 2010). Contrary to, is not what happened at the second arraignment, but the need for counsel that without, prejudiced and harm appellant at his first arraignment. Appellant Counsel is ineffective.

See Mr. Rodriguez could have copped out to a favorable plea like he had done in the past. For example, in 2007 appellant was before that very same Otsego County Court under indictment 2007-032 in which he was initially arranged on April 27th, 2007, facing a sentence of 18 years, but accepted a favorable plea bargain of 2 years on the day of arraignment and sentence within 28 days (May 25th, 2007). The difference between that 2007 indictment and indictment at hand (2010) is that Mr. Rodriguez had counsel representation at that initial arraignment and was capable of negotiating a favorable plea right there & then with the State. But here in the 2010 indictment there was no Counsel available to negotiate any plea offers with anyone. Coincidentally, the 28 days that appellant was

without counsel in the indictment at hand was the same amount of days (28) that it took appellant to dispose and get sentence in the 2007 indictment. This gap of without Counsel culminated to a 40 years sentence instead of 12 to 24 years if counsel would have been available: Mr. Rodriguez would have taken a plea.

B. Confrontation Clause

The Confrontation Clause guarantees face-to-face meeting in Court. **Coy v. Iowa**, 487 U.S. 1012 (1998). At Mr. Rodriguez's drug trial, testimonial statements concerning narcotics were entered without the forensic analyst having to testify. (See **SCR** 374-377-Lab Reports). Nor did the Confidential Informants called to testify to Counts 5, 6 and 9. (**SCR** 478). Appellant was prejudiced, received a fundamentally unfair, and unreliable trial because trial Counsel decided to enter into stipulation with the State in introducing sworn certification without the authors.

See the parties in Mr. Rodriguez case cannot create a case by stipulating to facts or evidence that does not exist. ***Sincicropi v. Milone***, 915 f.2d 66, 68 (2nd Cir. 1990); ***PPX Enterprise Inc. v. Audio Fidelity, Inc***, 746 f.2d 120, 123 (2nd Cir. 1984). Citation of *Mills v. Lempke*, should be set apart as that case facts were certainly different. Conceded by the Respondent's memorandum at page 5, "subsequent laboratory testing confirmed that the bags contained a mixture of heroin and cocaine" **SCR**. 375. Entering into stipulations was poor preparation from trial counsel and was objectively unreasonable as the testing method shows discrepancy and unreliability as appellant was on trial for the sales of **Heroin** not **Cocaine**. SCR 307. This is just one sufficient reason why the witnesses face-to-face

testimony was needed as the forensic testing method is questionable, non-factual and should have been explored. See ***Melendez v. Diaz***. 557 U.S. 305, 320-21 (2009).

C. Jury Selection

The main concern in a trial by a jury is that the prospective Jurors must give an unequivocal assurance that he or she can be fair and impartial. ***Duncan v. Louisiana*** 391 US 145 (1968). The challenge of prejudice was notice by the appellant jury expert, Marshall Hennington –PH.D., was raised in the lower Court and in a Personal Affirmation by Mr. Hennington (**SCR** 771-773). Fairly presented, among other things, the jury expert stated that the lower Court limited the defense time to select possible Jurors to "about 1 minute to reach a decision" **SCR** 753-759 Unable to explore jury bias. Also see prejudice at **T.**148-149, 233-235, 240-242, 439, 337-342. ***Turney v. Murray*** 476 US 28, 37, 39 (1986). Also the District Court Confusion; that it was "unclear" from whom the juror notes were improperly taken from by the lower court but refuted by the affirmation from the jury expert and the record which are clear as day: "the judge physically took away the jury notes and the jury sheets of the defense attorney, Mr. Rodriguez, and myself. I have never had this happen in 15 years of practicing jury psychology". **SCR** 772; **T.**357-341.

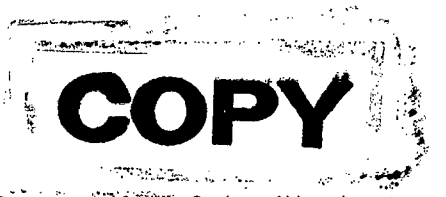
The next colorable claim stands out like Lady Gaga. In doing so, exclusion for jury service regardless of actual partiality due to its implied bias was warranted here because Jurors in the first, second, and third panel, subsequently rendering a

verdict at trial, could not have render an impartial verdict. There is no doubt that the Jurors had social relationships with the District Attorney who prosecuted the case, officials in the same office, and State witnesses, alarming. T-70-74, 154-157, 245-251 (SCR 819-821). See **Smith v. Phillips**, 455 US 209, 221-222 (1982); **U.S. v. Vitale**, 459 F.3d 190 (2006). Appellate Counsel is ineffective.

Next, the question of importance is whether the change of venue and the challenge of the jury panel were waived by not putting the claim in writing, deferred appellant from the guarantees of US Constitutional 6th Amendment? The Due Process clause suffice to bring this claim to the Federal Courts in which trial Counsel objected to the jury panel, demographic data, along with jury expert assertion in his personal affidavit, alerted Courts to prejudice that tainted the jury panel. **See** T.1-10; **SCR** 771-73. ***Irvin v. Dowd*** 366 US 717, 724-25; ***Cambell v. Louisiana*** 523 US 392, 398 (1998).

CONCLUSION: The arguments and premises supports Mr. Rodriguez sound conclusion: thus the panel's silent decision contains a glaring factual and legal error for not adhering to its own precedent, and because of such, consideration by the full Court or entire panel is therefore necessary to secure and maintain uniformity of the U.S. Supreme Court very own decisions which grounds raised above also contain questions of exceptional importance.

Dated: November 7th, 2019



Respectfully Submitted

_____

Jose A. Rodriguez, 11B3913
Green Haven Corr. Fac.
P.O. Box 4000
Stormville, NY 12582

Appendix - G

STATE OF NEW YORK
COUNTY COURT COUNTY OF OTSEGO

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Arraignment
Indictment No: 2010-067
NYSID No: 8800614R

JOSE A. RODRIGUEZ,
Defendant.

TRANSCRIPT OF THE PROCEEDINGS held in the above-entitled matter on the 17th day of December, 2010, at 10:58 a.m., at the Otsego County Court, 193 Main Street, Cooperstown, New York 13326.

PRESIDING: HONORABLE BRIAN D. BURNS

APPEARANCES: JOHN M. MUEHL, ESQ.
Otsego County District Attorney
193 Main Street
Cooperstown, New York 13326

JOSE A. RODRIGUEZ, Defendant

ALSO PRESENT:
ALTHEA D. BEAGEN, Senior Court Reporter
KIM SNYDER, Deputy Chief Clerk
TERRY CLAPPER, Security Officer
RON STRUCKLE, Security Officer

* * * * * *

P R O C E E D I N G S

THE COURT: Good morning, everyone. Have a seat. People of the State of New York against Jose A. Rodriguez, Indictment 2010-67.

You are Mr. Rodriguez?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Rodriguez, an indictment has been handed up to the Court which I've unsealed which charges you with 12 separate counts. The District Attorney has now served you with a copy of that indictment.

The first count of the indictment charges you with operating as a major drug trafficker, a class A-1 felony. The remaining 11 counts charge you with criminal sale of a controlled substance in the third degree, each of those counts allegedly taking place on separate days, each being a Class B felony, each alleging that you, while acting in concert with another, sold heroin, all of this allegedly taking place in Otsego County.

You have the right to be represented by an attorney in connection with this indictment. You have the right to an assigned attorney if you cannot afford to hire one yourself.

You have the right to an adjournment so that

you can secure legal representation.

Do you understand those things?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want an attorney to represent you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have the financial ability to hire one?

THE DEFENDANT: No, sir.

THE COURT: All right. I will assign the County Public Defender to represent you. You will be required to fill out a financial affidavit listing your assets to insure that you are eligible.

Mr. Muehl?

MR. MUEHL: Judge, the Public Defender is definitely going to be disqualified in this case based on their witnesses, for the Court's information.

THE COURT: All right. Then I'll assign someone off the 18-b panel.

Mr. Muehl, do you want to file anything today?

MR. MUEHL: Judge, I do want to file today because we probably won't be back in court before the holidays, so I'll file today and I'll mail to whoever is assigned to represent Mr. Rodriguez.

THE COURT: Go ahead.

MR. MUEHL: At this time I have a Statement of Readiness, Demand for Alibi. I serve a copy on Mr. Rodriguez, file an original and copy with the court clerk.

THE COURT: Mr. Rodriguez, to preserve the record are you going to enter a plea? I'm going to enter a plea of not guilty on your behalf to the indictment. We'll adjourn further proceedings until such times when your attorney is present and can speak for you. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Muehl, do you want to be heard on the issue of bail?

MR. MUEHL: Yes, Judge. Mr. Rodriguez has a prior felony conviction out of this court, criminal sale of controlled substance, four or five years ago, so he would be a second felony offender.

He's also facing attempted murder charges in Bronx County and also an assault in Bronx County.

The People's evidence, the People's case is strong in this matter. There has been a lot of work that's gone into it over the past year.

But more importantly, the defendant has absolutely no ties to Otsego County. He has no family in the area. He owns no real property. As far as the

People know, he's not employed other than in the drug business.

The defendant has access to a lot of money. It's our belief that he has a lot of money, and therefore he can make a substantial amount of bail.

But the problem is, Judge, that he attempted to escape. He did escape and he was caught in New Jersey on a warrant. He escaped from the federal marshals. He stole their car. He was eventually captured in the State of Vermont and brought back. So he's proven himself to be a flight risk.

In addition, he faces over a hundred years if convicted on all the charges in this indictment. This defendant poses a serious substantial flight risk and as he has access to a lot of money, no ties to the community, based on that the People request that the defendant be remanded without bail on these charges.

THE COURT: Mr. Rodriguez, do you want to speak to that today or do you want to wait until you receive legal advice and representation?

THE DEFENDANT: I want to wait, sir.

THE COURT: Okay. The District Attorney makes a compelling argument and I believe it is appropriate based on the flight risk that Mr. Rodriguez represents to remand him without bail at this juncture. I will do

so.

When is our next County Court date?

THE CLERK: January 7th. That's going to be really close on getting an order to produce, so we have the 14th.

THE COURT: Mr. Muehl, is he going to be kept locally or does he have to be returned downstate?

MR. MUEHL: He has to be returned to the Bronx, Judge.

THE COURT: So that's a good point raised by our clerk, that we need time to arrange for transportation. So we'll go with mid-January for the next date. That will be to complete the arraignment with Mr. Rodriguez's counsel present.

I'm sorry. What was the date?

THE CLERK: The 14th.

THE COURT: All right. So we're adjourned until January 14th of 2011.

Okay, Mr. Rodriguez, that is all for today.

THE DEFENDANT: Thank you, sir.

(Whereupon, the proceedings in the above-entitled matter were adjourned at 11:05 a.m., this date.)

* * * * * *

STATE OF NEW YORK

COUNTY OF OTSEGO

CERTIFICATION

I, Althea D. Beagen, Senior Court Reporter, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes taken in the above-entitled matter on the date noted in the heading hereof.

Althea D Beagen

Althea D. Beagen, Senior Court Reporter

Date: June 9, 2015

Appendix - H

STATE OF NEW YORK COUNTY OF OTSEGO
COUNTY COURT

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THE PEOPLE OF THE STATE OF NEW YORK,

DEC 22 2011

NOTICE OF APPEAL
Indictment No.: 2010-067

-against-

JOSE RODRIGUEZ,

Defendant.

----------x

PLEASE TAKE NOTICE that the defendant, Jose Rodriguez, hereby appeals to the Appellate Division of the Supreme Court, Third Judicial Department, from the judgment of conviction and sentence imposed upon the defendant in the County Court, County of Otsego, rendered on the 22nd day of December 2011, and from each and every part thereof and from each and every intermediate order made therein.

Dated: Troy, New York
December 22, 2011

Yours, etc.,

MATTHEW C. HUG, ESQ.
Attorney for Defendant
Rensselaer Technology Park
105 Jordan Road
Troy, New York 12180
T: (518) 283-3288
F: (518) 283-7649

TO:

JOHN MEUHL, ESQ.
Otsego County Dist. Attorney
197 Main Street
Cooperstown, NY 13326

CHRISTY BASS
Otsego Co. Chief Clerk
197 Main Street
Cooperstown, NY 13326
(2 copies)

KATHY SINNOTT GARDNER
Otsego County Clerk
197 Main Street
Cooperstown, NY 13326
(2 copies)

R002

STATE OF NEW YORK
COUNTY COURT : COUNTY OF OTSEGO

THE PEOPLE OF THE STATE OF NEW YORK

SEALED INDICTMENT

-against-

Indictment No.: 2010-067

JOSE A. RODRIGUEZ,

Defendant.

COUNT ONE

The Grand Jury of the County of Otsego, by this Indictment, accuses the defenda **JOSE A. RODRIGUEZ,** of the crime of **OPERATING AS A MAJOR TRAFFICKER,** a Class A-I Felor in violation of Section 220.77, Subdivision 1 of the Penal Law of the State of New Yo committed as follows:

That the defendant, **JOSE A. RODRIGUEZ,** between the 1st day of September, 20C and the 1st day of September, 2010, in the City of Oneonta, County of Otsego and Stat of New York, did act as a director of a controlled substance organization during whicl period the organization sold one or more controlled substances, and the proceed collected or due from such sales had a total aggregate value of seventy-five thousanc dollars ($75,000) or more.

COUNT TWO

The Grand Jury of the County of Otsego, by this Indictment, accuses the defendant, **JOSE A. RODRIGUEZ,** of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE,** a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Law of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ,** on or about the 18th day of March, 2009, in the City of Oneonta, County of Otsego and State of New York, did, acting in concert with another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT THREE

The Grand Jury of the County of Otsego, by this Indictment, accuses the defendant, **JOSE A. RODRIGUEZ,** of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE,** a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Law of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ,** on or about the 19th day of March, 2009, in the City of Oneonta, County of Otsego and State of New York, did, acting in concert with another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

R003

COUNT FOUR

The Grand Jury of the County of Otsego, by this Indictment, accuses the defend **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal l of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 5th day of May, 2009, in City of Oneonta, County of Otsego, and State of New York, did, acting in concert w another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT FIVE

The Grand Jury of the County of Otsego, by this Indictment, accuses the defendar **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN TI THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal La of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 2nd day of Septembe 2009, in the City of Oneonta, County of Otsego and State of New York, did, acting i concert with another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT SIX

The Grand Jury of the County of Otsego, by this Indictment, accuses the defendant, **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Law of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 21st day of January, 2010, in the City of Oneonta, County of Otsego and State of New York, did, acting in concert with another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT SEVEN

The Grand Jury of the County of Otsego, by this Indictment, accuses the defendant, **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Law of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 21st day of April, 2010, in the City of Oneonta, County of Otsego and State of New York, did, acting in concert with another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT EIGHT

The Grand Jury of the County of Otsego, by this Indictment, accuses the defenda **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN T THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Lc of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 26th day of April, 2010, the City of Oneonta, County of Otsego and State of New York, did, acting in concert wi another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT NINE

The Grand Jury of the County of Otsego, by this Indictment, accuses the defendan **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN TH THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Lav of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 4th day of May, 2010, in the City of Oneonta, County of Otsego and State of New York, did, acting in concert with another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT TEN

The Grand Jury of the County of Otsego, by this Indictment, accuses the defendant, **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Law of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 3rd day of June, 2010, in the City of Oneonta, County of Otsego and State of New York, did, acting in concert with another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT ELEVEN

The Grand Jury of the County of Otsego, by this Indictment, accuses the defendant, **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Law of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 15th day of June, 2010, in the City of Oneonta, County of Otsego and State of New York, did, acting in concert with another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

COUNT TWELVE

The Grand Jury of the County of Otsego, by this Indictment, accuses the defenda **JOSE A. RODRIGUEZ**, of the crime of **CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN T THIRD DEGREE**, a Class B Felony, in violation of Section 220.39, Subdivision 1 of the Penal Lc of the State of New York, committed as follows:

That the defendant, **JOSE A. RODRIGUEZ**, on or about the 8th day of July, 2010, in tl City of Oneonta, County of Otsego and State of New York, did, acting in concert wi another, knowingly and unlawfully sell a narcotic drug, to wit: heroin.

John M. Muehl
Otsego County District Attorney

H. Karl Chandler, Foreperson
Indictment No.: 2010-067
Filed: October 1, 2010

R006

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE A. RODRIGUEZ,

Defendant.

DEMAND FOR BILL OF PARTICULARS

Indictment No. 2010-067

Sir:

PLEASE TAKE NOTICE, that the Defendant, Jose A. Rodriguez, hereby requests a bill of particulars containing the following requested factual information without which the Defendant cannot adequately prepare or conduct his defense.

1. State the date, exact time and place or places of the commission of each crime charged and of the Defendant's arrest respectively for each crime charged.
2. Describe with particularity the date, time and place of the recovery and seizure of any property from the Defendant or person(s) which whom he was acting in concert, or from what is claimed to have been an area under his dominion and control and that is the subject of these proceedings, regardless of whether the Prosecution intends to offer said property at trial or hearing. Describe with specificity who was present at the time of each seizure and the exact location of each item of property when recovered. Provide a complete inventory of every items of property seized.
3. Set forth with specificity a chronology of events that relates to the claimed probable cause that purportedly supported the arrest of the Defendant.
4. Set forth all evidence regarding identification of the Defendant, Jose A. Rodriguez, as a perpetrator of the offenses charged that will be offered at trial.

5. As to each charge, indicate whether the People contend that the Defendant acted as a principal or accomplice, the specific factual manner of any such claimed conduct and the substance of his personal behavior, as to each count of the indictment.

With respect to the First Count of the Indictment:

a. Identify with specificity the personal actions and conduct of Jose A. Rodriguez for which criminal responsibility is attributed.

b. Identify what acts committed specifically by the Defendant and of those with whom he was "acting in concert with" constitute the crime of Operating as a Major Trafficker.

c. State with particularity a clear factual narrative of the conduct of Jose A. Rodrigues which constitutes the crime of Operating as a Major Trafficker.

d. State with particularity the acts or words of any witness or person who facilitated the actions of Jose A. Rodriguez.

e. State with particularity the name(s), address(es) and dates of birth of each and every person who observed the incidents which allegedly constituted Operating as a Major Trafficker.

With respect to each Count of the Indictment two through twelve:

a. Identify with specificity the personal actions and conduct of Jose A. Rodriguez for which criminal responsibility is attributed.

b. Identify what acts committed specifically by the Defendant and of those with whom he was "acting in concert with" constitutes the crime of Criminal Sale of a Controlled Substance in the Third Degree.

c. Identify the exact amount of cash, and denominations, if known, that was exchanged in the reported sale of drugs for each count of the indictment.

d. State with particularity the name(s) and address(es) of each individual alleged to have acted in concert with the Defendant.

PLEASE TAKE NOTICE that pursuant to CPL § 200.95, you are hereby required to file and serve the bill of particulars upon the undersigned within fifteen (15) days of the service of this Demand, or as soon thereafter as is practicable.

Dated: February 13, 2011

Tracy A. Donovan Laughlin, Esquire, of counsel
Harvey J. Slovis, Esquire
Attorney for Jose A. Rodriguez, Defendant
77 Alden Street, P.O. Box 217
Cherry Valley, New York 13320
(607) 264-9988

STATE OF NEW YORK
COUNTY COURT : COUNTY OF OTSEGO

MAR 10 2011

BY: .....

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE A. RODRIGUEZ,

Defendant.

BILL OF PARTICULARS

Indictment No.: 2010-067

The People of the State of New York, as and for a Bill of Particulars herein, state as follows: they never identify count#1 as ask for in the demand For bill of particulars

* (1) COUNT ONE: Unknown other than as set forth below in connection with counts two through twelve of the Indictment.

Jerry O'DELL
COUNT TWO: March 18, 2009 at approximately 3:50 p.m., at 571 Southside Drive, Oneonta, New York.

Jerry O'DELL
COUNT THREE: March 19, 2009 at approximately 6:50 p.m., at 571 Southside Drive, Oneonta, New York

~~*~~ COUNT FOUR: May 5, 2009 at approximately 6:50 p.m., at B.J.'s Wholesale Club, State Highway 23, Oneonta, New York.

Rebecca
start X COUNT FIVE: September 2, 2009 at approximately 4:50 p.m., at 4968 State Highway 28, Oneonta, New York.

Rebecca
X COUNT SIX: January 21, 2010 at approximately 8:20 p.m., on Walnut Street, Cooperstown, New York.

Mark Weinmuller - C.I. w/o Moore
COUNT SEVEN: April 21, 2010 at approximately 9:30 p.m., at 60 Church Street, Oneonta, New York.

COUNT EIGHT: May 26, 2010 at approximately 10:00 p.m., at 14 Washington Street, Oneonta, New York.

R010

Jessica Gaston
*COUNT NINE: May 4, 2010 at approximately 5:30 p.m., at 3 Grand Street, Oneonta, New York.

COUNT TEN: June 3, 2010 at approximately 9:30 p.m., at 3 Gardner Place, Oneonta, New York.

Leo moore
*COUNT ELEVEN: June 15, 2010 at approximately 10:10 p.m., in the parking lot across from 187 Chestnut Street, Oneonta, New York.

dismissed COUNT TWELVE: July 8, 2010 at approximately 10:45 p.m., at the Holiday Inn parking lot, State Highway 23, Oneonta, New York.

The defendant was arrested pursuant to a Sealed Indictment on all charges on December 17, 2010 at approximately 4:00 a.m., at Rikers Island, East Elmhurst, New York.

2. None.

3. Refused as an improper request pursuant to CPL §200.95.

4. Refused as an improper request pursuant to CPL §200.95.

5. As to whether the defendant acted as a principal or accomplice, see Indictment for all counts.

As to the defendant's conduct as to each count:

COUNT ONE: See Indictment.

COUNTS TWO THROUGH TWELVE: The defendant requested, commanded, importuned and intentionally aided another individual to sell heroin to another person.

COUNT ONE

a. Between September 1, 2009 and September 1, 2010, the defendant did organize and lead a group of individuals more than four in number for the purpose of selling heroin on his behalf, and during that period the proceeds collected from

the sale of heroin was over $75,000.

b. See "a" above.

c. See "a" above.

d. The individuals sold heroin to other people for the defendant.

e. Refused as an improper request pursuant to CPL §200.95.

COUNTS TWO THROUGH TWELVE

a. The defendant supplied heroin to individuals that sold the drug on his behalf.

*The defendant would receive orders for heroin via telephone and would direct the buyers to a specific location. He would then call an accomplice, to whom he had supplied heroin for sale, and direct them to the buyers location to sell the heroin to the buyer.

* In some instances, the accomplice was supplied heroin for sale by the defendant and was simply directed to sell the same without the defendant being involved in setting up and conducting the actual sale of heroin.

b. See "a" above.

c. Refused as an improper request pursuant to CPL §200.95.

d. Refused as an improper request pursuant to CPL §200.95.

Dated: March 9, 2011

JOHN M. MUEHL
Otsego County District Attorney
197 Main Street
Cooperstown, New York 13326

TO: TRACY A. DONOVAN LAUGHLIN, ESQ.
Attorney for Defendant
Post Office Box 217
Cherry Valley, New York 13320

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

THE PEOPLE OF THE STATE OF NEW YORK

–against–

JOSE A. RODRIGUEZ,

Defendant.

NOTICE OF PRETRIAL MOTIONS

Indictment No. 2010-067

PLEASE TAKE NOTICE that, upon the Affirmation of Tracy A. Donovan Laughlin, Esquire, duly affirmed the 26th day of February, 2011, upon the indictment against the above-named Defendant, Jose A. Rodriguez, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a special term thereof, to be held at the County Court, in the Village of Cooperstown, on the 18th day of March, 2011, at 9:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an Order as follows:

A. Pursuant to Section 210.30 of Criminal Procedure Law to inspect the Grand Jury minutes and, pursuant to Section 210.20 of the Criminal Procedure Law, an order to dismiss or reduce the indictment.

B. Pursuant to CPL 210.20(1)(b) dismissing Count One of the indictment, because the evidence present to the grand jury was not legally sufficient to establish the offense of Operating as a Major Trafficker

C. Pursuant to CPL 240.20(1)(h) and Brady v. Maryland, 373 U.S. 83 to furnish (give) the Defendant with all evidence favorable to the defense.

D. In the interests of judicial economy and in order to effectively prepare a defense, an order directing the District Attorney to turn over Rosario material to the Defendant in advance of trial.

E. Pursuant to People v. Sandoval, 34 NY2d 371, People v. Ventimiglia, 52 NY2d 350, and People v. Molineau, 168 NY 264 an order prohibiting the People from offering against the Defendant on their direct case, in cross-

R013

examination, or an rebuttal, any evidence of purported prior or subsequent acts at the trial of this Indictment; a hearing to determine the admissibility thereof; or in the alternative, an Order directing disclosure pursuant to CPL 240.43.

E. Pursuant to People v. Wise, 46 NY 2d 321, and People v. Misuis, 47 NY 2d 979, a hearing to inquire whether probable cause existed for the arrest of the Defendant.

F. Pursuant to Huntley and Criminal Procedure Law § 710, suppressing any and all incriminating statements allegedly procured from the Defendant.

G. Pursuant to CPL, Article 240, an order compelling discovery.

H. Pursuant to CPL 200.95, compelling the district attorney to file a bill of particulars with the Court and to serve a copy thereof upon the defendant.

I. Pursuant to CPL 710.30(3) and People v. Lopez 84 NY2d 425, an order precluding any oral or written statements allegedly made by Jose A. Rodriguez, upon the grounds that no notice was given of any such statements.

J. Pursuant to CPL 710.30(3) and People v. Lopez 84 NY2d 425, an order precluding any potential testimony concerning an identification of Defendant as the person who allegedly committed the offenses herein on the ground that no notice was given of any such identification.

Is granted <— K. An order providing for a hearing to determine the audibility of any recorded conversations which may be admitted as evidence against Jose A. Rodriguez.

L. Pursuant to People v. Darden, 34 NY2d 177, an order providing for an *in camera* hearing to examine the confidential informant.

M. An order reserving the right of defense counsel to file such other and further motions as may be deemed necessary upon receipt of discovery demands made upon the People.

N. Granting the Defendant such other, further, and different relief as to this Court seems just, proper and equitable.

R014

PLEASE TAKE NOTICE that pursuant to CPLR §2214(b) answering papers, if any, must be served at least seven (7) days before the time the motion is noticed to be heard.

Dated: February 26, 2011

Respectfully submitted,

Tracy A. Donovan Laughlin, Esquire, of counsel
Harvey J. Slovis, Esquire
Attorney for Jose A. Rodriguez, Defendant
77 Alden Street, P.O. Box 217
Cherry Valley, New York 13320
(607) 264-9988

TO: John M. Muehl, District Attorney
Otsego County Office Building
197 Main Street
Cooperstown, New York 13326

Office of the Otsego County Court Clerk
Otsego County Office Building
197 Main Street
Cooperstown, New York 13326

R015

Appendix – I

Q. Okay.

A. And then I met him again in the spring of 2009.

Q. Where did you meet him? How did you get back in touch with him in the spring of 2009?

A. I actually got back in touch with him through Slim.

Q. Who is slim?

A. Slim, Josh. I don't know what his last name is.

Q. Okay. What did you know the defendant as? What did you call him?

A. I called him Flip.

Q. Flip? This is the person that's sitting here?

A. Yep.

Q. And how many times have you seen the defendant?

A. A lot.

Q. You say a lot. How often?

A. I would see him sometimes a couple times a week. Sometimes less than a week.

Q. And where did you see him?

A. I mostly saw him down in the Bronx.

Q. Does he look the same today as he did the last time you saw him?

A. Yeah.

Q. Anything different about him?

A. Glasses.

Q. Did ever see him wear glasses before?

A. No.

Q. So what was your purpose for meeting Flip with Josh?

A. Josh needed a ride down to the city to pick up drugs and I had a car, so I took him down there.

Q. So you gave Josh a ride to New York City?

A. M-m h-m-m.

Q. That was in the spring of 2009?

A. Yep.

Q. Do you remember when?

A. April? I'm not exactly sure.

Q. And what did you and Josh do? Where did you go in New York City?

A. We went to the Bronx.

Q. And what did you do when you got to the Bronx?

A. We met up -- we went to a hotel, met up with Flip.

Q. You went to a hotel?

A. Yep.

Q. And then you said you met up with Flip. What do you mean by that?

A. We met Flip at the hotel with a couple other people.

Q. The defendant here?

A. Yes.

Q. And he came to the motel?

The answer is yes or no.

A. I never spoke with the US Attorneys Office.

Q. Isn't it a fact that the DEA did not want to cooperate with you, yes or no?

A. I personally didn't speak to them and ask for their help.

Q. Is it a fact that the U.S. Marshals did not want to cooperate with you, yes or no?

A. No, they cooperated. That's how he was located.

Q. In New York, in the investigation, not in the arrest, in the investigation they wouldn't help you, correct?

A. I didn't ask for their help during the investigation.

Q. Why did you just say a minute ago that they all helped when none of them helped?

A. They helped. You asked if I was in contact with them and I was in contact with them during the arrest.

Q. I'm not talking about the arrest. I'm talking about accumulating evidence.

A. I wasn't in contact with any outside agencies federally or down in New York City for the investigation. It was all local county and state police agencies that put this investigation together.

Q. Where did phone calls come from?

A. Which phone calls?

Q. That this person, whoever he is, Flip made, where did they come from? What city?

A. What specific phone calls? What are you talking about?

Q. Are you aware that people are alleging that a man in the Bronx made phone calls to Oneonta to set up drug deals? Are you aware of that?

A. I'm aware that Jose Rodriguez made phone calls. I was unaware of his whereabouts. I assume he's from New York City, that's where he was calling from. But if he was in another town I don't know. But I know it was him that made phone calls.

Q. Did you just say you assume?

A. I said that I assume he's back in his home town, but I don't know where he is.

Q. Did you go to New York and see him make any calls?

A. No.

Q. Did you go to New York and see him with any drugs?

A. No.

Q. You're talking about your drug addicts, your people who are saying it to you, that's when you say you know?

A. No, I know because I recognized his voice when we did controlled calls in two investigations.

MR. SLOVIS: Objection, your Honor.

MR. MUEHL: He answered his question, Judge.

THE COURT: Mr. Slovis, you asked the question.

CROSS-EXAMINATION

BY MR. SLOVIS:

Q. You recognized his voice? Are you an audiologist?

A. No.

Q. Was any test of his voice ever done?

A. No.

Q. So how in the world can you get up on this stand and say to this jury that you recognize a voice when you're not an expert?

A. Because I think when you have somebody, you talk with somebody you just recognize what their voice sounds like.

Q. Oh, you do? You do recognize a voice?

A. Yes.

Q. On a phone?

A. Yes.

Q. Uh-huh. Did you tell anyone this?

A. It's a recorded phone call.

MR. SLOVIS: I move for a mistrial. That's not in response to the question, your Honor.

THE COURT: I'll have the jury brought back to the jury deliberation room for a moment, please.

(The trial jury exits the courtroom.)

THE COURT: I'm going to ask the last couple of questions and answers be read back, okay? Go ahead.

(The reporter read the record.)

MR. SLOVIS: I am so upset. I have come up to the bench no less than five to six times and told you that you made a ruling that since he didn't give me notice, that he planned not to use those --

Can I have this witness taken out of the room?

THE COURT: Sure. Sir, why don't you have a seat downstairs.

(The witness steps down and exits the courtroom.)

THE COURT: Go ahead.

MR. SLOVIS: I asked you and I pointed it out to you and I have been so careful not to bring out these tapes. I didn't ask him anything about tapes. And it is the prosecution's duty to follow the law just like it's my duty to follow the law. You have to prepare your witness and say - because I used to prosecute, I was good - and say that you are not to mention tapes.

Now he gets the best of both worlds. He has this jury thinking that he has tapes, and I'm screwed in this case now because there are tapes which they're not going to hear, but they're going to assume that he heard the tapes and therefore that's Jose Rodriguez.

He had a choice, Judge, to put in those tapes and he told me, your Honor, I'm not doing it because I don't want you to know, I don't want you to know who the witnesses are. Now, this is not correct. It's not right. And it's pathetic that this happened after so many warnings not to get into these tapes. It's his job to prepare. Don't do this and sand bag a defendant in a case like this. This is vital information. I will ask for a curative instruction in the alternative to a mistrial. If you want to hear it --

THE COURT: Mr. Muehl, do you want to respond?

MR. MUEHL: Judge, I didn't bring out any facts about tapes. Mr. Slovis and I have told these guys the tapes aren't being introduced. You know. But I haven't introduced any tapes. And even though the tapes aren't introduced, these calls were listened to by this witness. He can testify as to what he heard over that telephone call during the course of a criminal transaction. I haven't introduced any tapes. This Court hasn't ruled on it. I told the Court I wasn't going to introduce any tapes and I haven't introduced, offered any tapes. But he's sitting here hounding this witness, how he can know what this witness sounds like and on and on and on over the phone and it's on the tape. I didn't expect him to say it, but it's based on

his questioning of this witness saying how could it be possible you expect this jury to believe. I didn't introduce any tape and the bottom line is the jury can be told to disregard any tapes that there may be. But the content of those tapes, who, what, he can testify. What he heard is admissible anyway because they're made in the course of a criminal transaction.

MR. SLOVIS: No, they're not. They're not, because you didn't give me notice. It is the clearest question in the world. You could have produced those tapes.

MR. MUEHL: They're -

MR. SLOVIS: They were devastating evidence for you.

MR. MUEHL: There need be no notice of a 710.30 nature when the voluntariness of the statement is unquestionable, which would be it, would be in the course of a criminal transaction.

MR. SLOVIS: Are you telling us now that you intend to use those tapes?

MR. MUEHL: No.

MR. SLOVIS: You can't have it both ways. You can't have a guy testify about tapes and you can't put them in. So what am I supposed to do?

MR. MUEHL: There is a difference between a

person testifying as to what they heard and playing what they heard from a tape in court.

MR. SLOVIS: No, he said he listened to tapes and that's how he did it. The jury knows now there's tapes, period. Forgot about anything else. The jury knows there's tapes. So what am I supposed to do, say there's tapes? Well, where are they? I can't cross-examine that. I relied on the fact that it wouldn't be brought out. And I assume that he had her on the phone, not on a tape. He said on the phone. He said on the phone. I never thought he was going to say tape.

MR. MUEHL: I didn't either, Judge. But it's clear from the discovery that I gave Mr. Slovis that these preliminary phone calls from the confidential informant to Flip are recorded. They're on speaker phone and they're recorded.

MR. SLOVIS: I know they're recorded, sir, but you didn't put them in, sir.

MR. MUEHL: I didn't, and I still haven't. I haven't offered them.

THE COURT: Okay. I'm not going to grant a mistrial. The witness's answer was cut off immediately. I'll give a curative instruction that they're to -- I'm going to strike that answer. I'm going to tell them not

to consider it. That's not part of this case. If you have a specific curative instruction you want me to give, bring it with you when we reconvene. I don't think this is so prejudicial that it requires a mistrial. The answer was not totally unresponsive to this question or line of questioning, the last question asked about a tape.

MR. SLOVIS: Judge --

THE COURT: I said it wasn't totally unresponsive. It wasn't directly responsive. But your line of questioning certainly brought his ability to recognize the voice into issue. If he was going to continue to testify there was a recorded, you know, the call is recorded, I listened to it five times to be sure -- I don't know what his answer was, but his answer was not totally unresponsive to your question. We didn't get his full answer.

So I will give a curative instruction and we'll proceed with the trial.

I would also ask everyone just to take a deep breath and take a step back. I know that each of you care passionately about your case. But no personal attacks on opposing counsel are ever allowed in my court and accusing someone of sandbagging when -- especially under these circumstances is just inappropriate. I'll

chock that up to zealous advocacy and I'm not going to make a bigger deal of this, but I just want everyone to be clear that as professionals I don't allow personal attacks on each other.

At this point I'm going to bring the jury back in. I'm going to give them admonitions and tell them I'll see them Monday morning at 8:30.

MR. SLOVIS: Judge, I love him, the prosecutor. He's been infinitely fair with me. I never have said a word bad about him. I was sandbagged by the witness, not by him. And I meant him no disregard. Respect! Respect! I can't think of a nicer guy than him. And if I said it and it sounded like that way, I apologize.

THE COURT: That's fine.

MR. SLOVIS: But before we bring the jury in --

THE COURT: M-m h-m-m?

MR. SLOVIS: I want you to strike -- I know exactly what I want, all his testimony about listening to his voice at all.

THE COURT: I can't do that. I'll strike the last answer.

MR. MUEHL: Your Honor, I know you have instructed me not to speak to my witnesses at all about

their testimony between on and off the witness stand and I certainly respect that, but I would ask permission to speak to him on the limited issue that I don't want him mentioning tapes anymore.

THE COURT: I'm going to allow you to speak to any police witnesses --

MR. MUEHL: I have already spoken to them, Judge.

THE COURT: -- who have knowledge of these recorded calls and tell them that they are to scrupulously avoid mentioning them. If they feel that -- I know you're not going to ask any question. If they feel that defense counsel has asked a question that will allow them to answer I want you to direct them --

MR. MUEHL: Wait until I approach.

THE COURT: Absolutely. But they're not going to decide if defense counsel has opened the door to allow it. I'll make that decision. I don't expect that to happen either, but I don't want things, witnesses to think they can jump the gun and give that answer.

MR. SLOVIS: I know you're trying to give a Solomon like decision, but now it is a factual thing that he never listened outside the tapes to the voice.

MR. MUEHL: That's not it, Judge. They were recorded, but he listened to them while they were being

recorded. If he wanted to ask him those questions on the stand out of the presence of the jury, that's fine. That's what his answer would be.

MR. SLOVIS: I have no problem if he said -- well -- no, I have a problem if it's anything to do with the tapes. If he listened to some conversation like the other officers where he heard part of someone directing someone to go somewhere is much different than listening to a tape. I'm worried about this listening to his voice and I need somehow to say that, you know, he heard a voice and it was the same voice, but he can't say it's this guy's voice.

THE COURT: He's testified he knew the defendant prior to the situation and he recognized his voice. I mean that's his testimony. Like it or not, that's what he said.

MR. SLOVIS: I don't like it.

THE COURT: You have certainly attacked his credibility on this issue, his ability to identify the voice. You can continue to do so being within the confines of not bringing into issue his recorded calls. Of course if you did, then that's all a separate issue, but I don't think that you meant to. I don't think that you completely did, and I don't think that you'll do that in the future.

All right. Let's have the jury brought in. Do you want me to instruct them on that immediately or wait until Monday so that it doesn't appear to be that important of an issue?

MR. SLOVIS: No, I want you to while it's fresh in their minds, instruct them to disregard any testimony about recorded calls.

THE COURT: Okay. Fair enough.

MR. SLOVIS: And they're not in this case, period.

THE COURT: Period. Have them brought in, please.

(The trial jury enters the courtroom.)

THE COURT: Okay. Ladies and gentlemen of the jury, thank you for your patience. You have now returned to the courtroom. Mr. Rodriguez, defense counsel, Mr. Slovis and District Attorney Muehl are all present.

We're going to wrap-up for the day at this juncture. I do have a standing open objection to the witness's last answer. I'm going to strike that answer from the record. I've obviously sustained the objection.

The answer dealt with a purported recording of a call. That answer was objected to and properly so and

familiar with from Oneonta, and the other girls that came up, it was pretty much all girls that we met.

Q Who are the girls that you knew?

A I think one of the girls' name was Laura. She was dating somebody that I knew only as Dave. And I'm not sure if I ever met Julia Hidek, but it was quite possible she was also there. It was a little while ago, so it's kind of hard for me to remember. So much has gone on since then.

Q All right. So after you handed out the free samples you started at some point actually distributing heroin in Albany?

A Correct.

Q And you believe that was the end of 2008 or beginning of 2009?

A Right. Maybe even closer to summer of 2009.

Q Okay. When you first started heroin were you still working at another job, or no?

A Yes, when I first started I was still working with Weather Guard.

Q And for how long were you able to continue to work for both the defendant and Weather Guard?

A I was able to work until the business really started to take off.

Q Which business?

A The business being selling heroin for Jose. When the

clientele really reached a certain point I wasn't able to maintain a steady employment and working for the defendant at the same time selling drugs.

Q And how long did it take for it to get to that point from the time you started selling it to the time when you had to work at it full time?

A It didn't take very long at all, probably only a matter of a few months maybe, if that.

Q And when you started selling heroin how much were you selling in a day or a week?

A In the beginning it was a little bit slow. We started off just I think it was just a few bundles every other day. And then within a week we were up to, you know, ten to 15 every other day.

Q Okay. And at the peek of your business up there how much heroin were you selling a day?

A I would say between 30 and 40 every day. By the very end when I -- when I -- before I stopped working, before I came to Oneonta it was at that point.

Q Thirty or 40?

A Bundles.

Q That's 300 to 400 bags of heroin?

A Yeah, about that.

Q And how often?

A Every other day.

Q And how would you get the heroin in Albany? Did you go get it or how did you get it?

A Sometimes I would go get it myself.

Q Where would you go?

A I would go to New York City, Queens or the Bronx.

Q And who would you meet?

A I would meet Jose.

Q Personally?

A Yes, absolutely.

Q And where would you go to get the drugs?

A Where would I meet him?

Q Yeah.

A Different areas in the city. There is a underground parking garage I went to, 24-hour Western Union place that was also in the Bronx.

Q And how many trips did you make to New York City?

A Overall how many have I made?

Q Yes.

A I would say probably between 40 and 50 I would imagine.

Q Well, I don't want you to imagine.

A Well, no. Yeah, absolutely. I mean 30 or 40 at the very least.

Q Okay. And did you -- every time did you bring heroin back?

A Yes.

Q And how much would you normally bring back?

A Depending on what Oneonta -- the way that it worked is if sometimes I would have to bring some here, drop some off in Oneonta on my way to Albany. Other times if Oneonta was already supplied I would just go straight to Albany. But it always varied on the amount depending on the demand at the time.

Q To your knowledge were there other people supplying heroin from the defendant to Oneonta?

A Yes.

Q Okay. Sometimes you did as well?

A Yes.

Q Now, how much would you normally bring back for Albany itself?

A At one time for Albany I would bring back just enough for a few days. I would say on average I would bring back 20 bundles.

Q Twenty bundles?

A Right, on an average.

Q That would be how many bags?

A Twenty times 200, so what is that, 2000?

Q Twenty times 200 is 4000.

A Okay.

Q So there's a hundred packs in a bundle?

A Right.

Q And what is the most you ever brought back that you can

remember?

A I would say that the most I ever brought back was probably -- the most I ever brought back was -- there was one time when we brought back close to I think it was around 180 I would say.

Q 180 what?

A Bundles.

Q And did all that go to Albany or did some go elsewhere?

A No, it got distributed to Oneonta and Albany, and I even think some of it went -- got distributed from there to other locations.

Q Now, was anybody else selling in Albany other than you?

A At first, no. I was selling by myself. But as the -- you know, as business picked up I could no longer do it on my own. He had sent up a couple people to try to help out and try to meet the supply and demand that was going on at the time.

Q And in Albany how did the sales work? How did you make a sale of heroin in Albany?

A Typically what that would consist of is someone would either call, somebody would call my phone and I would have to call Jose and let him know what was going on before I even made the sale or they may have called him directly.

Q And what happened if they called him directly?

A Then I would get a phone call letting me know where to go and meet him.

Q For how long did you sell heroin in the Albany area?

A I sold heroin in Albany for about I would say a year and a half to two years probably, maybe. Yeah, that's about right.

Q And when you left Albany -- you said at some point you did leave Albany?

A Yes, I did.

Q Why did you leave Albany?

A I left Albany to -- on Jose's request to come to Oneonta to try to help out, you know, in Oneonta. There was some things that were going on in Oneonta that he wasn't happy with. The people that he had distributing in Oneonta weren't following his instructions and he thought that --

MR. SLOVIS: Objection. This calls for hearsay.

MR. MUEHL: He had to get it from somewhere.

THE COURT: How do you know this, sir?

THE WITNESS: How?

THE COURT: How do you know what you're telling us right now?

THE WITNESS: Because it was the defendant who told me --

MR. SLOVIS: Statement against interest.

THE COURT: Objection overruled. You can continue.

DIRECT EXAMINATION

BY MR. MUEHL:

portion of the case is over.

MR. SLOVIS: It is, Judge.

THE COURT: Do you need to take up anything out of the presence of the jury?

MR. SLOVIS: Yes.

THE COURT: Okay. Folks, thank you. Please be escorted back to the deliberation room, but do not start your deliberations yet.

(The trial jury exited the courtroom.)

THE COURT: Mr. Slovis, the jury has now left the courtroom.

MR. SLOVIS: After the entire case I move to dismiss count one through count 11, and specifically as to count one it is my impression that every person who testified as to count one was, in fact, a co-conspirator. Bers was not a co-conspirator and I don't think anyone else who was not a co-conspirator testified. So my point is that beyond a reasonable doubt, after the entire case, the People have failed to present credible, believable evidence beyond a reasonable doubt as to counts one through 11.

THE COURT: Mr. Muehl?

MR. MUEHL: Judge, I see nothing that has happened on rebuttal or the defendant's case that would have any effect on the Court's initial ruling in connection with the indictment, that there's still just a question of fact for

the jury to decide. They can either belief Mr. Krone or don't have to.

As to count one, we have testimony from Bers who testified that, in fact, he drove people around during this time period who sold drugs for the defendant. We also have Leo Moore who allegedly buys through the defendant. And this is all during the time period of count one. So there is corroboration there. There is a nexus between these drug deals. There's the testimony of the people who were working for Mr. Rodriguez has been corroborated. The corroboration need not of itself prove the case. It doesn't need to tend to prove the case. All it needs to do is connect the defendant to the crime, and I submit that that's been done.

MR. SLOVIS: One more thing. Counts two, three and four are before the date of the legislative mandate of the 75,000, so I don't see how they can go to the jury. If you see the date the law hadn't been passed yet.

MR. MUEHL: It's a -- it was a continuous operation, your Honor.

MR. SLOVIS: It doesn't matter. The actions they're charging happened before the date of the crime and therefore cannot be submitted to the jury, most respectfully.

MR. MUEHL: I disagree, your Honor, because the dates that the jury has to find that that happened is

between September 1st, 2009 and September 1st, 2010, which means that it was when the law had been passed. If they don't find that that was made between those dates, then they can't convict.

MR. SLOVIS: The charge in the indictment is September, the first day of September. Count two is the 18th day of March, 2009, count three is the 19th of March, 2009, count four is the 5th day of May, 2009, and the statute was changed, was added -- what the hell is it -- and the law was I believe it was September 1st of 2010, 2010.

THE COURT: So let me see if I understand your argument, Mr. Slovis. You're saying that Penal Law 220.77, subdivision one was enacted in September of 2010?

MR. SLOVIS: Correct.

THE COURT: Your client was charged with violating that prior to the law's enactment?

MR. SLOVIS: That's correct.

THE COURT: Mr. Muehl, do you want to respond to that?

MR. MUEHL: Judge, I don't believe that's the case. I believe it was enacted well before that. I did the research on it -- unless I made a mistake.

THE COURT: We'll take a short recess.

MR. SLOVIS: I just want to go to the bathroom. Is that all right, your Honor?

THE COURT: Go ahead.

(Recess taken.)

* * * * *

(Back on the record at 9:01 a.m.)

THE COURT: Thank you. We're back on the record. Bring the defendant out.

(The defendant was produced.)

THE COURT: Okay, we're back on the record, continuing outside the presence of the jury.

Counsel's application is denied. The effective date of the law is not September 2010. That's just an error. So there's no grounds to dismiss the charges on that basis.

MR. SLOVIS: It isn't? When is the effective date of it?

MR. MUEHL: November 1st, 2009.

MR. SLOVIS: Well, the first and second counts is March, and November comes after March, so --

THE COURT: I'm well aware November comes after March, counsel. The jury obviously can't consider those counts as evidence supporting the major trafficker, but they're still separate crimes in their own right and they can consider them as such.

Mr. Muehl?

MR. MUEHL: Your Honor, I do see it was November and I researched the statute and I was thinking it was September 1st and I did put September 1st in the indictment. I don't know if the Court wants to change that to November 1st, 2009.

THE COURT: I'm not going to amend the indictment, but I'm going to tell, instruct the jury the only time is November 1st, 2009 to September 1st, September 1st, 2009 (sic).

MR. SLOVIS: Can I have that moved closer to the jury equi-distance with the reporter?

THE COURT: You can do it.

MR. MUEHL: I rather he do it after he's called for summations. Otherwise it's going to be in the way for the jury seeing everybody. They won't be able to see anybody. It will be in the way of some of the jurors I think.

THE COURT: I've got about two minutes worth of comments before he gives his closing, so we can move it out now.

(The position of the podium is adjusted.)

THE COURT: All right. We'll have the jury brought in, please.

(The trial jury enters the courtroom.)

THE COURT: If any witnesses have been excused from the courtroom and they would like to now come up, they are welcome to. I don't know if that's the case or not, but both counsel should be aware of that.

The record will reflect that the jury has rejoined us in the courtroom.

Members of the jury, you will now hear the summations or closing statements of the lawyers. Following those summations I will instruct you on the law, and then you will begin your deliberations.

Under our laws the defense counsel must sum up first and the prosecutor will then follow. The lawyers may not speak to you after that here in the courtroom.

Summations provide each lawyer an opportunity to review the evidence and to submit for your consideration the facts, inferences and conclusions that they contend you may properly draw from such evidence.

If you find that a lawyer has accurately summarized and analyzed the evidence and if you find that the inferences and conclusions the lawyer asks you to draw from the evidence are reasonable, logical and consistent, then

door and hand them the note.

Okay. At this point I'm going to turn to the crimes that have been charged in this case.

The first offense charged is operating as a major trafficker. I know you have all been very attentive, but the next few minutes I'm going to outline for you the specific definitions of each charged crime and this is what you will have to be deciding as you work in the deliberation room.

I tell you that a person is guilty of operating as a major trafficker when he acts as a director of a controlled substance organization during any period of 12 months or less, during which period such controlled substance organization sells one or more controlled substances and the proceeds collected or due from such sale or sales have an aggregate value of $75,000.00 or more.

Some of the terms used in this definition have their own special meaning in our laws. I will now give you those meanings.

A controlled substance includes heroin.

A controlled substance organization means four or more persons, sharing a common purpose, engage in conduct that constitutes or advances the commission of a knowing and unlawful sale of a controlled substance.

To sell means of course to sell, but also includes

to exchange, to give or to dispose of to another.

A person knowingly sells heroin when that person is aware that he is selling a substance which contains heroin, and a person unlawfully sells heroin when that person has no legal right to sell that substance.

Under our law, with certain exceptions not applicable here, a person has no legal right to sell heroin.

Director means the person who is the principle administrator, organizer or leader of a controlled substance organization or one of several principle administrators, organizers or leaders of controlled substance organization.

In order for you to find the defendant guilty of this crime, the People are required to prove from all the evidence in the case beyond a reasonable doubt both the following two elements:

First, that from November 1st, 2009 to September 1st, 2010, the defendant, Jose A. Rodriguez, in the County of Otsego, acted as a director of a controlled substance organization during any period of 12 months or less, during which period such controlled substance organization sold one or more controlled substances and, two, the proceeds collected or due from such sale or sales had an aggregate value of $75,000.00 or more.

If you find the People have proven beyond a reasonable doubt both of these elements you must find the

defendant guilty of the crime of operating as a major trafficker.

On other hand, if you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of operating as a major trafficker as charged in the first count of the indictment.

Count two charges criminal sale of a controlled substance in the third degree. Under our law a person is guilty of criminal sale of a controlled substance in the third degree when that person knowingly and unlawfully sells a narcotic drug.

The term narcotic drug includes heroin.

Again, to sell means to sell, but also includes to exchange, to give or to dispose of to another, and a person knowingly sells heroin when that person is aware that he is selling or she is selling a substance which includes heroin.

A person unlawfully sells heroin when that person has no legal right to sell it and, again, a person has no legal right to sell heroin except in certain exceptions that are not applicable here.

In order for you to find the defendant guilty of this crime the People are required to prove from all the evidence in the case beyond a reasonable doubt both of the following two elements:

That on or about March 18th, 2009, in the County of Otsego, the defendant, Jose A. Rodriguez, sold heroin an that he did so knowingly and unlawfully.

I would also remind you that he is charged in committing this sale acting in concert with another, and I have previously given you the definition of what acting in concert with another means.

If you find beyond a reasonable doubt that Jose A. Rodriguez, acting in concert with another, knowingly and unlawfully sold heroin on or about March 18th, 2009, in the County of Otsego, if you find those elements beyond a reasonable doubt, you must find him guilty of the charged crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of criminal sale of a controlled substance in the third degree.

Can I see the attorneys up here for a second? Mr. Rodriguez, you too.

(Whereupon, a discussion was held off the record at the bench.)

THE FOREPERSON: Will we be getting a copy of this?

THE COURT: No. All right. A couple clarifications. I'm going to read the definitions again to hopefully cure the issue of trying to remember everything.

Appendix - J

HABEAS,PRO SE

U.S. District Court
Northern District of New York - Main Office (Syracuse) [LIVE - Version 6.1.1]
(Prisoner)
CIVIL DOCKET FOR CASE #: 9:16-cv-01037-DNH
Internal Use Only

Rodriguez v. Griffin
Assigned to: Judge David N. Hurd
Case in other court: New York Southern, 1:16-cv-06484
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 08/25/2016
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Jose A. Rodriguez

represented by **Jose A. Rodriguez**
11-B-3913
Green Haven Correctional Facility
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Stormville, NY 12582
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PRO SE

V.

Respondent

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Bar Status: Active
Fee Status: paid_2015

Email All Attorneys
Email All Attorneys and Additional Recipients

Date Filed	#	Docket Text
08/16/2016	1	REQUEST TO PROCEED IN FORMA PAUPERIS. Document filed by Jose A. Rodriguez.(sac) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/17/2016)
08/16/2016	2	PETITION FOR WRIT OF HABEAS CORPUS pursuant to 28 U.S.C. 2254. Document filed by Jose A. Rodriguez.(sac) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/17/2016)
08/16/2016	3	LETTER from Jose A. Rodriguez, dated 8/9/2016. Document filed by Jose A. Rodriguez.(sac) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/17/2016)
08/16/2016	4	APPLICATION to Appoint Counsel pursuant to 18 U.S.C. 3006(A)(g) (Habeas Corpus Petition). Document filed by Jose A. Rodriguez.(sac) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/17/2016)
08/16/2016		Case Designated ECF. (sac) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/17/2016)
08/17/2016	5	TRANSFER ORDER: Petitioner, currently incarcerated at Green Haven Correctional Facility, brings this pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging the constitutionality of his 2011 conviction in the New York Supreme Court, Otsego County. Because Petitioner was convicted and sentenced in Otsego County, which is located in the Northern District of New York, this action is transferred under Local Rule 83.3 to the United States District Court for the Northern District of New York. The Clerk of Court is directed to assign this matter to my docket, mail a copy of this order to Petitioner, and note service on the docket. The Clerk of Court is further directed to transfer this action to the United States District Court for the Northern District of New York. Whether Petitioner should be permitted to proceed further without payment of fees is a determination to be made by the transferee court. This order closes this case. Because Petitioner has not at this time made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue under 28 U.S.C. § 2253. The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. Cf. Coppedge v. United States, 369 U.S. 438, 444-45 (1962) (holding that an appellant demonstrates good faith when he seeks review of a nonfrivolous issue). (Signed by Judge Colleen McMahon on 8/17/2016) (lmb) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/19/2016)

08/17/2016		NOTICE OF CASE ASSIGNMENT - SUA SPONTE to Judge Colleen McMahon. Judge Unassigned is no longer assigned to the case. (lmb) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/19/2016)
08/17/2016		Transmission to Docket Assistant Clerk. Transmitted re: 5 Order, to the Docket Assistant Clerk for case processing. (lmb) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/19/2016)
08/17/2016		CASE TRANSFERRED OUT ELECTRONICALLY from the U.S.D.C. Southern District of New York to the United States District Court - Northern District of New York. (lmb) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/24/2016)
08/22/2016		Mailed a copy of 5 Order, to Jose A. Rodriguez. (vj) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/22/2016)
08/22/2016		Mailed a copy of 2 Petition for Writ of Habeas Corpus, 5 Order and certified Docket Sheet to the United States District Court for the Northern District of New York. (vj) [Transferred from New York Southern on 8/25/2016.] (Entered: 08/22/2016)
08/25/2016	6	Case transferred in from District of New York Southern; Case Number 1:16-cv-06484. electronically transferred when case opened (Entered: 08/25/2016)
08/26/2016	7	ORDER Directing Administrative Closure with Opportunity to Comply with Filing Fee Requirement: ORDERED that Petitioner's IFP Application is DENIED as incomplete. ORDERED that because this action was not properly commenced, the Clerk is directed to administratively close this action. ORDERED that if Petitioner desires to pursue this action, he must so notify the Court WITHIN THIRTY (30) DAYS of the filing date of this Order and either (1) pay the full $400.00 filing fee for civil actions or (2) submit a completed and signed IFP Application that has been certified by an appropriate official at his facility. Signed by Judge David N. Hurd on 8/26/16. {order and blank ifp form served via regular mail on petitioner}(nas) (Entered: 08/26/2016)
09/15/2016	8	MOTION for Leave to Proceed in forma pauperis filed by Jose A. Rodriguez. (alh,) (Entered: 09/15/2016)
09/15/2016	9	TEXT ORDER REOPENING CASE: This action was administratively closed due to petitioner's failure to comply with the filing fee requirements, and petitioner was directed to respond to the Order if s/he wished to pursue this action. Petitioner has now responded. The Clerk is directed to reopen this action and restore it to the Court's active docket. Authorized by Judge David N. Hurd on 9/15/16. (served on petitioner by regular mail)(alh,) (Entered: 09/15/2016)

09/19/2016	10	TEXT ORDER RE: 8 Based on petitioner's Certified IFP Application, along with Inmate Statements for the period of July 1, 2016 through July 29, 2016, petitioner is eligible to proceed with this action without paying the statutory filing fee. His IFP Application is therefore GRANTED. Petitioner will still be required to pay fees that he may incur in the future regarding this action, including but not limited to copying fees ($.50 per page). Authorized by Judge David N. Hurd on 9/19/16. (served on petitioner by regular mail) (alh,) (Entered: 09/19/2016)
09/19/2016	11	ORDER directing response to the Habeas Corpus Petition; response due by Thomas Griffin served on 9/19/2016, answer due 12/19/2016. Signed by Judge David N. Hurd on 9/19/16. (Attachments: # 1 Petition) (served as directed)(alh,) (Entered: 09/19/2016)
09/29/2016	12	NOTICE of Appearance by Dennis A. Rambaud on behalf of Thomas Griffin (Rambaud, Dennis) (Entered: 09/29/2016)
10/31/2016	13	MOTION to Appoint Counsel filed by Jose A. Rodriguez. (alh,) (Entered: 10/31/2016)
11/07/2016	14	DECISION AND ORDER: ORDERED, that Petitioner's motion for appointment of counsel, Dkt. No. 13 , is denied without prejudice to renew in the event that an evidentiary hearing is later determined to be necessary in this matter. Signed by Judge David N. Hurd on 11/7/16. (served on petitioner by regular mail) (alh,) (Entered: 11/07/2016)
12/07/2016	15	Letter Motion for Thomas Griffin requesting Extension of Time to Answer the Petition submitted to Judge David N. Hurd . (Rambaud, Dennis) (Entered: 12/07/2016)
12/07/2016	16	TEXT ORDER granting 15 Letter Request, Thomas Griffin answer due 1/23/2017. Authorized by Judge David N. Hurd on 12/7/16. (Copy mailed to Pro Se party and therefore, pursuant to Fed.R.Civ.P. 6(d), an additional 3 (three) days for service may be allowed)(alh,) (Entered: 12/07/2016)
12/23/2016	17	MOTION to Stay filed by Jose A. Rodriguez. (Attachments: # 1 Affidavit of Service and Copy of Plaintiff's State Court Motion for Writ of Error Coram Nobis, # 2 Exhibit(s), # 3 Memorandum of Law, # 4 Certificate of Service, # 5 Envelope) (alh,) (Entered: 12/23/2016)
12/28/2016	18	TEXT ORDER regarding 17 MOTION to Stay: Motion is ON SUBMISSION ONLY returnable on 2/10/17. Response to motion is due on or before 1/24/17. Respondent's deadline to respond to the petition is hereby stayed until further order of the Court. Authorized by Judge David N. Hurd on 12/28/16. (served on petitioner by regular mail)(alh,) (Entered: 12/28/2016)

01/24/2017	19	RESPONSE in Opposition re 17 MOTION to Stay filed by Thomas Griffin. (Rambaud, Dennis) (Entered: 01/24/2017)
01/31/2017	20	DECISION AND ORDER: ORDERED that 17 Motion to Stay is denied. ORDERED that if petitioner wants add new claims to his pending habeas petition, he must file and serve upon the respondent a motion to amend his original petition, pursuant to Rule 15 of the Federal Rules of Civil Procedure and Local Rule 7.1, within thirty (30) days of the filing date of this Decision and Order. Signed by Judge David N. Hurd on 1/31/17. {order and blank 2254 form served via regular mail on petitioner}(nas,) (Entered: 01/31/2017)
02/06/2017	21	REPLY to Response to Motion re 17 MOTION to Stay filed by Jose A. Rodriguez. (alh,) (Entered: 02/06/2017)
02/07/2017	22	DUPLICATE REPLY to Response to Motion re 17 MOTION to Stay filed by Jose A. Rodriguez. (clerk notes this submission is a duplicate of Dkt. No. 21 and was mailed to the Utica Clerk's Office) (alh,) (Entered: 02/07/2017)
02/07/2017	23	TEXT ORDER RE: 21 . On January 31, 2017, the Court denied petitioner's motion to stay his petition (Dkt. No. 17), but permitted him thirty (30) days from the filing date of the order to file a motion to amend his petition if he intended to add new claims and, if necessary, to re-file a motion to stay (Dkt. No. 20). The Court is now in receipt of a letter from petitioner, dated February 2, 2017, in reply and in further support of his motion for a stay. Dkt. No. 21. It appears that petitioner's reply may have crossed in the mail with this Court's January 31, 2017 order. The Court has reviewed the letter and directs the Clerk to send petitioner a second courtesy copy of the January 31, 2017 order (Dkt. No. 20) along with an updated docket sheet. Authorized by Judge David N. Hurd on 2/7/17. (served on petitioner with copy of dkt. no. 20 and updated docket report by regular mail)(alh,) (Entered: 02/07/2017)

Appendix - K

JOSE A. RODRIGUEZ,11B3913
Green Haven Corr. Fac.
P.O. BOX 4000
Stormville, ny 12582

TO: John M. Muehl,DA
ATT: FOIL Officer
Otsego County DA
197 Main Street
Cooperstwon, NY 13326

3/18/15

RE: Freedom of information law request (Indictment#: 2010-067)

Dear Foil Officer;

PLEASE BE ADVISED, this request is being made pursuant to the Freedom of information Law [FOIL], Public officer law sec. 84 through 89, as amended, and Article 6 of public officer law. Upon receipt of this written request, Please provide me with copies of the following records;

1. Arrest Report(s).

1. Arrest Report(s).
2. Booking arrest worksheet.
3. Line-up,photos,mug shots,Photo array.
4. Complaint Report(s) [uf61].
5. Complaint follow-ups [DD-5].
6. Early Case Assessment Bureau [ECAB] Reports.
7. Crime Incident Data sheet(s).
8. Arrest Investigation Report[s].
9. Unusual Occurrence Report(s).
10. ALL Police memo book entries.
11. ALL Witness(es) Statements.
12. Copies of all 911 tapes connected with this case.
13. Felony Complaint.
14. Prosecutors Information.
15. Indictment(s)
16. Superior Court Informations.
17. Superciding Indictments.
18. Amendments to Indictments.
19. ALL Cases Investigation Reports.
20. Labatory exams of any fingerprints.
21. Parriffin test reports.

22. ALL medical examiner and/or coroner reports
23. ALL DNA analysis reports & worksheets.
24. ALL online warrant file system.
25. ALL E-mails connected with this case.
26. ALL arrest warrants,
27. Appearance ticket and/or court dates
28. ALL faxes connected with this case.
29. F.B.I. sheet
30. List of all Interviewed witnesses.
31. ALL miranda rights forms.
32. ALL transcripts of video statement.
33. ALL agreements with witnesses in this case.
34. ALL offers of immunity.
35. ALL audio/video Recording made in this case.
36. ALL photos made in crime scene or during Drug buys
37. ALL arrest photos.
38. ALL arrest and/or criminal records of complaint.
39. ALL mug shot photo of complaint/accomplices.
40. ALL known aliases used by complaint/accomplices.
41. List of all evidence destroyed.
42. List of all evidence.
43. All case folders Index and police Index sheet.
44. All request for buy money.
45. ALL search warrant applications.
46. ALL search warrants.
47. ALL audion/video sureillance warrants.
48. All premises Records of crime scene(During drug buy and search & seizure).
49. Copies of All buy money.
50. ALL vouchers for seized items.
51. Cell towers info business Record(s) and provider's name.
52. Cell phone/E-mail Electronic device record(s) Request(s).
53. ALL request for departmental recognition.
54. Grand jury evidence list,
55. Grand jury Reports.
56. Grand jury witness list.
57. Defendant's motion to appear before the grand jury.
58. ALL pre-trial discovery motions

59. Opposition to omnibus motion.
60. Bill of particulars.
61. List of all pre-trial hearings witnesses.
62. Suppression hearing motion.
63. Motion in opposition to suppression motion.
64. Suppression hearing transcript.
65. ALL Rosario material served upon defense attorney.
66. ALL discover/Rosario material served upon District Attorney by defense.
67. ALL Brady material served upon defense attorney.
68. Removal of action motion(s) CPL§230.
69. MOtion in opposition to removal of action.
70. Plea offers.
71. Motion to dismiss Indictment (cpl§210)
72. Motion to dismiss Indictment.
73. Motion to dismiss indictment hearing transcript.
74. List of trial witnesses.
75. Lsit of trial evidence.
76. List of trial exibits.
77. Challenge to jury panel.
78. ALL challenges to Individual jurors(cpl§270).
79. ALL jury charges request (cpl300).
80. ALL Jury note(s).
81. Verdict sheet.
82. Trail transcriptl (Pg,240-240,
83. sentence § commitment order.
84. Pre-sentence report (cpl 390).
85. Prosecort's second felony drug offender.
86. ALL police report(s)
87. ALL E-mail/data/communication with other agency's.
88. ALL statements of Confidential Informants in this case.
89. ALL Information pertaining to CI in this case.
90. Index of entire case folder.
91. ALL Documents available Document(s) (Indictment#2010-67).
92. ALL labatory drug(tested) Reports.
93. ALL handwriting notes,correspondence,memorandum.
94. ALL narcotic investigation in said case.
95. Entire file pertaining to this indictment.
96. ALL expense reports,vouchers,cancelled checks,witness relocation file.
97. Grand Jury Testimony of [CI]'s and of Count 5.[Leo Moore]
98. Mark Rathbun [accomplices] Incident Report of his arrest.

As you know, the freedom of information law provides that your agency must reply within (5) business days of receipt of this request. Therefore, I am requesting that you send me all documents and/or non-exempt portion of record which I've requested above, and that you inform me in writing of the denial of such document by certification in accordance with foil. I'll set-forth below further information if needed pertaining to this request;

name; Jose A. Rodriguez.
DIN: 11B3913
D.O.B.: 4/19/83
NYSID: 08800614R
Indictment: 2010-067

If there are any fees for copying the requested records, Please notify me in advance. Thank you for your attention.

Very truly yours,

Jose Rodriguez

JOHN M. MUEHL
OTSEGO COUNTY DISTRICT ATTORNEY
197 Main Street
Cooperstown, New York 13326
(607) 547-4249
*(607) 547-4373
*Fax, not for service of legal papers.

MICHAEL F. GETMAN
Chief Assistant District Attorney

PAUL ELKAN
Assistant District Attorney

MARVIN D. PARSHALL, JR.
Assistant District Attorney

WILLIAM C. GREEN
Assistant District Attorney

April 28, 2015

Jose A. Rodriguez, DIN 11B3913
Green Haven Correctional Facility
P.O. Box 4000
Stormville, New York 12582

Re: **FOIL Request**
People v. Jose A. Rodriguez
Indictment No.: 2010-067

Dear Mr. Rodriguez:

In response to your request of March 18, 2015, pursuant to the Freedom of Information Act, the People respond as follows:

1. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
2. None.
3. Copies of your arrest photographs are attached. As to the remaining requests, there are no such records.
4. None.
5. None.
6. None.
7. None.
8. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
9. None.
10. None.
11. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
12. None.
13. None.
14. None.
15. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
16. None.
17. None.
18. None.

19. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
20. None.
21. None.
22. None.
23. None.
24. None.
25. None.
26. Arrest Warrant is enclosed.
27. None.
28. All faxes contained in the People's file are enclosed.
29. None.
30. Refused pursuant to section 2(e)(iii) and 2(f) of the Public Offices Law as the records would disclose the identity of confidential sources and could endanger the life or safety of the witnesses.
31. None.
32. None.
33. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
34. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
35. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
36. None.
37. Copies of your arrest photographs are enclosed.
38. None.
39. None.
40. None.
41. None.
42. None.
43. None.
44. None.
45. None.
46. None.
47. None.
48. None.
49. None.
50. None.
51. None.
52. None.
53. None.
54. None.
55. None.
56. Refused pursuant to section 2(e)(iii) and 2(f) of the Public Offices Law as the records would disclose the identity of confidential sources and could endanger the life or safety of the witnesses.
57. None.
58. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
59. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
60. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.

61. None.
62. Request refused as said record was created by and is in the possession of your attorney. See Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996).
63. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
64. None.
65. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
66. None.
67. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
68. None.
69. None.
70. None.
71. Request refused as said record was created by and is in the possession of your attorney. See Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996).
72. Request refused as said record was created by and is in the possession of your attorney. See Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996).
73. None.
74. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
75. None.
76. None.
77. None.
78. None.
79. None.
80. None.
81. None.
82. None.
83. None.
84. None. A copy of the pre-sentence report must be requested from the presiding judge. See CPL §390.50. The People are not authorized to release it.
85. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
86. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
87. None.
88. Refused pursuant to section 2(e)(iii) and 2(f) of the Public Offices Law as the records would disclose the identity of confidential sources and could endanger the life or safety of the witnesses.
89. Refused pursuant to section 2(e)(iii) and 2(f) of the Public Offices Law as the records would disclose the identity of confidential sources and could endanger the life or safety of the witnesses.
90. None.
91. See this entire reply.
92. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
93. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
94. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.
95. See this entire reply.
96. None.

97. Refused pursuant to Matter of Walsh v. Waller, 225 AD2d 911 (3rd Dept., 1996) as said records were provided to your attorney during the prosecution of your case.

98. Refused pursuant to section 2(e)(iii) and 2(f) of the Public Offices Law as the records would disclose the identity of confidential sources and could endanger the life or safety of the witnesses.

Please contact your attorney for the refused material.

You have the right to appeal within 30 days to Kathleen Clark, Chair of the Otsego County Board of Representatives, 197 Main Street, Cooperstown, New York 13326.

Very truly yours,

John M. Muehl

JMM:lmb
Attachments
cc: Carol McGovern, Clerk of the Board

Appendix - L

COMPLAINT ARREST AFFIDAVIT - NARRATIVE CONTINUATION

Juvenile

Agency ORI Number	Agency Name	Agency Report Number
NY0380100	ONEONTA POLICE DEPARTMENT	2010-000591
Original Date Reported	**Incident Type**	
02/20/2010	Drug Offense	

NARRATIVE CONTINUATION

On Saturday, February 20, 2010 at about 1430 hours, I (Sgt. Witzenburg) was on patrol in the City of Oneonta in the area of Chestnut Street and Nicks Diner when I observed a gray Toyota Corolla bearing State of New York registration plate EKL4558 turn from Lewis Avenue onto Chestnut Street. The vehicle turned west on Chestnut Street and when it did so it crossed the clearly marked double yellow center lane divider and failed to keep right. I then observed the vehicle accelerate rapidly to about 40 miles per hour and swerve in and out of it's lane of travel.

I initiated a traffic stop on the vehicle in the area of Five Star Subaru and executed the stop at the Oneonta Nursing home at 330 Chestnut Street. The operator of the vehicle was known to me as MARK H. RATHBUN who also provided a paper interim license. As I spoke with RATHBUN he was sniffing and rubbing his nose, talking with slow and slurred speech, had watery eyes with dilated blood vessels and constricted pupils but no odor of an alcoholic beverage. RATHBUN was extremely nervous and was fidgeting with his hands and seemed as if he was ready to cry. The faint yet singular odor of marihuana could be detected coming from within the vehicle.

MR. RATHBUN has been implicated in the distribution of narcotics and confidential sources place MR. RATHBUN as an associate of an ongoing narcotics investigation. Based on my observations and knowledge of weapons having been stolen, carried and traded by MR. RATHBUN's associates I asked MR. RATHBUN to step from the vehicle. RATHBUN opened the driver side door and a small bag of marihuana could be easily seen from outside of the vehicle. When questioned about the marihuana, MR. RATHNUN was asked if he had anything else in the car at which point he said "Just the drugs in the" and stopped himself. At this time Mr. RATHBUN started to shake and said "They're gonna kill me" and I asked him who and he would say nothing. MR. RATHBUN then said that he had a package in the center console. I asked him how much was in the package, which at this time was presumably Heroin as it is RATHBUN's MO to deliver heroin.

MR. RATHBUN stated that he Only had FIVE packs in the center console. I began to pat MR. RATHBUN'S clothing and asked him if he had anything on his person and he replied that he had a knife and went to reach for his waistband. I then physically stopped MR. RATHBUN from reaching to his waistband and handcuffed him. RATHBUN was not found to be in possession of a knife on his person but one was located on the seat of the car where he had been sitting. The center console was opened up and a package wrapped in newsprint was located. The packaging was clearly the same type and shape as packaging I have seen used to hold several

ADMINISTRATIVE

Report Contains								Related Report Number(s)
Officer(s) Reporting	ID. Number	Name			ID. Number	Unit	Date	
CORTRIGHT, KRISTEN M	88KMC	WITZENBURG, CHRISTOPHE			64CJW	64CJW	02/20/2010	
Officer Reviewing (If Applicable)	ID. Number	Approved Date	# Offenses	# Victims	# Offenders	# Premises Ent.	# Vehicles Stolen	# Arrested
WITZENBURG, CHR	64CJW	02/23/2010	1	0	1	0	0	1

Routed To	Referred To	
NONE		
Assigned To	Asigned By	Date
Case Status	Exception Type	Date Cleared
CLOSED		02/20/2010

COMPLAINT ARREST AFFIDAVIT - NARRATIVE CONTINUATION

Juvenile ☐

Agency ORI Number	Agency Name	Agency Report Number
NY0380100	ONEONTA POLICE DEPARTMENT	2010-000591
Original Date Reported	**Incident Type**	
02/20/2010	Drug Offense	

NARRATIVE CONTINUATION

bundles of heroin together.
At this time, Mr. RATHBUN was advised that he was under arrest and placed in my patrol vehicle. I called for Officer Cortright who responded to 330 Chestnut St. and completed a more thorough search of the vehicle and located another 6 bags of heroin in the vehicle that had been held together with a rubber band in approximately the same location as the 5 bundles (50 bags). A hypodermic needle was also found in the vehicle. MR. RATHBUN was subsequently arrested for Criminal possession of a controlled substance in the third degree, section 220.16(1) of the New York State Penal Law. Fifty-six packets of heroin were seized from the vehicle and taken back to the station to be tested. When tested with a 924 Mecke's Reagent, it came back positive for heroin. $598.00 in cash was also seized from the vehicle and placed into evidence.

RATHBUN was transported back to the station where he was booked and subsequently arraigned and remanded to Otsego County Jail in lieu of $75,000 bail.

ADMINISTRATIVE

Report Contains

Related Report Number(s)

Officer(s) Reporting	ID. Number	Name	ID. Number	Unit	Date
CORTRIGHT, KRISTEN M	88KMC	WITZENBURG, CHRISTOPHE	64CJW	64CJW	02/20/2010

Officer Reviewing (If Applicable)	ID. Number	Approved Date	# Offenses	# Victims	# Offenders	# Premises Ent.	# Vehicles Stolen	# Arrested
WITZENBURG, CHR	64CJW	02/23/2010	1	0	1	0	0	1

Routed To	Referred To	
NONE		
Assigned To	**Asigned By**	**Date**
Case Status	**Exception Type**	**Date Cleared**
CLOSED		02/20/2010

Appendix - M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

----------X

The People of the State of New York,

Respondent

- against -

JOSE A. RODRIGUEZ,

Defendant

----------X

AFFIDAVIT IN SUPPORT OF NOTICE OF MOTION TO SET ASIDE SENTENCE PURSUANT TO CPL 440.20

Ind. No. 2010-067

STATE OF NEW YORK)
)s.s.:
COUNTY OF DUTCHESS)

I, **Jose A. Rodriguez,** being duly sworn, depose and says:

1) I am the defendant in the above-entitled proceeding, and I make this affidavit in support of a motion pursuant to CPL §440.20 to set aside the sentence herein, upon the grounds that:

a. The Court sentence as alleged on Grounds I *Infra* was unauthorized and illegal when it failed to specify what counts or charges were to be consecutive or concurrent to each-other;

b. The defendant sentence as alleged on Ground II *Infra* was illegal and unlawfully imposed when the court erroneously imposed consecutive sentences;

c. The defendant due process as alleged in Ground III *Infra* was violated when the clerk court erroneously entered information in the Uniform Sentence & Commitment and The Certificate of Conviction;

d. The court's sentence as alleged on Ground IV *Infra* was based on inaccurate information by the prosecutors remarks and pre-sentence report in violation of defendant' due process;

e. The court as alleged on Ground V *Infra* violated the defendant's State and Federal Constitutional rights against its double jeopardy clause, when it punished him twice for the same crimes;

f. The court as alleged on Ground VI *Infra* violated the defendant's State and Federal Constitutional rights when it excessively rendered a civil judgment of one hundred thousand dollars ($100.000.00).

2) The criminal proceeding commenced pursuant to "a sealed indictment" filed on October 1st, 2010, when the Otsego County Grand Jury voted and charged the defendant with one count of "Operating as a Major Trafficker," an A-1 felony (PL §220.77[1]), and eleven counts of Criminal Sale of a Controlled Substance in the third degree (PL §220.39[1]), a class B felony.

3) At the Supreme Court indictment arraignment, the Justice presiding entered a plea of "not guilty" on defendant behalf and at the same time denied him bail. Defendant was tried in this court before Hon. Brian D. Burns during the entire proceeding from November 2010 until August 2011.

4) After a jury trial, on August 25, 2011, a verdict of guilty was rendered and defendant was found guilty of counts 1, 5, 6, 9, and 11, and acquitted him on counts 2, 3, 4, 7, 8, and 10. (See, Verdict Sheet as **Exhibit – A**).

5) Defendant was then sentenced on December 22, 2011, in Otsego County Supreme Court before Hon. Brian D. Burns to a determinate sentence of 20 years, 5 years post release supervision (PRS), plus S80.000.00 dollar Civil Judgment, $375 dollars surcharge/DNA/cv fee, on count One (1) Operating as a Major Trafficker (PL §220.77[1]); and five (5) years sentence, 3 years PRS and $5,000.00 civil judgment for each of the remaining counts (5, 6, 9, and 11) for an aggregated term of 40 years in state prison, post release supervision and $100.000.00 (hundred thousand dollars) civil judgment. (See, Sentencing Minutes (S.T.:) as **Exhibit – B**).

6) During sentencing defendant was represented by Mathew C. Hug, Esq., who is located in Rensselear Technology Park, 105 Jordan Road, Troy, New York 12180. All referenced to S.T.: and (TT:) are the appropriate pages for sentencing minutes and trial transcripts respectively.

7) Included herewith is defendant's affidavit in which has been described the reason(s) for this motion to set aside his sentence and events that brought to light the numerous due process violation. (See, **Exhibit – C**)

GROUNDS FOR RELIEF

GROUND – I

DEFENDANT'S CONSTITUTION RIGHTS TO DUE PROCESS WAS VIOLATED, WHEN THE SENTENCING COURT FAILED TO SPECIFY WHAT COUNTS OR CHARGES WERE TO BE RUNNING CONCURRENT OR CONSECUTIVE TO EACH OTHER

jail

According to New York Penal Law §70.25 (1)(a), "[I]f a sentencing court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follow: (a) [Eff. Until Sept. 1, 2015, pursuant to L. 1995, c. 3, §74 subd.d.]. *An indeterminate or determinate sentence shall run concurrently with all other terms.*" *(Italics added).*

CPL §380.20 further states that ... "if an accusatory instrument contains multiple counts and conviction is entered on more than one count the court must pronounce sentence on each count." In addition, a resentence pursuant to CPL §380.20 to consecutive terms, just to correct the sentence would not do it as the court violated the operation of law which required concurrent sentences, Penal Law §70.25(1)(a).

By operation of law, Defendant's sentence is unauthorized and illegal. Upon a jury trial, defendant was convicted of counts 1, 5, 6, 9 and 11. (See, Verdict Sheet as ***Exhibit – A***). During sentencing, on December 22, 2011, Judge Brian D. Burn at Otsego County Court stated "on Count One (1), Operating as Major Trafficker" that "he be sentenced to a determinate period of incarceration ... 20 years." Next, "with his conviction on Count Five (5), "Criminal Sale of a Controlled Substance in the Third Degree, I sentence him to serve a period of five years

incarceration..." [it should be noted that at this point the court mentioned the offense charge, but did not pronounced if the sentence under count five (5) was to run consecutive or concurrent to count one (1) of the indictment).

The Court continued with its sentencing with Count six (6) of the indictment, and used the same exact wording as to count five, but failed to pronounced the charge and if the sentence were to be running concurrent or consecutive to count one and count five.

For the remaining counts "nine (9) and eleven (11)" the sentencing court made the same exact statement as to count 6 yet failed to adhere to the requirements stipulated under CPL §380.20; PL §70.25 (1)(a). The Court then stated at the end of its sentence proceedings that: "it is the Court intent that the sentences be served consecutively." Thus, which sentences to what counts? (See, S.T.: 17-19, as **Exhibit – B**).

In ***People v. Vasquez***, 88 NY2d 561 (NY 1996), the Court of Appeals stated that:

> "At sentencing, the trial court states that counts 5, 6, and 11 were each consecutive to count 1 and 2, but no mention was made of how 5, 6 and 11 were to run in relation to each-other. Accordingly, under the plain language of Penal Law 70.25(1)(a), these counts were concurrent to each other. Since there is no proof on the record that the court misspoke or that its failure to designate counts 5, 6 and 11, as "consecutive" with respect to each other was accidental, there was no basis for any subsequent change in the sentence to reflect a consecutive relationship among the sentences for those counts..." Id., at 580-581.

It should be noted however, that even though the commitment order and certificate of conviction in defendant's case states that the sentences are "all to run consecutive with ***each other***," that order was not indicated on defendant's sentencing minutes. Thus, since the sentencing court did not specifically authorized for those entries, the court clerk abused its discretion, which represents an unauthorized alteration of defendant's sentence and should be modified to reflect that those counts are concurrent to each other. (See, Certificate of

Conviction and Commitment Sheet as ***Exhibit – D***, also see, S.T.: as ***Exhibit - B***). Therefore, by operation of law the sentences pronounced by the court in defendant case on counts 5, 6, 9 and 11, shall run concurrent to count One (1) of the indictment. See, ***People v. Bradford***, 118 AD3d 1254 (4th Dep't 2014); ***People v. Vasquez***, *supra*.

GROUND – II

THE SENTENCING COURT ERRONEOUSLY IMPOSED ILLEGAL AND UNLAWFUL CONSECUTIVE SENTENCES, IN FAILING TO FOLLOW PENAL LAW §70.25(2); AND/OR AS A CONTINUOUS CRIME WHICH ALSO REQUIRED CONCURRENT SENTENCES

A – COURTS FAILURE TO ADHERE TO PL §70.25(2)

Penal Law §70.25(2) provides that sentences (and thus counts) must run concurrent when two or more offenses are committed through: **1)** A single act or omission; or **2)** an act or omission which (a) in itself constituted one of the offenses, and (b) was an essential material element of the other offense. ***People v. Laureano***, 87 NY2d 260 (N.Y. 1996). The People are obligated to establish the legality of consecutive sentence. Id., at 643.

Defendant was charged, convicted, and sentenced consecutively to a determinate sentence of 40 years for drug felony charges under statutes containing an act or omission, which in itself, constituted one of the offenses, and was a material element of the other.

In ***People v. Battles***, 16 NY3d 54 (NY 2010), the Court of Appeal stated that "[t]he court must first look to the statutory definition of the crimes at issue to decide whether concurrent sentences are warranted." Thus, an analysis is required concerning the statutory definition of the

top count (1) on defendant's indictment which charged him with PL §220.77(1) as Operating as a Major Trafficker[1], a Class A Felony. This statute states that:

> "Such person act as a Director of a controlled substance organization during any period of twelve months..."
>
> "Such controlled substance organization sells one or more controlled substance ..."
>
> "Proceeds collected or due from such sale or sales have a total aggregate of seventy-five thousand or more."

Now, examining the other counts (5, 6, 9, and 11) Penal Law §220.39(1) states that:

> "A person is guilty of Criminal Sale of a Control Substance ..."
>
> "When he knowingly and unlawfully sells; a narcotic drug."

Under counts 5, 6, 9, and 11, defendant was charged with acting in concert. The *actus Reus* by definition under Penal Law §220.77 are the same material elements for the lesser counts under Penal Law §220.39, or vice-versa.

The word "sale" is defined in Penal Law 220.00(1). Furthermore, PL 220.39 "criminal sale of a controlled substance" is the same material element as stipulated under P.L. §220.77 in that it is alleged in the indictment that the "defendant's" organization "sold one or more controlled substance..." "or due from such sale or sales". Also, "acting in concert" is the same as "organization" (sharing a common purpose). See, Indictment as **Exhibit – E**.

Moreover, Penal Law §220.39(1) describes its second element as "knowingly and unlawfully sells a narcotic drug." It should be noted that the standard requirement that the sale be made knowingly and unlawfully is omitted from the statute P.L. §220.77(1). The word knowingly is defined in Penal Law §15.05(2) and the word unlawfully is defined in P.L.

[1] For clarification purposes defendant was the first person convicted under PL §220.77 after the statute was enacted by the Legislature on November 1, 2009. There are no provisions either in PL §220.77, or PL §70.25 that mandates that the sentences shall run consecutive to each other concerning those statutes.

§220.00(2). Indeed, by definition each member of the organization must share the purpose of engaging in felonious conduct in violation set forth in Penal Law article 200, and those felonies required knowingly and unlawfully conduct. ***Practice Commentary by William C. Donnino***, Penal Law 220.77 at "***The Crimes.***"

In other words, the sentencing Judge here charged the jury with said element and was not, by any stretch of the imagination, omitted in defendant's case. According to the Court of Appeal in ***People v. Battles***, 16 NY3d 54, (NY 2010), this Court further stated that it must consider the Court's jury charge as an addition requirement to determine the matter at hand for concurrent sentences purposes. *Id.*, at 69-70. During the Judge final instruction, and without any request to do so, the court instructed the jury as follow:

> "A person knowingly sales heroin when that person is aware that he is selling a substance which contain heroin, and a person unlawfully sales heroin when that person has no legal right to sell the substance." (See, (TT) 1327-1330, as **Exhibit – F**).

The same transpired with the lesser counts under Penal Law §220.39 at TT: 1329-30. This took placed again without any party requesting it to do so. The Legislator body enhanced punishment already. The Statute could not have been designed to require court to distinguish between one or several bodily movements [Penal Law §15.00(1)], which draws a line prohibited "act" --- "a bodily movement;" or *actus reus* --- and a "culpable mental state" [Penal Law 15.00(6)] --- a state of mind or *mens rea*. Thus, if an act violates "one statute and constitute an legal component of a second crime, then the first offense would be material element of the second crime and only single concurrent punishments will be permissible." ***People v. Day***, 73 NY2d 208 (NY 1989).

Accordingly, the Court should concern itself with the particular act(s) that fulfill the act material element(s) contain in the indictment and jury charge. In addition, the bill of particulars

should be considered as the prosecutor concedes that said counts were all "in connection" with each other. (See, Bill of Particulars as ***Exhibit – G***). In fact, during the beginning stages of defendants' trial the prosecution also considered that "Count One is just a culmination of all the other counts" and "all tied in." (See, TT: 38 and 40, as **Exhibit – H**). Lastly, as a matter of law, Penal Law §70.25(2), requires that when an act constituted one offence and is material element, is part of another offense concurrent sentence must be imposed. See, ***People v. Amato***, 1 A.D.3d 713, (3rd Dep't 2003); ***People v. Day***, *supra*. Therefore, if the People at the time which to seek consecutive sentences in the case such as this, they should have requested a form of verdict that will required the jury to explicitly delineate that an acts constituting one offense is not a material element of another offense. See, ***People v. Alford***, 14 NY3d 846 (NY 2010). Interestingly, the People further failed to do so in defendant's case, and as such, requiring concurrent sentences. As a result, it is submitted that the sentence must be modified by running the offenses of Operating as a Major Trafficker and criminal sales of a controlled substances concurrently.

B – CONTINUOUS CRIMES ALSO CONSTITUTE CONCURRENT SENTENCES

Continuous crime is one that by its nature may be committed either by one act or multiple acts and readily permits characterization as a continuous offense over a period of time purpose of specificity of charging instrument CPL §200.50(6). However, whether multiple acts may be charged as a continuing crime is resolved by reference to language in Penal Statute, which determines whether statutory definition to crime necessary contemplates single acts and guidance is also obtained from analysis of whether Legislature intended to prohibit course of conduct of only specific, discrete act. See, ***People v. Shack***, 86 NY2d 529 (NY 1995).

As previously argued, defendant was sentenced to consecutive terms even though the statutory requirement for those offense required concurrent sentences. The State statute herein, uses some of the same language utilized in the federal statute 21 U.S.C. §848, cited in Penal Law §220.77. Defendant was charged with drug sales under Penal Law §220.39 as the underline charge.

It has long been the law that prosecutors cannot divide continuous crimes into bits and prosecute separately for each count. It is almost impossible (as in both statutes) to consume a drug sell without at the same time getting charge with the drug sale itself, and if so, then sentence the defendant to consecutive terms? Oddly enough, this is exactly what took place in defendant's sentencing proceeding. Defendant is aware that not all drug sales constitute concurrent sentences when by their nature are complete upon a single act or omission. ***Blockburger v. United States***, 284 U.S. 299, 92 S.Ct. 18 (1932). However, this is not the situation in defendant's case. Defendant's top charge constituted a continuous crime with elements of conducting sales during a period of time, which by their very nature requires a course of conduct or several acts or omissions over a period of time, and even the prosecution acknowledged that this crime is a "***continuous operation***," which as matter of law, always continuous. (See, T.T: 1253 as **Exhibit – I**)

In ***Jeffers v. United States***, 423 U.S. 137, 97 S.Ct. 2207 (1977), the Supreme Court strongly suggested that 21 U.S.C. §846, forbidding conspiracy to distribute drugs, was a "lesser included offense" in respect to 21 U.S.C §848. The Court reasoned that the word "concert" in §848 was intended "to have its common meaning of agreement in a design or plan." Thus, proof of §848 violation would automatic show a violation of §846. "So construed, section 846 is a lesser offense of section 848 because §848 require proof of every fact necessary to show a

violation under section 846 as well as proof of several additional elements." ***Jeffers***, *supra*, at 150. The events described above are analogous to defendant's case.

Based on this test, it was obvious that Penal Law §220.39(1), while "acting in concert" was used as one of the underlining offenses in the statute Penal Law §220.77(1) violation, using "several additional element." Thus, a violation in Penal Law §220.77(1) would automatically show a violation of Penal Law §220.39(1). Rather, the analysis became more necessary because the same facts in ***Jeffers v. United States***, *supra*, were used to show both §848 and §846 offenses: the issue was whether *Jeffers* could be punished separately for two offenses steaming from the same fact; and the court held it could not.

Additionally, in the nineteenth century, the Supreme Court held as a continuous offense that the government could prosecute a Mormon only once for a cohabiting for three years straight with more than one woman as his wife; it could not prosecute him three times once for each years. See, ***In re Snow*** 120 U.S. 274, 75 S.Ct. 556 (1887).

Furthermore, the Legislature enacted Bill #51576-2009 and stated that "even with overwhelming evidence of organization, prosecutors often can only charge them with conspiracy, which at most would be a class B felony. Recognizing this shortcoming in existing law, the bill creates the crime of operating as a major trafficker. This new offense will enhance law enforcements ability to prosecute king-pings by providing meaningful criminal sanction for those who conspire ... ." Accordingly, when reviewing Penal Law 220.77 it is straightforward that the Legislature enacted it as the new drug conspiracy for king-pins, which also enhanced criminal sanction for this new crime, it did not intent to sentence defendants to consecutive terms upon two conflicting statutes.

As argued here, the crime of operating as a major trafficker is indeed a "continuous operation," requiring a latter of other offenses to constitute the crime, thus, constituting concurrent sentencing. There is periods of time contained in PL §220.77 sub. 1, with the elements of sales committed over a length of time ("twelve months or less") with "virtue of series of acts" that "when combine make out the crime." ***People v. Keindl***, 68 NY2d 410 (1986); ***People v. Abedi***, 156 Misc.2d 904 (1983). Similarly, larceny also has been label as a continuous crime, through multiple acts taking prolong periods. See, ***People v. Schwenk***, 92 Misc.2d 331 (1977). Likewise, conspiracy offenses with periods of beginning and ending with multiple overt-acts also has been considered a continuous crime. ***People v. Hines***, 284 NY 93 (NY 1940); ***People v. Leisner***, 73 NY2d 140 (1989).

In addition, "[c]losely related to double jeopardy is the concept of consecutive sentencing. A person can be sentence only once for a single criminal act, regardless of the number of statutes violated by such criminal act. If a crime is continuous, then sentence on each act forming a part of the continuous crime must be concurrent." [Emphasis added], See, ***People v. Brown***, 159 Misc.2d 11, (N.Y. Sup. 1983); ***In re Snow***, *supra*; ***People v. Sweeter***, 125 AD2d 841, 842-843 (3rd Dep't 1986).

Therefore, it is defendant's contention that based upon the foregoing his sentences should have been ran concurrent, and defendant CPL §440.20 should be granted and his sentences corrected as a matter of law.

GROUND – III

DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS WERE VIOLATED WHEN THE CLERK OF THE COURT ERRONEOUSLY ENTERED REMARKS ON THE COMMITMENT ORDER AND CERTIFICATE OF CONVICTION WHERE THE SENTENCING JUDGE DID NOT AUTHORIZE AND THE DISTRICT ATTORNEY DID NOT ADHERE

According the United States Supreme Court in ***Hill v. United State ex rel. Wampler***, 298 U.S. 460 (1936), stated that: "the sentence imposed by a sentencing judge is controlling; it is this sentence that constitute the court's judgment and authorizes the custody of the defendant." In that case, pursuant to custom, added a condition of the defendant's sentence of eighteen months and a $5,000.00 dollars fine. Specifically, that the defendant was to remain in custody until the fine was pay. Justice Cardoza, in holding that the clerk did not have the power to alter the sentence imposed, by the court by way of "commitment" opined that "the only sentence known to the law is the sentence or judgment entered upon records of the court ... until corrected in a direct proceeding, it says what it was meant to say, and this is by an irrebuttable presumption." The court in ***Wampler***, therefore excluded the commitment prepared by the clerk of the court. *Id.*, 298 U.S. at 464. The Criminal Procedure Law §380.60 further states that a sentence commitment or certificate of conviction showing the sentence pronounced by the court, or a certified copy thereof, constitutes the authority for execution of the sentence and serves as the order of commitment, and no other warrant, order of commitment or authority is necessary to justify or to require execution of the sentence. See, ***Walker v. Perlman***, 556 F.Supp.2d 259 (2008).

Only the judgment of the court has the power to constrain a person's funds and liberty from the sentence or judgment entered by the sentencing judge. See, ***People v. Selikoff***, 35

NY2d 222, 240-241 (NY 1971) "[s]entence is primarily a judicial responsibility"; ***People v. Fuller***, 57 NY2d 152, 158-159 (NY 1982) "the court ... alone must impose the sentence"; ***People v. Farrar***, 52 NY2d 302, 306 (NY 1981) "the sentence function rest primarily with the judge, whose ultimately obligation is to impose an appropriate sentence.

In the instant matter, the court clerk departed from the judge's oral pronouncement of sentence and entered on defendant's sentence commitment and certificate of conviction a notation which mandated DOCCS to "withheld" "from state prison wages" $100.000.00 dollars for a civil judgment even thought the District Attorney office never follow through with the civil action as directed by the court. (See, **Exhibit – D & B**).

Upon review of defendant's inmate accounts records and defendant's commitment sheet and certificate of conviction, as stated above, it was revealed that the clerk of the court entered a remark stating that DOCCS withheld from state prison wages $100,000.00 dollars from a "*Civil Judgment to be entered for fine*," and consequently DOCCS has already collected over $2,000.00 dollars. (See, **Exhibit – J**). It is imperative to observe how is it possible that DOCCS has excluded over $2000.00 dollars from defendant's account due to the clerk's order when the district attorney never filed the civil judgment.

The entire execution documents are unauthorized as it is different from the court oral statement, see, CPL §380.60. In fact, another egregious discrepancy is found in the Commitment papers when it further states that the defendant conviction was for a "*Plea*" instead of jury verdict, as defendant went to a jury trial. In addition, it was further noted by the clerk court that she hand-printed the sentences "all to run consecutively with *each other*" when the sentencing judge never entered such order. This abuse of authority violated the defendant's due process, as sentencing is indeed a critical stage. It is well settled that courts possess inherent power to

correct their records, where the correction relates to mistakes, or errors, which may be termed clerical in their nature, or where it is made in order to conform the record to the truth. See, ***People v. Minaya***, 54 NY2d 360, 364 (NY 1981). Lastly, defendant here is attacking the sentence as well as remittal for entry to amend the Uniform Sentence and Commitment Order and the Certificate of Conviction and order DOCCS to refund the defendant's the fees already taken from defendant's inmate account[2].

GROUND – IV

DEFENDANT SENTENCE WAS BASED UPON INACCURATE INFORMATION IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

New York State and Federal courts has stated that "as a matter of due process, an offender may not be sentenced on the basis of materially untrue assumptions or misinformation" ***United States v. Pugliese*** 805 F2d 1117, 1123, *quoting* ***Townsend v. Burke***, 334 U.S. 736. Rather, "to comply with due process * * * the sentencing court must assure itself that the information upon which it basis the sentence is reliable and accurate." ***People v. Outley***, 80 NY2d 702 (NY 1993).

During the sentencing proceeding in the instant case, the prosecutor stated that:

> *"as the court knows, we've had five people die from his heroin in the past two years, and in effect this defendant is worse than your average murderer, certainly the average murderer kill one person and not several, and I'm not saying that the defendant intended to kill this people, but it's certainly something that he knows that could happen. These people die from overdoses from his heroin. He doesn't care about these people. We don't know how many people die in Albany where his operation was going or Connecticut ..."* (See, S.T.: pg 10 as **Exhibit – B**)

[2] It should be noted that according to CPL §440.40 the District Attorney had a year grace period of time to fix their mistake or omission in defendant's sentence. Thus, defendant's portion of the sentence regarding the civil judgment cannot be re-entered here nor on any ground in this CPL §440.20 motion.

This information is inaccurate and contained very inflammatory uncharged acts, which has no basis in truth as defendant never committed such crimes, nor has he ever been charged, nor there was any evidence at trial of said allegation, which is completely out of bound. Moreover, this inaccurate information served to influence the judges determination of sentencing defendant to the maximum sentence allow and as such prejudice the entire proceeding.

This allegation was so disseminated throughout the proceeding that spilled over to the Presentence Report ("PSR") in which the probation officer did not hesitate to further included it in the report even though the allegation was an uncharged act.

It should be noted that upon information and belief, probation officer Karen Prager is known to have numerous complaints in volunteering inaccurate information when preparing PSRs. As a matter of fact, she also included further uncharged acts in my PSR when she stated that "defendant stole a vehicle belonging to the State Marshalls and escape to Connecticut ..." See, Evaluate Analysis at Presentence Report as **Exhibit – K**)[3]. Thus, the defendant was prejudice because during sentence the judge unequivocally stated, "I have the opportunity to review the presentence investigation report prepared by the probation department ...," and went on to state that "my decision is not based on the advocacy that I've heard today. It is based on the facts set forth in the various memorandums that have been submitted ... ." (See, S.T.: pg. 14, as **Exhibit – B**).

It is defendant's contention that the information on the PSR were not "facts" as stated by the sentencing judge. On the contrary, this information was very prejudicial because the PSR

[3] Presentence Report is from a previous felony with the same court which probation officer concedes at "defendant's statement," "social history" to be the same as the previous PSR. Therefore, an inquiry must be held as defendant's PSR attached as Exhibit – H is from unrelated matter tried in this Court after this conviction was rendered. Furthermore, defendant brings to the court's attention that pursuant to CPL §390.50, he was unable to obtain a copy of the PSR under Indictment No. 2010/067, and respectfully request that a record of fact be held concerning this matter.

alleged uncharged acts, and because this information influenced the judge's determination to severely sentence the defendant to 40 years of incarceration. Therefore, since PSR are prepare on the basis of interviews conducted by probation officer with crime victims, eye witnesses, police officers, law enforcement agents, prosecutor attorneys, etc., they may well be inaccurate. They may also include allegation not proven at trial as well as alleged facts that would have been inadmissible at trial had the prosecution attempted to present them. See, ***Dickson v. Aschroft***, 346 F.3d 44, 54 [2nd Cir. 2003]; *citing*, ***Hill v. Sciarrota***, 140 F.3d 210, 216 (2nd Cir. 1988), [noting that the inclusion of hearsay statement and inaccurate information in the PSR is "virtually inevitable"].

As relevant in the case at bar, when materially untrue assumptions or misinformation are presented to a court at sentencing, due process is violated and resentencing is required. See, ***People v. Naranjo*** 89 NY2d 1047 (NY 1997). It should also be noted here for clarification purposes that defendant not only is attacking the sentencing court for relying on inaccurate information but also is attacking the pre-sentence investigation and report as the probation officer in preparing the PSR violated CPL §390.30.

GROUND – V

THE SENTENCING COURT VIOLATED DEFENDANT'S DUE PROCESS RIGHT WHEN VIOLATED THE DOUBLE JEOPARDY CLAUSE AND FOR THE LACK OF JURISDICTION TO IMPOSE A CIVIL JUDGMENT WHICH WAS NOT INCLUDED IN THE INDICTMENT AND NOT ALLOWED IN THE STATUTE ENACTED BY THE LEGISLATIVE BODY

The Fifth Amendment of the United States Constitution and N.Y. Const., Art. 1, §6, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause protects individuals from three types of violations: (1) a

second prosecution after acquittal for the same offense, (2) a second prosecution after conviction of the same offense, and (3) multitude punishment for the same offense. Also see, New York State statutory protection against double jeopardy in CPL §40.20. Historically, the primary function of the double jeopardy clause has been to bar consecutive prosecutions and multiple punishments for the same offense. ***Helvering v. Mitcheill***, 303 US 391 (1938).

Under certain circumstances, a civil sanction triggers the protection of the double jeopardy clause, where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the double jeopardy clause forbids from even "attempting a second time to punish criminally." ***Helvering v. Mitcheill***, *supra*, at 399.

In ***Hudson v. U.S.***, 522 US 93, (1997), in a divided Supreme Court disavowed ***United States v. Harper***, 490 U.S. 435, (1989), and stated "[w]hether a punishment is criminal or civil is, at least initially, a matter of statutory construction," *id.*, the Court found that *Halper* had given insufficient consideration to the statute at issue. *Id.*, 102, 118 S.Ct. 488. *Hudson* instruct court to ask first "whether the legislators, in establishing the penalizing mechanism, indicated either expressly or impliedly for one label or the other," and second, to inquiry whether the statutory scheme so punitive in either purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Id.*, at 99. This second inquiry, in turn, is to be resolved by consulting seven factors originally enumerated in ***Kennedy v. Mendoza-Martinez***, 372 U.S. 144 (1963). At the outset, *Hudson* observed that while the Kennedy factors "provide a useful guidepost," *Id.*, at 99, however, it need not be applied rigidly. See, ***United States v. Ward***, 448 U.S. 242, 249 (1980) (characterized *Kennedy* factors as *"neither exhaustive nor dispositive"*).

Moreover, in New York State the Appellate Division applied the same two-prong test, see, ***People v. Roach***, 226 AD2d 55, (4th Dep't 1996), in which adopted the language from ***United States v. Ursery***, 518 U.S. 267 (1996).

In defendant case, at sentencing, Judge Brian D. Burns rendered a "**Civil Judgment**" *sua sponte* combine with the criminal sentence. This violation is detailed in defendant's sentencing proceeding when on December 22, 2011, at Otsego County Supreme Court, Judge Burn sentenced defendant for "Operating as a Major Trafficker" [PL §220.77(1)] to serve 20 years in state prison with a $350.00 dollar surcharge, DNA, c.v. fee. The court then stated "that he pay a fine in the amount of $80.000 and I direct the District Attorney to file a civil judgment in that amount against him." The same was done for the lesser offenses in the amount of $5000.00 for "Criminal Sale of a Controlled Substance" [PL §220.39(1)] for each of the other four counts.

The total amount for the civil judgment was of $100.000.00 and was combined with the 40 year criminal sentences for the five guilty verdict after a jury trial. (See, Verdict Sheet, as **Exhibit – A**). The District Attorney then asks the court "*do you want them separately or one civil judgment?*" The court replied "*separately by count, please.*" (See, S.T.: pg 17-19 as **Exhibit – B**).

It is defendant contention that the statutes on which he was convicted are based on drug sales and elements of drug conspiracy. These statutes, PL §220.77(1) and PL § 220.39(1) does not list any additional civil litigation as a cause of action or any separate intent to sell drugs. The legislator did not intend to establish a second civil penalty in nature into the criminal statute, and the civil judgment was not transformed to be in the criminal statute when it was created, making the second sanction against the defendant punitive. In fact, the record clearly reflects that the second punishment was the judge's intention during sentencing when he "further" stated that:

> *"In addition, (to the criminal sentence) given the nature of this offense and the jury's conclusion beyond a reasonable doubt that he was a major operator in an organization that sold more than $75,000 worth of heroin, it is further order of the court that he pay a fine in the amount of $80,000 and I direct the District Attorney to file a civil judgment in that amount against him."* (See. S.T.: at Pg. 17-19 as **Exhibit – B**)

It is unmistakable that the "civil judgment" imposed by Judge Burns in defendant's case was "further" a second punishment "in addition" to the criminal conviction which undeniably violated defendant's right to double jeopardy clause, which forbids that a defendant be punished "twice for the same offense." See, ***Ex Parte Lange 18 Wall*** 85 U.S. 163 at 175 (1873). Thus, satisfying both prongs in *Hudson* and *Roach supra*.

Penal Law §60.30, as is relevant read as follow:

This article does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty and any appropriate order exercising such authority may be included as part of the judgment of conviction.

It is crucial to keep in mind that in this case, none of the statutes on which the defendant was convicted provides for a civil penalty. While Penal Law §60.30 authorizes a court to impose a civil penalty in conjunction with a criminal sentence, the court reads this statute as meaning that a civil penalty may be imposed in conjunction with a crime if the statute of which the defendant has been convicted provides for a civil penalty. See. People ***v. O'Hara***, 191 Misc.2d 248, 250 (NY Sup. 2002) ["a sentence that it is illegal is jurisdictionally defective"].

Since the statute on which the defendant was convicted does not provide for a civil penalty, this Court did not have jurisdiction to apply CPLR in this criminal matter, therefore Penal Law §60.30 is inapplicable here. Consequently, violating defendant' protection under

double jeopardy clause. Therefore, a defendant who has already been punished in a criminal prosecution may not be subjected to additional civil sanctions to extent a second sanction which may not fairly be characterized as remedial, but only as deterrent or retribution, given the protection against double jeopardy.

Accordingly, defendant's sentence was unauthorized and illegally imposed. The court must consider whether a civil sanction, in application, [is] so divorced from remedial that it constitutes "punishment" for the purpose of double jeopardy and the court must rule accordingly to state and federal constitutional mandates.

GROUND – VI

THE SENTENCING COURT VIOLATED DEFENDANT'S EXCESSIVE FINE CLAUSE OF THE U.S. Const. Amends 8; Mckinney's N.Y. Const. Art. 1, §5

In the instant matter, even assuming arguendo that defendant's double jeopardy clause was not violated, which the court in fact did; the sentencing court also violated defendant's excessive fine clause.

Penal Law §80.00 requires the Court to consider profit gained by defendant's conduct, whether amount of profit gained was disproportionate to conduct in which defendant engaged, conducts impact on victims, and defendant economic circumstances. See, McKinney's P. L. §80.00 subd. 1, Part. C. Further, Part B, requires that such fine must not exceed double the amount of defendant's gain.

The Eighth Amendment protects against civil fines, see, ***Alexander v. United States***, 509 U.S. 544 (1993); ***Austin v. United States***, 509 U.S. 602 (1998). Although the Eighth Amendment claims often arise in the criminal context, civil fines may also fall within reach of

the Amendment. See, ***Korangy v. United States FDA***, 498 F.3d 272, 277 (4th Cir. 2007). A fine is unconstitutional excessive if it "notably exceeds in the amount that which is reasonable, usual, proper or just." See, ***People v. Saffore***, 18 NY2d 101, 104 (NY 1996). Thus, the excessive fine clause is also violated where the fine is "grossly disproportionate to the gravity of the offense." See, ***United State v. Bajakajians***, 524 U.S. 321, 324 (1998) or serves, at least in part, deterrent and retributive purposes as punitive – the defendant is further subject to the excessive purpose fine clause. See, ***Nassau v. Canavan***, 1 NY3d 134, 139-140 (NY 2003).

In the case at bar, addressing the lesser count of criminal sales of a controlled substance, first, it is evident that on counts 5, 6, 9, and 11 for which defendant was also convicted, (see, ***Exhibit – A***) the civil judgment fine imposed on those counts is far more than excessive and exceptionally punitive. The sale on count 5, for instance, which was recorded on September 2, 2009, was a controlled buy of $100 dollars (T.T.: 755). The sale on count 6, recorded on January 21, 2010, was also a controlled substance buy of $180 dollars. (See, T.T.: 775-779). On count 9, the sale of a controlled substance buy was of $40 dollars (T.T.: 890). Lastly, the controlled substance buy on count 11 was of $100 dollars (T.T.: 1102). Defendant was charged as acting in concert on all four sales under Penal Law §220.39(1). (See, Indictment as **Exhibit – E**, also see, **Exhibit – L,** as Trial Transcripts).

The issue here is that the court imposed a $5000 dollars civil judgment fine on each of the four counts for an aggregated total of $20.000 dollars, meanwhile and according to court records, the profit gained on those controlled sales were of $470 dollars. Defendant was sentenced consecutively on each of the four counts to 5 years, together with ***a civil judgment 4200% greater than all sales combined***. It is apparent that the court's intention in imposing said

fine was not in accordance to Penal Law §80.00(1-b); (1-c) or (3), rather it was as punishment as it is clearly reflected on the sentencing minutes. (See, ***Exhibit – B***).

As to the $80.000 dollars civil judgment fine imposed on count One (Operating as a Major Trafficker [P.L. §220.77(1)]), the county court further erred because if did not comply with the requirement set-forth in Penal Law §80.00(1)(c), see, ***People v. Colburn***, 213 AD2d 746 (3rd Dep't 1995). Therefore, a further fact-finding hearing must be conducted pursuant to CPL §400.30 addressing count One, and the sale count as the sentencing court also disregarded P. L. §80.00(3) during sentencing. See, ***People v. Kozlowoski***, 11 N.Y.3d 223 (NY 2008).

Additionally, and for the sake of this argument, a factfinding hearing pursuant to Article 80 will be needless. Either the Penal Law or the Criminal Procedure Law are silent regarding this matter and quite certainly does not contain or states any civil judgment as part of above-mentioned statutes. The relevant inquiry is not whether the fine arises in the civil judgment or criminal, but whether the fines constitute punishment. See, ***Austin***, 509 U.S. at 610, thus triggering the excessive fine clause.

Defendant's punishment during sentencing was not reasonable, usual, proper, nor just and the violation here was grossly disproportionate, the gain nullified, making the judge's sentence punitive, as the civil judgment fine is invalid and unlawful as a matter of law. This leaves the sentencing court no choice to rule on a United States Const. Eighth Amendment violation and New York Const. Art. I §5, which forbids the imposition of excessive fines. Accordingly and based on the above allegations, defendant's civil judgment fine should be stricken from the record, nullified them and modified the sentence in accordance with the law.

CONCLUSION

It is well settled, that sentencing is a critical stage. The defendant's State and Federal Constitution rights have indeed been violated in so many areas through his sentence. It is unexplainable and remarkably outrageous. Therefore, the grounds for relief as described herein have not been determined on the merits upon a prior motion or proceeding in a court of this State or Federal Court. Accordingly, the sentence should be reversed and modified as well as amended, or for any other alternative relief requested herein.

WHEREFORE, defendant further request that this Court enter an Order, pursuant to CPL §440.20, setting aside the sentence imposed upon defendant and resentence him in accordance with the law; and request that the court, pursuant to CPL 440.30(5), cause the defendant, who is confined at the address set forth in this motion, to be produced at any hearing which the court shall conduct to determine the merits of this motion; and that under CPLR §§1101 and 1102, as well as County Law §722, defendant be assigned suitable counsel to represent him in this matter, and for such and further relief as this Court may find just and proper.

DATED: July 22, 2015
Stormville, New York

Respectfully Submitted,

Jose Rodriguez

José A. Rodriguez, 11B3913
Defendant *Pro-se*
Green Haven Corr. Fac.
P.O. Box 4000
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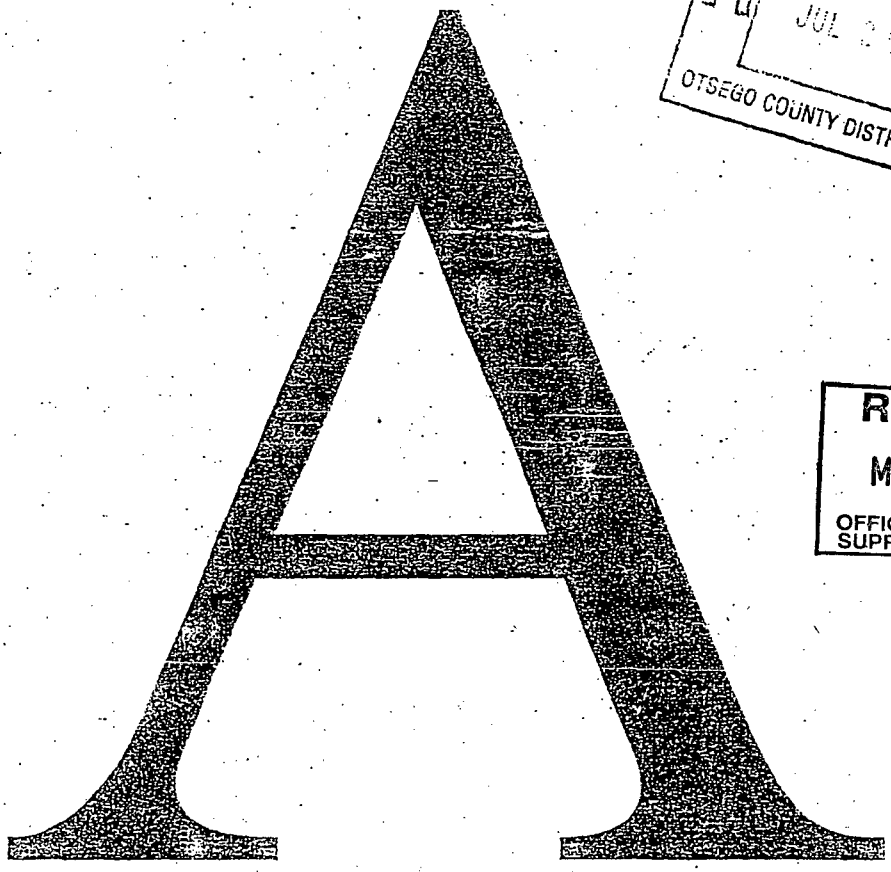
SWORN TO BEFORE ME THIS
22 DAY OF JULY 2015

NOTARY PUBLIC

NOTARY PUBLIC
PATRICK LEON MCNEIL
No. 01MC6324976
Exp. 05/18/2019
BRONX COUNTY
STATE OF NEW YORK

EXHIBIT



ACKNOWLEDGMENT AND NOTICE OF APPEARANCE

Short Title: Rodriguez v. Griffin Docket No.:

Lead Counsel of Record (name/firm) or Pro se Party (name): Jose A. Rodriguez, # 11B3913

Appearance for (party/designation): Pro-se at Green Haven Correctional Facility
Stormville, N.Y. 12582

DOCKET SHEET ACKNOWLEDGMENT/AMENDMENTS

Caption as indicated is:
(✓) Correct
( ) Incorrect. See attached caption page with corrections.

Appellate Designation is:
(✓) Correct
( ) Incorrect. The following parties do not wish to participate in this appeal:
Parties: _____
( ) Incorrect. Please change the following parties' designations:
Party — Correct Designation

Contact Information for Lead Counsel/Pro Se Party is:
(✓) Correct
( ) Incorrect or Incomplete, and should be amended as follows:

Name: _____
Firm: _____
Address: _____
Telephone: _____ Fax: _____
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RELATED CASES

(✓) This case has not been before this Court previously.
( ) This case has been before this Court previously. The short title, docket number, and citation are: _____
( ) Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers, and citations are: _____

CERTIFICATION

I certify that ( ) I am admitted to practice in this Court and, if required by LR 46.1(a)(2), have renewed my admission on _____ OR that ( ) I applied for admission on _____ or renewal on _____. If the Court has not yet admitted me or approved my renewal, I have completed Addendum A.

Signature of Lead Counsel of Record: _____
Type or Print Name: _____
OR
Signature of pro se litigant: Jose Rodriguez
Type or Print Name: Jose A. Rodriguez
( ) I am a pro se litigant who is not an attorney.
(✓) I am an incarcerated pro se litigant.