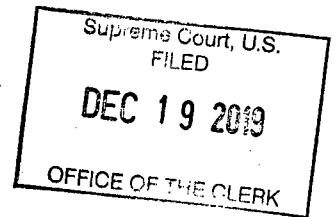


20-7857

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

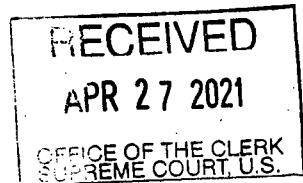


BENJAMIN AYALA, PETITIONER
VS.
NEW YORK, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEW YORK:
APPELLATE DIVISION: SECOND DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

BENJAMIN AYALA
DIN 05A0302
GREEN HAVEN CORRECTIONAL FACILITY
P. O. BOX 4000
STORMVILLE, NY 12582



QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment right against double jeopardy was violated when he was convicted of multiple burglaries based upon a single entry into a dwelling?
2. Whether a uniform decision by this Court required where a New York State Court's decision on petitioner's Fifth Amendment claim is in conflict with other state courts?

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at People v. Ayala, 172 A.D.3d 1084 (2d Dep't 2019).

JURISDICTION

The date on which the highest court decided my case was September 24, 2019. A copy of that decision appears at Appendix K. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

"No person shall...be subject for the same offense to be twice put in jeopardy of life or limb."

The Fourteenth Amendment of the United States Constitution provides:

"No State shall...deprive any person of life, liberty, or property, without due process of the law."

New York Penal Law Section 140.30 provides in relevant part:

"A person is guilty of Burglary in the First Degree when he knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:

- (2) causes physical injury to any person who is not a participant in the crime; or**
- (3) uses or threatens the immediate use of a dangerous instrument."**

STATEMENT OF THE CASE

In 2003, petitioner, Benjamin Ayala, was indicted of three (3) counts of Burglary in the First Degree, one (1) count of Burglary in the Second Degree, one (1) count of Attempted Robbery in the First Degree, one (1) count of Attempted Robbery in the Second Degree, two (2) counts of Criminal Possession of a Weapon in the Fourth Degree, one (1) count of Assault in the Second Degree, and one (1) count of Assault in the Third Degree for an incident that occurred on November 18, 2003. At jury trial, it was alleged that the petitioner and an accomplice entered a couple's home, demanded \$29,000 from them at knife point, which the couple said they did not have, and fled after taking property. The couple's two grandsons chased the men, caught up, and got into a fight during which one of the grandsons was stabbed.

A suppression hearing was held on August 23, 2004. Trial took place from December 13, 2004 to December 16, 2004. Petitioner was convicted of three (3) counts of Burglary in the First Degree. On January 15, 2005, petitioner was sentenced to twelve (12) years in prison with five (5) years of post-release supervision on each count, the sentences to run consecutively, for a total effective prison sentence of thirty-six (36) years.

Petitioner filed a Notice of Appeal on March 22, 2005. On March 9, 2006, counsel perfected his appeal and raised only two (2) issues: 1. There was insufficient evidence to convict petitioner; and 2. The petitioner's sentence was excessive because he was thirty-six (36) years old and had no violent criminal history. In a pro-se Supplemental Brief, petitioner argued that he should have received concurrent sentencing instead of consecutive sentences under Penal Law §70.25(2) because all the charges involved the same, single Burglary. The Appellate Division: Second Department affirmed judgment in People v. Ayala, 36 A.D.3d 827 (2d Dep't 2007) holding that: 1. there was legally sufficient evidence to convict petitioner and the weight of the evidence supported his conviction; and 2. the sentence was legal because the evidence established that the crimes involved separate and distinct acts, nor was it excessive. Leave to Appeal was denied (See: People v. Ayala, 8 N.Y.3d 943 [2007]).

On August 3, 2007, petitioner filed a post-conviction motion to vacate judgment because he was actually innocent, his consecutive sentences was illegal, and he received ineffective assistance

of counsel (who did not object to insufficiency of the evidence, did not properly cross-examine witnesses, did not object to an improper relationship between the arresting officer and a member of the jury, did not prepare petitioner's alibi witness, did not subpoena medical records, did not move to suppress a suggestive line-up ID, and did not tell petitioner about a plea offer of seven years in prison).

On March 17, 2009, the motion was denied (Lott, J.). The petitioner filed a motion to renew his motion to vacate judgment, which was denied on September 16, 2013. Leave to appeal was denied on March 3, 2014.

Petitioner filed a second motion to vacate judgment on December 21, 2015, which was denied on April 20, 2016 (Gerstein, J.). Leave to appeal was denied by Appellate Division: Second Department (People v. Ayala, 2016WL5328604 [2d Dep't 2016]), and the New York State Court of Appeal (People v. Ayala, 28 N.Y.3d 1122 [2016]). A motion for reconsideration was denied (People v. Ayala, 28 N.Y.3d 1181 [2017]).

Petitioner filed a federal petition for a writ of habeas corpus in 2009. It was denied in 2012 (Ayala v. Ercole, 2012WL425231 [E.D.N.Y. February 9, 2012], appeal dismissed [2d Cir. 12-794][July 17, 2012]). His petition for a writ of certiorari was denied (Ayala v. Lee, 133 S.Ct. 987 [2013]).

On July 13, 2015, petitioner filed an application for a writ of error coram nobis to vacate judgment on the ground of ineffective assistance of appellate counsel. The motion argued that appellate counsel failed to argue that the trial court erred in failing to declare a mistrial because the prosecutor failed to disclose cell phone records of a witness, the prosecutor made improper comments during summation, and trial counsel was ineffective for failing to argue the use of photos as the basis for an in-court identification by a complainant was improper and suggestive, failed to object to prosecutorial misconduct during summation, did not argue that there was insufficient evidence of assault on the grandson, did not object to the introduction of a witness's cell phone records, and did not argue that the prosecutor failed to comply with the notice requirement of C.P.L. §250.20(4). The coram nobis was denied (People v. Ayala, 137 A.D.3d 804 [2d Dep't 2016]). His application for leave was denied by the Appellate Division: Second Department (People v. Ayala,

2016WL5328604 [2d Dep't 2016]) and dismissed by the New York State Court of Appeals (People v. Ayala, 27 N.Y.3d 1065 [2016]).

On May 22, 2017, the petitioner filed a second petition for a writ of error coram nobis. He argued that appellate counsel failed to raise trial counsel's ineffectiveness for failure to object to the prosecutor's misuse of subpoenas to obtain defendant's cell phone records and its investigation of personal information on his cell phone. Petitioner also argued that his appellate counsel was ineffective for failing to argue that his trial attorney raised a flawed alibi defense, failed to object to the multiplicitous of the counts of Burglary in the First Degree, and failed to argue that the sentence was illegal because the trial court did not comply with C.P.L. §400.21 concerning predicate felony sentencing.

In its affirmation in response to the petition dated September 1, 2017, and its affirmation dated August 29, 2017, the respondents admirably acknowledged that the petitioner's multiplicitous argument has merit because all three (3) Burglary in the First Degree counts arose out of a single entry into the dwelling. The respondents noted that even though the Appellate Division rejected the claim that the petitioner made in his pro se supplemental brief on the direct appeal that consecutive sentencing was improper because there was a single actus reus, his current argument that the counts were multiplicitous is different. The respondents concluded that the Burglary sentences should run concurrently, not consecutively, because they arose from a single entry into a single residence at a single residence at a single time. The respondents asked that the case be returned to the trial court for resentencing if relief on the coram nobis petition was granted. The coram nobis was denied (People v. Ayala, 172 A.D.3d 1084 [2d Dep't 2019]). His application for leave to appeal was denied by the New York State Court of Appeals (People v. Ayala, 34 N.Y.3d 949 [2019]).

REASONS FOR GRANTING THE PETITION

Charging the petitioner with multiple counts of Burglary in the First Degree based upon a single entry into a dwelling violates his right against double jeopardy because it convicts petitioner multiple times for the same crime (U.S. Const. Amends. V and XIV).

All three of petitioner's Burglary in the First Degree arose out of a single entry of a dwelling. Despite the clear violation of petitioner's right against double jeopardy, trial counsel failed to seek dismissal of two of the three multiplicitous counts of Burglary in the First Degree.

This error is not harmless because the trial court imposed three (3) consecutive sentences of twelve (12) years imprisonment on **each** count of Burglary in the First Degree. As a result, what should have been a twelve (12) year determinate sentence wrongly became a thirty-six (36) year determinate sentence.

Petitioner was charged and convicted on three (3) counts of Burglary in the First Degree. The relevant portion of New York Penal Law §140.30 states the following:

"A person is guilty of Burglary in the First Degree when he knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:

2. causes physical injury to any person who is not a participant in the crime; or
3. uses or threatens the immediate use of a dangerous instrument."

Specifically, count 1 of the indictment under Penal Law §140.2(2) alleges that the petitioner unlawfully entered the dwelling of Angel and Claudia Santiago, and while in the dwelling or in immediate flight therefrom caused physical injury to Angel. Count 2 of the indictment, also under Penal Law §140.2(2), alleges that petitioner unlawfully entered the dwelling of Angel and Claudia Santiago, and while in the dwelling or in immediate flight therefrom caused physical injury to Erick Marin. Count 3 of the indictment for Burglary in the First Degree, under Penal Law §140.30(3), alleges that petitioner unlawfully entered the dwelling of Angel and Claudia Santiago, and while in the dwelling or in immediate flight therefrom used a dangerous instrument.

Reflecting the language of the indictment, in its final charge, the trial court instructed the jury

that all three counts of Burglary in the First Degree involved unlawful entry into the same home at the same time. The parties did not object to this charge (See: Trial Transcripts, pp. 393-398; 408-410). Thus, all three (3) counts of Burglary in the First Degree were based upon a single entry.

"An indictment is multiplicitous when two or more counts charge the same crime." (See: People v. Aaron, 296 A.D.2d 508 [2d Dep't 2002]) These include counts in which the petitioner's conduct involves the same mental state, the same act, and the same course of conduct. (See: People v. Senisi, 196 A.D.2d 376, 382 [2d Dep't 1994]; See also: Brown v. Ohio, 432 U.S. 161 [1977]) Charges that are multiplicitous deprives petitioner of his federal right against double jeopardy because such charges convicts petitioner twice for the same crime. (U.S. Const. Amend. V and XIV)

In a decision and order dated May 15, 2019, the New York State Appellate Division held the following:

"[T]he counts charging [petitioner] with Burglary in the First Degree were not multiplicitous.....because they involved separate subsections of the relevant Burglary statute (Penal Law §140.30[2], [3], and [] required proof of separate and distinct conduct involving different victims. The separate subsections of the Burglary statutes that provide different ways in which Burglary may be committed constitutes separate offenses [citations omitted]."

"[C]ounts were not multiplicitous, since they involved physical injury to different victims with different methods of injury, occurring at different times and places during the criminal transaction [citations omitted]. Multiplicity does not exist when each count requires proof of an additional fact that the other does not [citations omitted]."

The New York State Appellate Division's decision and order exacerbated a growing divergence of opinion in other Appellate Division courts in New York and other state courts regarding multiplicitous counts rebutting in convictions of the same issues. Compare the petitioner's case, People v. Ayala, 172 A.D.3d 1084 (2d Dep't 2019) with People v. Perrin, 56 A.D.2d 957 (3d Dep't 1977) ("[I]t is clear that the defendant could only be convicted of one count of Burglary.....Regardless of how many persons are injured by the defendant inside the dwelling, the defendant can only be convicted of one count of Burglary since there has been only one entry. The error occurred when both counts of Burglary were submitted to the jury.....Accordingly, we set aside the judgment and sentence of the court under the second count of the indictment wherein the defendant was convicted of Burglary

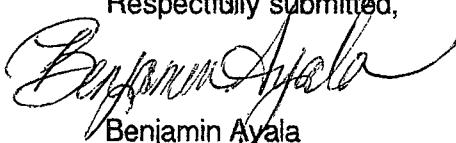
in the Second Degree and sentenced to serve an indeterminate term of imprisonment with a maximum of 10 years and a minimum of 5 years."; People v. Rodriguez, 74 A.D.3d 1818 [4th Dep't 2010][same]). Other statutes have held the same way, in the law as by the appellate court in Hawai'i, "[t]he Burglary statute requires both an entry and an intent to commit a crime.....Consequently, a person commits but one Burglary if there is only one entry, despite what may be viewed as an intent to commit more than one crime therein or opportunant intents with respect to two or more crimes committed." (See: State v. Harper, 104 Haw. 146, 147 [Sup. Ct. Hawai'i 2004]; See also: Walker v. State, 394 NW2d 192, 198 [Minn. Ct. App. 1986][same]; Green v. State, 694 So.2d 876, 877 [Fla. Dist. Ct. App. 197][same]; Bowman v. United States, 652 A.2d 64, 70 [D.C. 1994][same]; People v. Newbern, 226 Ill.App. 623 [Ill.App.Ct. 1995][same]; People v. Fuentes, 258 P.3d 320, 325 [Colo.App. 2011 2011][same]; Commonwealth v. Gordon, 42 Mass.App.Ct. 1001 [1997][same]; State v. Marriott, 189 Ohio App.3d 98 [2010][same]; State v. Brooks, 113 Wash.App. 397 [2002][same]; State v. Allen, 125 Ariz. 158, 159 [Ct. App. 1980][same]).

That is precisely what occurred in petitioner's case. By definition, Burglary occurs when there is an unlawful entry into a dwelling for the purpose of committing a crime therein or during immediate flight therefrom regardless of how many people are injured or how many dangerous instruments are used. The Three (3) counts of Burglary in the First Degree against petitioner were multiplicitous because they all occurred during a single entry. As a matter of law, there was only one Burglary, not three different counts of Assault, for instance, each involving a different victim, when it comes to Burglary in the First Degree, there was but one criminal act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Benjamin Ayala

Dated: December 19, 2019