APPENDIX A

PETITION FOR A COMMON-LAW WRIT OF ERROR CORAM NOBIS

No. _____

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

BENJAMIN AYALA,
Defendant-Appellant.

ON PETITION FOR A COMMON-LAW WRIT OF ERROR
CORAM NOBIS TO THE APPELLATE DIVISION

PETITION FOR A COMMON-LAW WRIT OF ERROR CORAM NOBIS

Benjamin Ayala
Pro Se Appellant
Din. 05-A-0302
Green Haven Corr. Fac.
P.O. Box 4000
Stormville, NY 12582

QUESTIONS PRESENTED

1. Whether the defendant's right to effective counsel was violated when appellate counsel failed to raise on direct appeal the issue of trial counsel's performance with respect to the prosecutor misuse of the subpoena process to obtain the defendant's cellular telephone records entitles the defendant to a reversal of his conviction and dismissal of the indictment?

2. Whether the defendant's right to effective counsel was violated when appellate counsel failed to raise on direct appeal the issue of trial counsel's performance with respect to his investigation of defendant's personal data in his cellular telephone found on his person and the cellular telephone records produced at trial by the People?

3. Whether the defendant's right to effective counsel was violated when appellate counsel failed to raise on direct appeal the issue of trial counsel's performance with respect to the use of a flawed alibi defense?

4. Whether the defendant's right to effective counsel was violated when appellate counsel failed to raise on direct appeal the issue of trial counsel's performance with respect to the multiplicitous counts charging the defendant with burglary in the first degree?

5. Whether the defendant's right to effective counsel was violated when appellate counsel failed to raise on direct appeal the issue that defendant received an illegal sentence because of noncompliance with the statutory mandates of CPL § 400.21?

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IN THE

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

Petitioner, Benjamin Ayala, respectfully prays that a Writ of Error Coram Nobis be issued so that the defendant may pursue his direct appeal on the merits.

DECISION

Petitioner's direct appeal argued that: (1) the prosecution failed to prove his guilt beyond a reasonable doubt and the verdict was against the weight of the evidence; (2) the aggregate sentence of imprisonment of thirty years was excessive; and (3) the three twelve-year sentence of imprisonment could not be consecutive pursuant to Penal Law § 70.25(2). On January 23, 2007, this Court unanimously affirmed petitioner's conviction (People v. Ayala, 36 AD3d 827 [2d Dept.2007]).

JURISDICTION

The Appellate Division, Second Judicial Department has subject matter jurisdiction pursuant to People v. Bachert, 69 NY2d 593 (1987).

> "[T]here [is] no comprehensive statutory mechanism to address collateral claims of ineffective assistance of appellate counsel * * *. That a defendant who claims to be aggrieved by appellate counsel's failures could proceed by writ of error coram nobis before the appellate court in which the allegedly deficient representation took place."

See People v. Stultz, 2 NY3d 277, 281 (2004).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 6 of the New York Constitution provides as follow:

"In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel".

2. The Sixth Amendment of the United States Constitution provides as follow:

"In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence."

3. The Fourteenth Amendment of the United States Constitution provides as follow:

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

4. Penal Law Section 140.30(2) provides as follow:

> "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) cause physical injury to any person who is not a participant in the crime".

5. Criminal Procedure Law Section 470.15(3)(c) provides as follow:

> "A reversal or a modification of a judgment, sentence or order must be based upon a determination made:
>
> "As a matter of discretion in the interest of justice".

6. Criminal Procedure Law Section 400.21(1) provides, in part:

> "The provisions of this section govern the procedure that must be followed in any case where it appears that a defendant who stands convicted of a felony has previously been convicted of a predicate felony and may be a second felony offender as defined in section 70.06 of the penal law or a second felony drug offender as defined in either paragraph (b) of subdivision one of section 70.70 of the penal law, or paragraph (b) of subdivision one of section 70.71 of the penal law."

7. Criminal Procedure Law Section 400.21(2) provides, in part:

> "When information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction and whether the predicate felony conviction was a violent felony as that term is defined in subdivision one of section 70.02 of the penal law * * *."

STATEMENT OF THE CASE

Under Kings County Indictment Number 8275/2003, the Petitioner was charged with three counts of burglary in the first degree (PL § 140.30[2], [3]), two counts of criminal possession of a weapon in the fourth degree (PL § 265.01[2]), one count each of burglary in the second degree (PL § 140.25[2], [3]), attempted robbery in the first degree (PL §§ 110/160.15 [3]), attempted robbery in the second degree (PL §§ 110/160.10 [1]), assault in the second degree (PL § 120.05[2]), and assault in the third degree (PL § 120.00[1]).

Petitioner was tried before a jury in the Supreme Court of New York, Kings County. On December 16, 2004, the Petitioner was convicted of three counts of burglary in the first degree (PL § 140.30[2], [3]).

On January 11, 2005, the Petitioner was sentenced to three consecutive terms of 12 years of imprisonment, and 5 years post-supervision for each conviction. By operation of law, the aggregate sentence was reduced from 36 years to 30 years (see PL § 70.30[1][e][i]).

REASONS FOR GRANTING THE WRIT

"The Federal Constitution imposes on the State no obligation to provide appellate review of criminal convictions" (see Halbert v. Michigan, 545 US 605, 610 [2005]). "In New York State every defendant has an absolute and fundamental right to appeal a conviction" (see People v. Rivera, 39 NY2d 519, 522 [1976] [internal quotation marks omitted]). "[I]n first appeals as of right, States must appoint counsel to represent indigent defendants" (see Halbert, 545 US at 610).

> "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."

See Evitts v. Lucey, 469 US 387, 396 (1985); People v. Stultz, 2 NY3d 277, 282 (2004)("[Defendants in criminal cases have a federal and state constitutional right to effective assistance of appellate counsel.").

The standards enunciated in People v. Baldi (54 NY2d 137 [1981]) and the two-prong test in Strickland v. Washington, 466 US 668 (1984), apply to claims of ineffective assistance of appellate counsel (see Evitts, 469 US at 396-397; Aparicio v. Artuz, 269 F3d 78, 95 [2d Cir. 2001]; Stultz, 2 NY3d at 284).

When ineffective assistance of counsel claims are asserted under New York law, the Court of Appeals has adopted a flexible "totality of the circumstances" test to measure the actions of counsel (see People v. Henry, 95 NY2d 563, 565-566 [2000]), which had been enunciated in Baldi (54 NY2d at 147). Under that

"flexible approach"

> "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met [citation omitted]. The core of the inquiry is whether defendant received meaningful representation."

See People v. Benevento, 91 NY2d 708, 712 (1998)(internal quotation marks omitted).

> "[W]e have clarified 'meaningful representation' to include a prejudice component which focuses on the 'fairness of the process as a whole rather than [any] particular impact on the outcome of the case'".

See Henry, 95 NY2d at 566 (quoting Benevento, 91 NY2d at 714).

Appellate counsel provides meaningful representation when he displays "a competent grasp of the facts, the law and appellate procedure, supported by appropriate authority and argument" (Stultz, 2 NY3d at 285).

> "The essential inquiry in assessing the constitutional adequacy of appellate representation is, then, not whether a better result might have been achieved, but whether, viewed objectively, counsel's actions are consistent with those of a reasonable competent appellate attorney [citation omitted]. To be meaningful, appellate representation may be meaningful even where appellate lawyers have failed to brief potentially meritorious issues [citation omitted]."

See People v. Borrell, 12 NY3d 365, 368 (2009).

Strickland has two components:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

See Strickland, 466 US at 687.

ARGUMENT I

THE DEFENDANT'S RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED WHEN APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE ISSUE OF TRIAL COUNSEL'S PERFORMANCE WITH RESPECT TO THE PROSECUTOR'S MISUSE OF THE SUBPOENA PROCESS TO OBTAIN THE DEFENDANT'S CELLULAR TELEPHONE RECORDS.

During the course of defendant's trial at least 10 witnesses had testified prior to the prosecutor's cross-examination of the defense witness, Magdelena Perez. While cross-examining Perez, the prosecutor introduced the defendant's cellular telephone records which the defendant's counsel claims that he was "sandbagged". See Trial Transcripts, 321-324; 366. After his conviction, the defendant filed with the Kings County district attorney's office a FOIL request that inquired of any documents which pertains to Indictment Number 8275/2003. A disclosure of the aforesaid documents reveal that Samantha Magnani, Assistant District Attorney, issued a subpoena to T-Mobil requesting production of defendant's cellular telephone records from November 17, 2003 to November 19, 2003 for cellular telephone number 347-866-6876 and account number 251543803. The aforesaid subpoena which was dated December 6, 2004, had further requested that the cellular telephone records be faxed or mailed to Magnani (see T-Mobil Subpoena).

> "CPL 610.25(1) makes clear that where the District Attorney seeks trial evidence the subpoena should be made returnable to the court, which has the right to possession of the subpoenaed evidence. It is for the court, not the prosecutor, to determine where subpoenaed material should be deposited, as well as any disputes regarding production".

See People v. Natal, 75 NY2d 379, 385 (1990)(quotation marks

and citation omitted).

Here, it was inappropriate for the prosecutor to have issued a subpoena returnable to their office in advance of trial, and this Court should unequivocally condemn such practice as a misuse of the court process (id. at 384-385).

The defendant was prejudiced by the prosecutor's premature subpoena regarding the cellular telephone records (see Argument II).

ARGUMENT II

THE DEFENDANT'S RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED WHEN APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE ISSUE OF TRIAL COUNSEL'S PERFORMANCE WITH RESPECT TO HIS INVESTIGATION OF DEFENDANT'S PERSONAL DATA IN HIS CELLULAR TELEPHONE FOUND ON HIS PERSON AND THE CELLULAR TELEPHONE RECORDS PRODUCED AT TRIAL BY THE PEOPLE.

At trial, Magdalena Perez, defendant's alibi witness, testified to the defendant's whereabouts on the evening of November 18, 2003. Perez stated that after leaving a hotel, Perez had dropped the defendant off on the corner of Third Avenue and Butler Street, at approximately, 10:00 p.m. (see Trial Transcripts, pp. 304-307)

During cross-examination of Perez, the prosecutor introduced cellular telephone records to undermine defendant's alibi defense. The defendant's counsel was "sandbagged" when without notice the prosecutor used cellular telephone records which the prosecutor was adamant in his refusal to disclose to defense counsel in a timely manner (see TT., pp. 366-369). That cross-examination impressed in the jury's mind that the defendant and Perez could not had been together because of a 23 minute

call which the prosecutor alleges the defendant had made (see TT., pp. 309-323). The use of the cellular telephone records went beyond the scope of refreshing Perez's recollection. Those records were used as evidence in rebuttal to the defendant's alibi. The cellular telephone records were not offered into evidence.

During jury deliberation, the jury sent a note to the trial court (see Court Exhibit No. 3), requesting all cellular telephone records. The trial court's response to that note was that "the cell phone records are not in evidence" (see TT., p. 407).

Where a defendant's claim stems from a "strategic choice[] made after less than complete investigation," such a choice is reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." See Strickland, at 690-91.

> "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (Id. at 691)

In assessing whether counsel exercised "reasonable professional judgment," this Court's "principal concern ... is not whether counsel should have presented" the additional evidence that further investigation would have revealed, but rather, "whether the investigation supporting counsel's decision not to introduce" the additional evidence "**was itself reasonable.**" See Wiggins v. Smith, 539 US 510, 522-523 (2003).

In doing so, this Court must look to "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." See Id. at 527.

> "[A] defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial".

See People v. Bennett, 29 NY2d 462, 466 (1972)(internal quotation marks omitted); see also People v. Droz, 39 NY2d 457, 462 (1976).

The cellular telephone records are material to the defendant's case because they are essential to the prosecutor's rebuttal evidence, they appear to show that the prosecutor misled the jury in believing that the defendant created a false alibi defense, and they further appear to support defendant's alibi defense upon further inspection and investigation.

As to the defendant's whereabouts on the evening of November 18, 2003, Perez testified that she met the defendant at Third Avenue and Atlantic Avenue at, approximately, 5:30 p.m., and that they decided to go to a hotel. Perez and the defendant arrived at the hotel at, approximately, 6 p.m., and that they departed from the hotel at, approximately, 9:30 p.m. Perez testified that she left the defendant at Third Avenue and Butler Street at, approximately, 10 p.m. (see TT., pp. 304-307).

During cross-examination of Perez, the prosecutor misled the jury in believing that the cellular telephone records show that Perez called the defendant and that the call lasted 23

minutes. The prosecutor impressed in the jury's mind that the defendant and Perez could not had been together because there is a question as to why would Perez call the defendant if they are together (see TT., pp. 309-323).

Had defendant's counsel investigated the defendant's cellular telephone records, he would had found that the defendant did not actually possess the cellular telephone involved in the 23 minute call. Upon a closer inspection of the cellular telephone records, it will be found that the cellular telephone was continuously in use by someone else while the defendant was incarcerated (Compare Cellular Telephone Records with Defendant's Personal Property Voucher). The cellular telephone that was in defendant's possession at the time of his arrest is not the one in which the prosecutor falsely accuses the defendant of possessing on his person (see TT., p. 250).

Defendant's counsel failed to pursue the minimal investigation required under the circumstances. The People's case rested almost entirely on a 23 minute call in defendant's cellular telephone records as rebuttal to defendant alibi defense. Defense counsel's ability to undermine that 23 minute call was crucial. The strategy to present that defendant has a strong alibi defense could only be fully developed after counsel's investigation of the facts and law, which required review of the cellular telephone records that would reveal that the defendant could not have made that 23 minute call because the cellular telephone was still in use while the defendant

was at all times being held in detention. Further investigation into the defendant's cellular telephone records was absolutely vital. However, defense counsel's decision in not investigating the records is inconsistent with his constitutional "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." See Strickland, 466 US at 691. Considering all the circumstances, no "fairminded jurist[]," see Harrington v. Richter, 562 US 86, 101 (2011), could agree that the quantum of evidence known to Martin Goldberg, Esq. at the time justified his decision to forego further investigation and rely instead on a critically flawed alibi defense.

Having established deficient performance, the defendant also shows "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Strickland, 466 US at 694. The failure to secure and review the cellular telephone records, that would have undeniably provided valuable information to assist defendant's counsel in developing a strategy during his investigation, does not constitute a trial strategy resulting in meaningful representation (see People v. Benevento, 91 NY2d at 708, 712 [1998]; People v. Caban, 5 NY3d 143, 152 [2005]; People v. Rivera, 71 NY2d 705, 709 [1988]). Counsel should have investigated why was the cellular telephone that made the 23 minute call still in use while the defendant was in detention; rebutting the prosecutor's evidence that the defendant was not

with Perez when the alleged crime occurred. This failure seriously compromised defendant's right to a fair trial (see People v. Hobot, 84 NY2d 1021, 1022 [1995]).

ARGUMENT III

THE DEFENDANT'S RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED WHEN APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE ISSUE OF TRIAL COUNSEL'S PERFORMANCE WITH RESPECT TO THE USE OF A FLAWED ALIBI DEFENSE.

The defendant's position at trial, as stated by his counsel in his opening statement to the jury, was that the identification of the defendant was mistaken. Defense counsel told the jury that he would call as a witness Magdelena Perez, defendant's girlfriend, who would give the defendant an alibi for the time of the burglary (TT., pp. 27-28).

Perez testified to the defendant's whereabouts on the evening of November 18, 2003. Perez testified that the defendant called her via telephone and asked to "see (her) in person." At approximately 5:30 p.m., Perez met the defendant at Third Avenue and Atlantic Avenue. After they met, the defendant and Perez had gone to a hotel, which they arrived at approximately 6 p.m. At approximately 9:30 p.m., the defendant and Perez left the hotel and Perez dropped the defendant off at Third Avenue and Butler at approximately 10 p.m. (see TT., pp. 304-307).

During cross-examination of Perez, the prosecutor led the jury to believe that the defendant's alibi was false by introducing cellular telephone records of the defendant. The

records reveal that the defendant received a call from Perez that lasted 23 minutes. As a result, the prosecutor impressed in the jury's mind that the defendant and Perez could not had been together because of that 23 minute call (see TT., pp. 309-323).

While the cellular telephone records led the jury in believing that Perez had given a false alibi, that evidence was reinforced by the prosecutor's capitalizing on those records in summation (see TT., pp. 354-357).

The prosecutor's direct-examination of the two primary victim/witness's of the burglary, Angel Santiago and Claudia Santiago, reveal that the Santiagos' were unable to definitively identify the defendant as the person who committed the burglary.

The prosecutor asked Angel Santiago whether he "(c)ould () identify either of the men who came into your apartment that night?" Mr. Santiago said, "No." (see TT., p. 156)

The prosecutor's direct-examination of Claudia Santiago is as follow:

Q. How many people were on the other side of the door?

A. Two, a tall one and a short one.

Q. When there were speaking to you were they speaking in English or Spanish?

A. The tall one spoke to me in Spanish.

Q. What happened?

A. When I opened the door he took out a knife, the one you

use to cut carpet and he pushed me. And he told me we are from the Mafia. We have your son. If you don't give me 29 thousand dollars we will kill him and we'll kill you.

Q. That was the tall one or the short one who was talking to you at this point?

A. The tall one.

Q. I am going to ask you to look around the courtroom and if you see that individual, tall one, if you can point him out, please?

A. **I don't see him, no.**

See Trial Tr., pp. 174-175 (emphasis added).

Upon hearing the defendant's counsel during sentencing, counsel stated the following:

"I realize that the jury has spoken. I'm not [] here to re-litigate. In hindsight, I understand how the jury would give a verdict. The alibi witness I put on did not make a very favorable impression at all and had I known she would testify as she did, I would have kept her off, obviously."

See Sentence Minutes, pp. 3-4.

The sentencing court went even further:

"I have a lot of trouble believing anything that comes from family, especially in light of the witness that was called --"

See Sentence Minutes, p. 6.

"[I]t is generally acknowledged that an attempt to create a false alibi constitutes evidence of the defendant's consciousness of guilt" (see People v. Jarvis, 113 AD3d 1058, 1060 (4th Dept. 2014)(citing Henry v. Poole, 409 F3d 48, 65 [2d Cir. 2005][internal quotation marks omitted])). "'If the prosecution can establish the falsity of an alibi ..., [a defendant's] case is as good as lost'" (see Henry, 409 F3d at 65).

Here, the defect in defendant's trial counsel's representation was his failure to investigate the cellular telephone records that show a 23 minute call which undermined defendant's alibi defense. By not investigating the cellular telephone records, defendant's counsel allowed the prosecutor to mislead the jury in believing that the purported alibi witness could not vouch for defendant's whereabouts at the time of the crime because Perez and the defendant could not had been together because the 23 minute call. Had defense counsel investigated the cellular telephone records, he would had found that the defendant did not possess the cellular telephone that made the 23 minute call. A closer inspection of the records reveal that the cellular telephone was continuously in use by an unknown third-party while defendant was being detained and during the course of his prosecution. Furthermore, the property voucher shows that the cellular telephone on the defendant's person is not the cellular telephone involved in the 23 minute call. By defense counsel's own admission, he admits that he was not thoroughly prepared.

ARGUMENT IV

THE DEFENDANT'S RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED WHEN APPELLATE COUNSEL FAILED TO RAISE ON APPEAL THE ISSUE OF TWO COUNTS CHARGING DEFENDANT WITH BURGLARY IN THE FIRST DEGREE ARE MULTIPLICIOUS.

This Court will find that the defendant has merit in arguing that two counts charging burglary in the first degree were

multiplicious. Although this issue was not properly preserved, this Court can exercise its interest of justice jurisdiction to take corrective action with respect thereto.

Under count one of Kings County Indictment Number 8275/2003, the defendant was convicted of a violation of subdivision (2) of Penal Law § 140.30 for having entered the dwelling with intent to commit crimes therein and having caused physical injury to Angel Santiago. The second count, of which defendant was also convicted, was identical to the first count, except that it charged defendant with having caused physical injury to Erick Marin.

> "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."

See People v. Perrin, 56 AD2d 957, 958 (3d Dept. 1977); People v. Aaron, 296 AD2d 508 (2d Dept. 2002).

Under these circumstances appellate counsel failed to raise an issue on direct appeal that would have resulted in reversal.

ARGUMENT V

THE DEFENDANT'S RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED WHEN APPELLATE COUNSEL FAILED TO RAISE ON APPEAL THE ISSUE OF DEFENDANT'S SENTENCE IS INVALID AS A MATTER OF LAW DUE TO THE PEOPLE'S FAILURE TO FILE A PREDICATE FELONY STATEMENT.

The sentence to three consecutive prison terms of twelve years, and five-year period of post-release supervision that was imposed for each conviction is "invalid as a matter of law" (see CPL § 470.15[4][c]) because no predicate felony statement

was filed as mandated by CPL § 400.21(2), even though "information available to the court [and] to the people prior to sentencing for a felony indicate[d] that the defendant may have previously been subjected to a predicate felony conviction."

At the time of sentencing the court was aware that the defendant had five prior felony convictions:

> "First. This isn't the first time that you been involved in criminal activity. Not the second time. It's not your third felony. It's not your fourth felony. But you have five prior felony convictions. Five prior felony convictions - -"

See Sentence Minutes, p. 5.

The People took no position as to whether they would file a predicate felony statement. In spite of this, the sentencing court sentenced the defendant as a second felony offender to a determinate term of imprisonment in the New York State Department of Corrections and Community Supervision.

The mandatory nature of the second felony offender sentencing statute is apparent. The procedures set forth in CPL § 400.21(1) states that "[t]he provisions of this section govern the procedure that **must be followed** in any case where it appears that a defendant who stands convicted of a felony has previously been convicted of a predicate felony and may be a second felony offender" (see People v. Scarbrough, 66 NY2d 673, 674 [1985], revg. on dissenting mem. of Boomer, J., 105 AD2d 1107, 1107-1109 [4th Dept. 1984])(emphasis in the original).

CPL § 400.21(2) provides:

"When information available to the court or the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, **a statement must be filed by the prosecutor before sentence is imposed** setting forth the date and place of each alleged predicate felony conviction" (id; emphasis in the original).

"The statutory requirement that a defendant with a predicate felony conviction be sentenced as a second felony offender was not intended 'to be circumvented by ... the acquiescence of a sentencing judge whenever he is inclined to extend leniency in violation of the legislative mandate.'" See People v. Motley, 56 AD3d 1158, 1159 (4th Dept. 2008)(quoting Scarbrough, 105 AD2d at 1109).

Here, from the information available to the sentencing court prior to sentencing, there is an indication that the defendant may have previously been subjected to a predicate felony conviction. Thus, it is mandatory that the second felony offender statement be filed prior to sentencing. The failure to comply with this mandatory requirement rendered the sentence "invalid as a matter of law" (see CPL § 470.15[4][c]).

For all the foregoing reasons, appellate counsel's conduct was contrary to prevailing professional norms and betrayed a startling ignorance of the law. Defendant was prejudiced by appellate counsel's ineffectiveness and there exists more than a reasonable probability that but for appellate counsel's unprofessional errors and omissions the results of the prior proceedings would have been vastly different. The foregoing

instance of incompetence of appellate counsel (which are by no means exclusive), and the vast prejudice that has been caused to the defendant as a result, have denied the defendant the right to effective assistance of appellate counsel under the constitutions of this State and the United States. For the foregoing reasons, this Writ of Error Coram Nobis should be granted.

Respectfully submitted,

Benjamin Ayala, Pro Se
Din. 05-A-0302
Green Haven Corr. Fac.
P.O. Box 4000
Stormville, NYY12582

Sworn to before me

This 22 day of May, 2017.

NOTARY PUBLIC

NOTARY PUBLIC
PATRICK LEON MCNEIL
No. 01MC6324976
Exp. 05/18/2019
BRONX COUNTY
STATE OF NEW YORK

District Attorney TMobil Subpoena

SUPREME COURT
County of Kings, State of New York

THE PEOPLE OF THE STATE OF NEW YORK

To: T-Mobil - Greetings:

YOU ARE COMMANDED to appear before the Supreme Court, Part 30, at a term thereof to be held in and for the County of Kings, at the Courthouse at 120 Schermerhorn Street, in the Borough of Brooklyn, of the City of New York, on December 8, 2004 at 10 o'clock in the forenoon, as a witness in a criminal action prosecuted by

The People of the State of New York

Vs.

Benjamin Ayala Ind. # 8275/03

And to bring with you and produce at the time and place aforesaid, the following: ALL PHONE RECORDS FOR THE BELOW PHONE NO. FROM NOVEMBER 17, 2003 TO NOVEMBER 19, 2003:

Cell phone #[redacted] - Account # 251543803

And concerning the above case. It is not necessary for anyone from your office all other evidences and writings which you have in your custody or power to appear in court at this time.

Please fax to me at [redacted] OR mail to me care of the Kings Co. Supreme Court – Criminal Term, 360 Adams St., Brooklyn, NY 11201

DO NOT INFORM SUBSCRIBER OF THIS REQUEST FOR 90 DAYS

Samantha Magnani
Assistant District Attorney
Orange Zone
[redacted]

Defendant's Personal Property Vouchers

☐ ARREST EVIDENCE ☐ DECEDENT'S PROPERTY ☐ FOUND PROPERTY

☐ INVESTIGATORY ☐ PEDDLER PROPERTY ☒ OTHER Safekeeping

DATE PREPARED 11/19/2003 YR 2003 PCT 078

Prisoner's Name (Last, First)	Age	Address (Include City, State, Zip Code, Apt.)	No. of Prisoners	
AYALA, BENJAMIN	36	36 Edwards Street Brlyn NY 11205	01	985

Date of Arrest	Arrest No.	Charge/Offense Under Investigation	Fel.	Misd.	J.D.	Viol.	Complaint No.
11/18/03	K03681379	Burglary	☒	☐	☐	☐	64568

Finder of Property	Address (Include City, State, Zip Code, Apt.)	Telephone No.

Owner's Name (See Instructions)	Address (Include City, State, Zip Code, Apt.)	Telephone No.
AYALA, BENJAMIN	36 EDWARDS STREET BKLYN NY 11205	

Complainant's Name	Address (Include City, State, Zip Code, Apt.)	Telephone No.
Santiago, Claudia	[redacted]	[redacted]

ITEM NO.	QUANTITY	ARTICLE	CASH VALUE U.S. Currency Only		(For Property Clerk's Use Only) DISPOSITION AND DATE
01	10	Key			
02	02	car remote			
03	01	bottle opener			
04	01	cell phone samsung # 160500014256628			
05	01	cell phone battery			
		ABOVE IS A COMPLETE LIST OF ITEMS VOUCHERED			
		TOTAL			

Additional Invoice Nos. Related to This Case Including Motor Vehicles

Pink Receipt Copy of Voucher Issued ☐ Yes ☐ Refused

R.T.O. Owner/Claimant's Signature Date Time

Property Clerk Storage Location

REMARKS: Briefly explain why the property was taken into custody (see instructions on BACK OF BLUE COPY)

ABOVE IS PRISONERS PERSONAL PROPERT VOUCHERED FOR SAFEKEEPING IN Sec envelope # D029030

Rank and Signature of Desk Officer | Tax No. | Signature of Arresting/Assigned Officer | Boro Storage No.

Defendant's Cellular Telephone Recods

0215240546

Your Statement

Statement For: **BENJAMIN AYALA**
Account Number: **251543803**

Important Information

New FREE service:

Dial #646# and press "send" from your mobile phone to view Whenever minutes used. For details visit: www.t-mobile.com/minutemessenger

---Manifest Line----------

BENJAMIN AYALA
36 SAINT EDWARDS ST APT 9F
BROOKLYN, NY 11205-1967

Summary of Charges

Previous Balance	$	210.11
Pmt Rec'd -Thank You	$	(210.11)
Monthly Service Charges	$	86.39
Total Amount Due	**$**	**86.39**
Total Amount Due by		**1/02/04**

Monthly Service Summary

Monthly service charges from 11/08/03 - 12/07/03

Mobile Number	Service Plan	Service Charges	Adjustments	Usage Charges	One Time Charges	Tax Summary	Total Charges
Account Charges		$ 69.99	$ -	$ -	$ -	$ 13.40	$ 83.39
347-866-6870	NW Family Time	$ -	$ -	$ -	$ -	$ 1.50	$ 1.50
347-866-6876	NW Family Time	$ -	$ -	$ -	$ -	$ 1.50	$ 1.50
Total		**$ 69.99**	**$ -**	**$ -**	**$ -**	**$ 16.40**	**$ 86.39**

Available Service		**Type**	**WHENEVER**	**WEEKEND**
NW Family Time	Free Minutes	Minutes	800	-

PLEASE DETACH THIS PORTION AND RETURN WITH YOUR PAYMENT PLEASE MAKE SURE ADDRESS SHOWS THROUGH WINDOW.

T-Mobile

Statement For: **BENJAMIN AYALA**
Account Number: 251543803

Amount Due By 1/02/04	Amount Enclosed
$86.39	

T-MOBILE
PO BOX 742596
CINCINNATI,OH 45274-2596

☐ To pay this invoice using your credit card - check box and complete the reverse side

☐ For EasyPay Option - check box and complete the reverse side

☐ If you have changed your address - check box and record new address on the reverse side.

040251543803010204000008639011205196 7

Available Service - (Continued)		Type	WHENEVER	WEEKEND
NW Family Time	Free Txt Msg	Messages	50	-
	T-Mobile to T-Mobile	Minutes	Unlimited	-
	Use Them Or Lose Them	Minutes	-	Unlimited

Account Service Detail

		Amount	Totals
Previous Balance		$ 210.11	
Payment Received On	12/02/03	$ (210.11)	
Monthly Service Charges			**$ 69.99**
NW Family Time		$ 69.99	
Tax Summary			**$ 13.40**
County Surcharge		$ 0.09	
County Telecom Excise (RC)		$ 1.38	
Federal Excise Tax		$ 2.13	
Federal Universal Service Fund		$ 1.12	
Local Sales Tax		$ 3.17	
Special Tax		$ 0.42	
State Gross Receipts Tax		$ 0.26	
State Sales Tax		$ 3.08	
State Telecom Excise		$ 1.75	
Total Charges			**$ 83.39**


0415240546

Itemized Details For: **(347) 866-6870**
Account Number: 251543803

Customer Service Number **1-800-937-8997**

Dec 10, 2003

LOCAL AIRTIME, LONG DISTANCE and INTERNATIONAL CHARGES - (Continued)

Date	Call Destination	Time	Number Called	Call Type	Minutes	Airtime Charges	Toll Charges	Additional Charges	Total
11/19/03	Bklyn Nyc, NY	6:50 AM	718-415-7881	(F)	15	$ -	$ -	$ -	$ -
11/20/03	New York, NY	2:41 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/20/03	Bklyn Nyc, NY	2:41 PM	718-522-4456		3	$ -	$ -	$ -	$ -
11/20/03	New York, NY	3:12 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/20/03	New York, NY	7:25 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/20/03	New York, NY	9:26 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/20/03	New York, NY	9:26 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/20/03	New York, NY	10:22 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/21/03	Bklyn Nyc, NY	3:54 PM	718-522-4456		1	$ -	$ -	$ -	$ -
11/21/03	Bklyn Nyc, NY	7:42 PM	718-452-7942		3	$ -	$ -	$ -	$ -
11/22/03	New York, NY	11:48 AM	917-743-4414		1	$ -	$ -	$ -	$ -
11/22/03	Bklyn Nyc, NY	5:58 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/22/03	Incoming	9:36 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
'23/03	Sabanagrnd, PR	6:47 PM	787-873-7401		15	$ -	$ -	$ -	$ -
.23/03	Sabanagrnd, PR	7:13 PM	787-873-7401		10	$ -	$ -	$ -	$ -
11/24/03	Bklyn Nyc, NY	5:36 PM	347-866-6876	(F)	1	$ -	$ -	$ -	$ -
11/24/03	Bklyn Nyc, NY	5:39 PM	347-866-6876	(F)	1	$ -	$ -	$ -	$ -
11/24/03	Bklyn Nyc, NY	5:47 PM	347-866-6876	(F)	1	$ -	$ -	$ -	$ -
11/24/03	Bklyn Nyc, NY	11:01 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/27/03	Bklyn Nyc, NY	2:03 PM	718-492-6063		3	$ -	$ -	$ -	$ -
11/27/03	Bklyn Nyc, NY	7:00 PM	646-334-0738		1	$ -	$ -	$ -	$ -
11/27/03	Bklyn Nyc, NY	7:13 PM	646-327-1646	(F)	1	$ -	$ -	$ -	$ -
11/27/03	Incoming	7:32 PM	646-327-1917	(F)	1	$ -	$ -	$ -	$ -
11/28/03	Incoming	3:50 PM	646-334-0738		1	$ -	$ -	$ -	$ -
12/01/03	Incoming	11:20 AM	Blocked NBR	(F)	7	$ -	$ -	$ -	$ -
12/01/03	Incoming	12:07 PM	Blocked NBR	(F)	11	$ -	$ -	$ -	$ -
12/05/03	Bklyn Nyc, NY	2:50 PM	718-497-8670		1	$ -	$ -	$ -	$ -
12/05/03	Bklyn Nyc, NY	3:41 PM	718-415-7881	(F)	6	$ -	$ -	$ -	$ -
12/06/03	Sansebstan, PR	8:32 PM	787-280-5212		15	$ -	$ -	$ -	$ -
12/06/03	Bklyn Nyc, NY	10:15 PM	718-452-7942		1	$ -	$ -	$ -	$ -
12/06/03	Bklyn Nyc, NY	11:25 PM	718-452-7942		1	$ -	$ -	$ -	$ -
12/07/03	Sabanagrnd, PR	2:39 PM	787-873-7401		12	$ -	$ -	$ -	$ -
Total Zero VM calls					**13**	**$ -**	**$ -**	**$ -**	**$ -**
LOCAL AIR, LONG DISTANCE and INTERNAT'L SUBTOTAL					**333**	**$ -**	**$ -**	**$ -**	**$ -**

Call Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls

(I) Internat'l Call (K) WPS Call

0515240546

Itemized Details For: **(347) 866-6876**
Account Number: 251543803

Customer Service Number **1-800-937-8997**

Dec 10, 2003

Account Service Detail for Subscriber (347) 866-6876

Available Service		Type	WHENEVER	WEEKEND
NW Family Time	Free Minutes	Minutes	800	-
	Free Txt Msg	Messages	50	-
	T-Mobile to T-Mobile	Minutes	Unlimited	-
	Use Them Or Lose Them	Minutes	-	Unlimited

Used Service		Type	WHENEVER	PEAK	OFF PEAK	WEEKEND
	Enhanced VoiceMail	Minutes	-	51	27	31
	Included Plan Minutes	Minutes	-	520	77	271
	T-Mobile to T-Mobile	Minutes	-	722	373	436

	Amount	Totals
Monthly Service Charges		$ -
VM & Fax	$ -	
Tax Summary		$ 1.50
County 911	$ 0.30	
State 911	$ 1.20	
Total Charges		**$ 1.50**

LOCAL AIRTIME, LONG DISTANCE and INTERNATIONAL CHARGES

te	Call Destination	Time	Number Called	Call Type	Minutes	Airtime Charges	Toll Charges	Additional Charges	Total
11/08/03	Incoming	12:40 AM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/08/03	New York, NY	2:24 AM	917-403-3605	(F)	2	$ -	$ -	$ -	$ -
11/08/03	Incoming	10:09 AM	917-403-3605	(F)	2	$ -	$ -	$ -	$ -
11/08/03	Incoming	12:10 PM	718-455-8797		1	$ -	$ -	$ -	$ -
11/08/03	Incoming	12:24 PM	917-403-3605	(F)	4	$ -	$ -	$ -	$ -
11/08/03	Incoming	1:09 PM	718-415-7881	(F)	5	$ -	$ -	$ -	$ -
11/08/03	Incoming	1:51 PM	718-455-8797		2	$ -	$ -	$ -	$ -
11/08/03	Incoming	2:27 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/08/03	Incoming	3:47 PM	718-415-7881	(A)	5	$ -	$ -	$ -	$ -
11/08/03	Incoming	3:53 PM	Blocked NBR		14	$ -	$ -	$ -	$ -
11/08/03	Incoming	4:08 PM	917-865-9221		2	$ -	$ -	$ -	$ -
11/08/03	Incoming	4:25 PM	Blocked NBR		2	$ -	$ -	$ -	$ -
11/08/03	Bklyn Nyc, NY	4:36 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/08/03	Incoming	4:43 PM	Blocked NBR		5	$ -	$ -	$ -	$ -
11/08/03	Bklyn Nyc, NY	5:02 PM	718-415-7881	(F)	2	$ -	$ -	$ -	$ -
11/08/03	Incoming	5:08 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/08/03	Incoming	5:18 PM	917-403-3605	(F)	2	$ -	$ -	$ -	$ -
11/08/03	Incoming	5:23 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/08/03	Incoming	5:26 PM	347-645-1373		1	$ -	$ -	$ -	$ -
'08/03	Incoming	5:50 PM	718-455-8797		2	$ -	$ -	$ -	$ -

Call Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls

(I) Internat'l Call (K) WPS Call

LOCAL AIRTIME, LONG DISTANCE and INTERNATIONAL CHARGES - (Continued)

Date	Call Destination	Time	Number Called	Call Type	Minutes	Airtime Charges	Toll Charges	Additional Charges	Total
11/09/03	Incoming	5:17 PM	646-773-9900		1	$ -	$ -	$ -	$ -
11/09/03	Incoming	5:20 PM	646-773-9900		2	$ -	$ -	$ -	$ -
11/09/03	Incoming	5:23 PM	646-773-9900		1	$ -	$ -	$ -	$ -
11/09/03	Incoming	5:25 PM	646-773-9900		1	$ -	$ -	$ -	$ -
11/09/03	Incoming	5:50 PM	718-443-1386		2	$ -	$ -	$ -	$ -
11/09/03	Incoming	6:14 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/09/03	Incoming	6:37 PM	917-442-9262	(F)	1	$ -	$ -	$ -	$ -
11/09/03	Incoming	7:08 PM	718-496-1663	(F)	2	$ -	$ -	$ -	$ -
11/09/03	Incoming	7:36 PM	718-415-7881	(A)	9	$ -	$ -	$ -	$ -
11/09/03	Bklyn Nyc, NY	8:08 PM	718-452-5818		1	$ -	$ -	$ -	$ -
11/10/03	Incoming	8:58 AM	516-578-0851		11	$ -	$ -	$ -	$ -
11/10/03	Incoming	10:40 AM	516-578-0851		3	$ -	$ -	$ -	$ -
11/10/03	Incoming	11:08 AM	347-645-1373		2	$ -	$ -	$ -	$ -
'10/03	Incoming	11:19 AM	917-403-3605	(F)	3	$ -	$ -	$ -	$ -
./10/03	Incoming	11:29 AM	718-415-7881	(F)	9	$ -	$ -	$ -	$ -
11/10/03	Incoming	12:27 PM	Blocked NBR		3	$ -	$ -	$ -	$ -
11/10/03	Incoming	1:10 PM	917-328-4040		4	$ -	$ -	$ -	$ -
11/10/03	Bklyn Nyc, NY	3:17 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/10/03	Incoming	3:23 PM	516-369-1979		2	$ -	$ -	$ -	$ -
11/10/03	Incoming	3:40 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/10/03	Gardencity, NY	3:45 PM	516-369-1979		1	$ -	$ -	$ -	$ -
11/10/03	Incoming	4:11 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/10/03	Incoming	4:13 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/10/03	Bklyn Nyc, NY	4:23 PM	917-487-7544		1	$ -	$ -	$ -	$ -
11/10/03	New York, NY	4:31 PM	917-403-3605	(F)	2	$ -	$ -	$ -	$ -
11/10/03	Bklyn Nyc, NY	4:53 PM	718-415-7881	(F)	2	$ -	$ -	$ -	$ -
11/10/03	Incoming	5:06 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/10/03	Incoming	5:25 PM	718-452-8977		1	$ -	$ -	$ -	$ -
11/10/03	New York, NY	5:27 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/10/03	New York, NY	8:17 PM	917-743-4414		1	$ -	$ -	$ -	$ -
11/10/03	Incoming	8:27 PM	917-865-9221		3	$ -	$ -	$ -	$ -
11/10/03	Incoming	9:12 PM	917-328-4040		2	$ -	$ -	$ -	$ -
11/10/03	Incoming	10:05 PM	Blocked NBR		4	$ -	$ -	$ -	$ -
11/11/03	Incoming	11:11 AM	516-578-0851		4	$ -	$ -	$ -	$ -
'11/03	Incoming	11:18 AM	516-578-0851		2	$ -	$ -	$ -	$ -
./11/03	Incoming	11:33 AM	718-382-5304		1	$ -	$ -	$ -	$ -

Call Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls

(I) Internat'l Call (K) WPS Call

0715240546

Itemized Details For: **(347) 866-6876**
Account Number: 251543803

Customer Service Number **1-800-937-8997**

Dec 10, 2003

LOCAL AIRTIME, LONG DISTANCE and INTERNATIONAL CHARGES - (Continued)

Date	Call Destination	Time	Number Called	Call Type	Minutes	Airtime Charges	Toll Charges	Additional Charges	Total
11/12/03	Incoming	2:11 PM	646-372-0563		1	$ -	$ -	$ -	$ -
11/12/03	Incoming	2:15 PM	718-415-7881	(F)	4	$ -	$ -	$ -	$ -
11/12/03	Incoming	2:37 PM	516-369-1979		2	$ -	$ -	$ -	$ -
11/12/03	Incoming	3:09 PM	917-476-9680	(F)	1	$ -	$ -	$ -	$ -
11/12/03	Incoming	3:22 PM	516-578-0851		1	$ -	$ -	$ -	$ -
11/12/03	Incoming	3:51 PM	718-415-7881	(F)	4	$ -	$ -	$ -	$ -
11/12/03	Incoming	4:05 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/12/03	New York, NY	4:07 PM	917-403-3605	(F)	2	$ -	$ -	$ -	$ -
11/12/03	Incoming	5:17 PM	718-284-7533		1	$ -	$ -	$ -	$ -
11/12/03	Incoming	5:22 PM	718-624-9202		1	$ -	$ -	$ -	$ -
11/12/03	Incoming	5:37 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/12/03	Incoming	6:02 PM	Blocked NBR		2	$ -	$ -	$ -	$ -
11/12/03	New York, NY	6:12 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/12/03	Incoming	6:19 PM	718-602-3402		1	$ -	$ -	$ -	$ -
11/12/03	Incoming	8:21 PM	718-415-7881	(F)	25	$ -	$ -	$ -	$ -
11/12/03	Incoming	8:46 PM	718-497-2151		3	$ -	$ -	$ -	$ -
11/12/03	Incoming	9:48 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/12/03	Incoming	9:57 PM	718-497-2151		2	$ -	$ -	$ -	$ -
11/12/03	Bklyn Nyc, NY	10:01 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/13/03	Incoming	7:11 AM	718-415-7881	(F)	2	$ -	$ -	$ -	$ -
11/13/03	Incoming	9:06 AM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/13/03	Incoming	9:14 AM	516-578-0851		1	$ -	$ -	$ -	$ -
11/13/03	Incoming	9:22 AM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/13/03	Mineola, NY	9:25 AM	516-578-0851		1	$ -	$ -	$ -	$ -
11/13/03	New York, NY	11:42 AM	917-407-7544		1	$ -	$ -	$ -	$ -
11/13/03	Incoming	12:15 PM	718-415-7881	(F)	9	$ -	$ -	$ -	$ -
11/13/03	Incoming	1:02 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/13/03	Incoming	2:04 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/13/03	New York, NY	2:33 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/13/03	Incoming	3:20 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/13/03	New York, NY	3:30 PM	917-403-3605	(A)	1	$ -	$ -	$ -	$ -
11/13/03	Incoming	3:31 PM	917-403-3605	(A)	1	$ -	$ -	$ -	$ -
11/13/03	Incoming	3:47 PM	917-256-9139	(F)	1	$ -	$ -	$ -	$ -
11/13/03	Incoming	3:52 PM	Blocked NBR		2	$ -	$ -	$ -	$ -
11/13/03	Mineola, NY	4:10 PM	516-578-0851		2	$ -	$ -	$ -	$ -
11/13/03	Incoming	4:12 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -

Call Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls

(I) Internat'l Call (K) WPS Call

LOCAL AIRTIME, LONG DISTANCE and INTERNATIONAL CHARGES - (Continued)

Date	Call Destination	Time	Number Called	Call Type	Minutes	Airtime Charges	Toll Charges	Additional Charges	Total
11/14/03	Incoming	11:03 PM	718-782-9199		1	$ -	$ -	$ -	$ -
11/15/03	Incoming	12:42 AM	347-645-1373		1	$ -	$ -	$ -	$ -
11/15/03	Incoming	12:48 AM	718-415-7881	(F)	28	$ -	$ -	$ -	$ -
11/15/03	Incoming	7:07 AM	347-645-1373		1	$ -	$ -	$ -	$ -
11/15/03	Incoming	1:26 PM	718-813-6318		1	$ -	$ -	$ -	$ -
11/15/03	Incoming	2:52 PM	718-415-7881	(F)	3	$ -	$ -	$ -	$ -
11/15/03	Incoming	2:57 PM	917-256-9139	(F)	1	$ -	$ -	$ -	$ -
11/15/03	New York, NY	3:30 PM	917-256-9139	(F)	1	$ -	$ -	$ -	$ -
11/15/03	Incoming	4:01 PM	917-256-9139	(F)	1	$ -	$ -	$ -	$ -
11/15/03	Incoming	4:15 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/15/03	Incoming	4:23 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/15/03	Incoming	5:28 PM	718-525-3795		1	$ -	$ -	$ -	$ -
11/15/03	Incoming	5:58 PM	917-689-9637		1	$ -	$ -	$ -	$ -
11/15/03	Incoming	6:00 PM	917-689-9637		1	$ -	$ -	$ -	$ -
15/03	Incoming	7:04 PM	917-403-3605	(F)	1	$ -	$ -	$ -	$ -
11/15/03	Incoming	9:41 PM	718-415-7881	(F)	4	$ -	$ -	$ -	$ -
11/15/03	New York, NY	9:46 PM	917-256-9139	(F)	2	$ -	$ -	$ -	$ -
11/16/03	Incoming	1:41 AM	917-865-9221		2	$ -	$ -	$ -	$ -
11/16/03	Incoming	1:52 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/16/03	Bklyn Nyc, NY	2:12 PM	718-415-7881	(F)	2	$ -	$ -	$ -	$ -
11/16/03	Incoming	2:36 PM	Blocked NBR		2	$ -	$ -	$ -	$ -
11/16/03	Incoming	3:44 PM	917-326-1243	(F)	23	$ -	$ -	$ -	$ -
11/16/03	Incoming	4:37 PM	718-602-5381		1	$ -	$ -	$ -	$ -
11/16/03	Incoming	6:32 PM	646-773-9900		1	$ -	$ -	$ -	$ -
11/16/03	Incoming	10:10 PM	718-415-7881	(F)	3	$ -	$ -	$ -	$ -
11/16/03	Incoming	10:19 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/17/03	Incoming	10:57 AM	718-625-9563		1	$ -	$ -	$ -	$ -
11/17/03	Bklyn Nyc, NY	12:46 PM	718-415-7881	(F)	2	$ -	$ -	$ -	$ -
11/17/03	Incoming	1:15 PM	718-415-7881	(F)	9	$ -	$ -	$ -	$ -
11/17/03	New York, NY	1:39 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/17/03	Incoming	2:47 PM	646-372-0563		2	$ -	$ -	$ -	$ -
11/17/03	Incoming	4:33 PM	917-402-3442	(F)	4	$ -	$ -	$ -	$ -
11/17/03	Incoming	4:56 PM	917-403-3605	(F)	3	$ -	$ -	$ -	$ -
11/17/03	Bklyn Nyc, NY	5:34 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/17/03	Incoming	6:15 PM	718-415-7881	(A)	44	$ -	$ -	$ -	$ -
17/03	Incoming	6:59 PM	917-402-3442	(F)	2	$ -	$ -	$ -	$ -

Call Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls

(I) Internat'l Call (K) WPS Call

LOCAL AIRTIME, LONG DISTANCE and INTERNATIONAL CHARGES - (Continued)

Date	Call Destination	Time	Number Called	Call Type	Minutes	Airtime Charges	Toll Charges	Additional Charges	Total
11/19/03	Incoming	1:26 PM	917-365-3605	(F)	2	$ -	$ -	$ -	$ -
11/19/03	Bklyn Nyc, NY	1:28 PM	718-455-8797		1	$ -	$ -	$ -	$ -
11/19/03	New York, NY	1:36 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/19/03	Incoming	1:57 PM	347-234-1074		2	$ -	$ -	$ -	$ -
11/19/03	New York, NY	1:59 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/19/03	New York, NY	2:17 PM	917-365-3605	(F)	1	$ -	$ -	$ -	$ -
11/19/03	Incoming	2:39 PM	917-865-9221		3	$ -	$ -	$ -	$ -
11/19/03	Incoming	3:23 PM	917-365-3605	(F)	3	$ -	$ -	$ -	$ -
11/19/03	Incoming	3:29 PM	917-365-3605	(F)	6	$ -	$ -	$ -	$ -
11/19/03	Incoming	4:01 PM	917-365-3605	(F)	8	$ -	$ -	$ -	$ -
11/19/03	New York, NY	4:21 PM	917-407-7544		2	$ -	$ -	$ -	$ -
11/19/03	New York, NY	5:01 PM	917-407-7544		2	$ -	$ -	$ -	$ -
11/19/03	Incoming	5:18 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/19/03	Incoming	6:00 PM	Blocked NBR		1	$ -	$ -	$ -	$ -
11/19/03	Incoming	7:00 PM	917-365-3605	(F)	1	$ -	$ -	$ -	$ -
11/19/03	Incoming	7:06 PM	917-365-3605	(A)	8	$ -	$ -	$ -	$ -
11/19/03	Incoming	7:14 PM	626-240-3821	(A)	2	$ -	$ -	$ -	$ -
11/19/03	Incoming	7:37 PM	347-234-1074		1	$ -	$ -	$ -	$ -
11/19/03	New York, NY	7:46 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/19/03	Incoming	7:53 PM	917-365-3605	(F)	1	$ -	$ -	$ -	$ -
11/19/03	Incoming	8:08 PM	347-234-1074		2	$ -	$ -	$ -	$ -
11/19/03	New York, NY	8:27 PM	917-365-3605	(F)	1	$ -	$ -	$ -	$ -
11/19/03	Bklyn Nyc, NY	8:35 PM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/19/03	New York, NY	8:43 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/19/03	New York, NY	9:22 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/19/03	Incoming	9:24 PM	347-234-1074		1	$ -	$ -	$ -	$ -
11/19/03	Incoming	10:33 PM	718-415-7881	(F)	2	$ -	$ -	$ -	$ -
11/20/03	Incoming	8:57 AM	516-578-0851		2	$ -	$ -	$ -	$ -
11/20/03	New York, NY	10:16 AM	917-365-3605	(F)	3	$ -	$ -	$ -	$ -
11/20/03	Bklyn Nyc, NY	10:22 AM	718-415-7881	(F)	2	$ -	$ -	$ -	$ -
11/20/03	Bklyn Nyc, NY	10:31 AM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/20/03	Mineola, NY	10:45 AM	516-578-8051		1	$ -	$ -	$ -	$ -
11/20/03	Mineola, NY	10:46 AM	516-578-0851		1	$ -	$ -	$ -	$ -
11/20/03	Mineola, NY	10:48 AM	516-578-0851		1	$ -	$ -	$ -	$ -
11/20/03	New York, NY	11:00 AM	917-365-3605	(F)	2	$ -	$ -	$ -	$ -
11/20/03	Incoming	11:45 AM	516-578-0851		1	$ -	$ -	$ -	$ -

Call Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls

(I) Internat'l Call (K) WPS Call

LOCAL AIRTIME, LONG DISTANCE and INTERNATIONAL CHARGES - (Continued)

Date	Call Destination	Time	Number Called	Call Type	Minutes	Airtime Charges	Toll Charges	Additional Charges	Total
11/21/03	Incoming	12:10 PM	917-328-4040		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	12:19 PM	347-234-1074		1	$ -	$ -	$ -	$ -
11/21/03	New York, NY	12:47 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	1:18 PM	347-234-1074		1	$ -	$ -	$ -	$ -
11/21/03	New York, NY	1:20 PM	917-407-7544		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	1:26 PM	718-525-3795		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	1:27 PM	917-865-9221		3	$ -	$ -	$ -	$ -
11/21/03	Incoming	1:40 PM	Blocked NBR	(A)	1	$ -	$ -	$ -	$ -
11/21/03	Incoming	1:41 PM	917-328-4040	(A)	1	$ -	$ -	$ -	$ -
11/21/03	Incoming	2:01 PM	347-234-1074		2	$ -	$ -	$ -	$ -
11/21/03	Incoming	2:45 PM	718-415-7881	(F)	4	$ -	$ -	$ -	$ -
11/21/03	Incoming	2:56 PM	508-667-4338		3	$ -	$ -	$ -	$ -
11/21/03	Incoming	3:10 PM	508-667-4338		1	$ -	$ -	$ -	$ -
/21/03	Incoming	3:25 PM	347-234-1074		2	$ -	$ -	$ -	$ -
/21/03	Incoming	4:33 PM	973-632-2639		2	$ -	$ -	$ -	$ -
11/21/03	Incoming	5:07 PM	508-667-4338		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	5:34 PM	347-234-1074		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	5:37 PM	917-348-7551	(F)	1	$ -	$ -	$ -	$ -
11/21/03	Incoming	5:52 PM	508-667-4338		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	6:01 PM	508-667-4338		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	6:14 PM	347-234-1074		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	6:24 PM	973-632-2639		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	6:30 PM	347-234-1074		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	6:31 PM	508-667-4338		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	6:32 PM	973-632-2639		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	6:56 PM	508-667-4338		1	$ -	$ -	$ -	$ -
11/21/03	New York, NY	7:25 PM	917-365-3605	(F)	2	$ -	$ -	$ -	$ -
11/21/03	Incoming	7:28 PM	718-624-8470		1	$ -	$ -	$ -	$ -
11/21/03	Incoming	8:12 PM	Blocked NBR	(F)	2	$ -	$ -	$ -	$ -
11/22/03	Incoming	12:06 AM	718-415-7881	(F)	18	$ -	$ -	$ -	$ -
11/22/03	Incoming	1:00 AM	718-415-7881	(F)	7	$ -	$ -	$ -	$ -
11/22/03	Incoming	1:13 AM	917-535-9095	(F)	1	$ -	$ -	$ -	$ -
11/22/03	Incoming	1:14 AM	917-535-9095	(A)	2	$ -	$ -	$ -	$ -
11/22/03	Bklyn Nyc, NY	1:19 AM	718-415-7881	(F)	1	$ -	$ -	$ -	$ -
11/22/03	New York, NY	1:20 AM	917-365-3605	(F)	1	$ -	$ -	$ -	$ -
/22/03	Incoming	1:26 AM	917-535-9095	(F)	1	$ -	$ -	$ -	$ -

Call Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls

(I) Internat'l Call (K) WPS Call

Court's Exhibits #3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
CIVIC CENTER AT MONTAGUE STREET
BROOKLYN, NEW YORK 11201

J U R Y N O T E

TIME: 12:05

DATE: 12/16/04

HON. HON. ROBERT J. COLLINI

MESSAGE:

line up photos
blow up Picture of defendant
defense map of area (marked by detective w/ St. Edmonds st)
cell phone records (all)
Erick Marin's testimony IDing the defendant

SIGNED lola Walker

DO NOT WRITE BELOW THIS LINE

COURT'S EXHIBIT NO. 3 12/16/04 JM

MT 4/9

APPENDIX B

AFFIRMATION IN RESPONSE OF WRIT OF ERROR CORAM NOBIS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- BENJAMIN AYALA, Defendant-Petitioner.	AFFIRMATION IN RESPONSE TO MOTION FOR A WRIT OF ERROR CORAM NOBIS Kings County Indictment Number 8275/2003 Appellate Division Case Number 2005-00576

JILL OZIEMBLEWSKI, an attorney admitted to practice in the State of New York and an Assistant District Attorney in the County of Kings, affirms the following to be true under the penalties of perjury:

1. This affirmation is submitted in response to defendant Benjamin Ayala's pro se motion, dated May 22, 2017, for a writ of error coram nobis on the ground of ineffective assistance of appellate counsel.

2. The statements in this affirmation are made on information and belief based upon the records and files of the Kings County District Attorney's Office and of the Supreme Court of the State of New York, Kings County, and upon the written submission of Paul Skip Laisure, Esq., of the office of Lynn W. L. Fahey, dated September 1, 2017, which has been filed in this Court.

The Facts and the Indictment

3. On November 18, 2003, at approximately 9:40 p.m., defendant, armed with a box cutter, and an unapprehended accomplice pushed their way into the apartment of Claudia Santiago, who was sixty-five years old, and her husband Angel Luis Santiago, who was seventy years old. The couple lived at 596 Baltic Street in Brooklyn. Defendant and his accomplice grabbed Mrs. Santiago by the neck, demanded money, and threatened to kill her. Defendant then shoved her into the bedroom and pushed her face against the mattress. Meanwhile, the accomplice struck the sleeping Mr. Santiago in the face and threw him to the floor. Defendant and his accomplice then handcuffed Mr. and Mrs. Santiago together, demanded money, and threatened to kill them and their son. Mr. and Mrs. Santiago's grandsons Erik Marin and Edwin Sandino, who also lived in the building, interrupted the burglary by pounding on the door and shouting that the police were on their way.

4. Defendant and his accomplice fled from the building on foot. Marin grabbed a broomstick and, with Sandino, ran outside to chase the assailants. The accomplice got away, but defendant, appearing to tire, slowed down and stopped. Marin and Sandino caught up to defendant on Douglass Street between Fourth and Fifth Avenues. Defendant warned Sandino not to get

close or he would shoot him. A scuffle ensued, during which defendant pulled out his box cutter and Sandino kicked defendant in the chest. Marin then struck defendant with the broomstick, and defendant stabbed Marin in the neck and arm with the box cutter. Defendant continued his flight by running away and, ultimately, jumping into a livery cab. A police car then arrived with Marin's brother, Norvin Moreno, inside. Marin and Sandino entered the police car, and, less than a minute later and two blocks away, the police stopped the livery cab in which defendant was riding. Marin and Sandino pointed defendant out to the police. The police arrested defendant and recovered the box cutter from his pants pocket. Marin was taken to Methodist Hospital, where he received 14 stitches to the stab wound on his neck and 12 stitches to the stab wound on his arm. The next day, Mrs. Santiago identified defendant in a lineup as one of the men who had attacked her.

5. For these acts, defendant was charged, under Kings County Indictment Number 8275/2003, with two counts of Burglary in the First Degree under P.L. § 140.30(2), one count of Burglary in the First Degree under P.L. § 140.30(3), one count of Burglary in the Second Degree (P.L. § 140.25[2]), one count of Attempted Robbery in the First Degree (P.L. §§ 110.00/160.15[3]), one count of Attempted Robbery in the

Second Degree (P.L. §§ 110.00/160.10[1]), one count of Assault in the Second Degree (P.L. § 120.05[2]), one count of Assault in the Third Degree (P.L. § 120.00[1]), and two counts of Criminal Possession of a Weapon in the Fourth Degree (P.L. § 265.01[2]).

Defendant's Trial and Sentence

6. In December 2004, defendant, represented by Martin Goldberg, Esq., was tried before a jury in the Supreme Court, Kings County (hereinafter, the "Supreme Court"). A full statement of facts adduced at defendant's trial, as testified to by the People's witnesses, appears at pages 3 to 13 of Respondent's Brief to this Court. A summary of defendant's case appears at pages 14 to 15 of Respondent's Brief. Defendant presented an alibi witness, Magdelena Perez, who testified that, on November 18, 2003, between 5:15 p.m. and 9:30 p.m., she was with defendant at a hotel on Emmons Avenue in Brooklyn, and that, between 9:30 p.m. and 10:00 p.m. (when the burglary occurred), she was in a car with defendant before dropping him off at Third Avenue and Butler Street (Perez: 305-07, 315-20, 323).[1] On cross-examination, the prosecutor confronted Perez

[1] Unless otherwise indicated, unprefixed numbers in parentheses refer to pages of the trial transcript, dated December 10, 2004 et seq. Numbers in parentheses preceded by "S" refer to pages of the sentencing transcript, dated January 11, 2005. Names preceding the page numbers identify the witnesses whose testimony is being cited.

with her cellular telephone bill, which showed a twenty-three minute telephone call to defendant's cellular telephone that began at 5:24 p.m., a time Perez said she was with defendant (Perez: 310, 320-23). In a rebuttal case, a stipulation was read into evidence that stated that hotel managers for the only two hotels in the area would testify that no one named Benjamin Ayala signed in under that name on November 18, 2003 (328-29).

7. On December 16, 2004, the jury convicted defendant of two counts of Burglary in the First Degree under P.L. § 140.30(2), which pertained to Angel Santiago and Erik Marin, and one count of Burglary in the First Degree under P.L. § 140.30(3), which pertained to Claudia Santiago (414-16).

8. On January 11, 2005, the court sentenced defendant to three consecutive prison terms of twelve years, and imposed five years of post-release supervision for each count (S. 7-8) (Collini, J., at trial and sentence). By operation of law, the aggregate sentence reduced from thirty-six years to thirty years. See P.L. § 70.30(1)(e)(i).

9. Defendant is incarcerated pursuant to the judgment of conviction.

The Direct Appeal

10. Defendant, represented by appellate counsel Tonya Plank, Esq., who was then employed by the office of Lynn W. L.

Fahey, perfected his appeal from the judgment of conviction. In a 26-page brief dated March 2006, appellate counsel raised the following claims:

> (a) in light of the inability of two of the three eyewitnesses to make in-court identifications, the unreliability of the two out-of-court identifications, and evidence strongly indicating that the burglary was committed by someone close to the victimized family, to which defendant had no connection, the People failed to prove defendant's guilt of the charges beyond a reasonable doubt and the verdict was against the weight of the evidence; and
>
> (b) an aggregate sentence of 30 years in prison was excessive given that defendant was 36 years old and had no violent criminal history.

11. On May 31, 2006, the People served and filed a responding brief.

12. By pro se motion dated March 20, 2006, defendant requested this Court's permission to file a supplemental brief. Defendant sought to raise a claim challenging his three consecutive twelve-year sentences as illegal pursuant to P.L. § 70.25(2) (Defendant's Affidavit in Support of Motion to File a Pro Se Supplemental Brief at ¶ 3).

13. In a letter to this Court dated April 5, 2006, Ms. Plank conveyed her support of defendant's motion to file a supplemental brief, stating that defendant had "shown a great interest in his appeal and he should be given permission to file

a brief of his own as he sees fit" (4/05/06 Letter of Tonya Plank, Esq.).

14. In papers dated April 10, 2006, the People opposed defendant's motion, arguing that defendant appeared to have raised the claim that his sentence was illegal in his main brief.

15. By decision and order dated May 8, 2006, this Court granted defendant's motion to file a supplemental brief. See People v. Ayala, No. 2005-00576 (2d Dep't May 8, 2006).

16. In a 10-page pro se supplemental brief dated May 23, 2006, defendant claimed that his three consecutive twelve-year sentences were illegal and that, pursuant to P.L. § 70.25(2), concurrent sentences should have been imposed. Specifically, defendant argued:

> The crimes for which [defendant] was charged with and convicted of are all part of a single act, which constitute[s] all three offenses. They are all interrelated element crimes of one another. One (1) burglary occurred at (1) one residence and one (1) address in Kings County at one (1) specific time.

(Defendant's Pro Se Supplemental Brief at 1).

17. On July 31, 2006, the People served and filed a responding supplemental brief, arguing that consecutive sentences were appropriate because each count of first-degree burglary for which defendant was convicted was based on a

separate act against a separate victim: the beating of Angel Santiago, the slashing of Erik Marin, and the threatening of Claudia Santiago with the box cutter.

18. By decision and order dated January 23, 2007, this Court unanimously affirmed defendant's judgment of conviction. People v. Ayala, 36 A.D.3d 827 (2d Dep't 2007). This Court held that defendant's legal sufficiency claim was unpreserved for appellate review because, at trial, defendant had made only a general motion for a trial order of dismissal. Id. In any event, this Court held that the evidence was legally sufficient to establish defendant's identity as one of the burglars, and that the verdict of guilt was not against the weight of the evidence. Id. This Court also held that the consecutive sentences imposed upon defendant were not illegal, because the evidence "established that the crimes involved separate and distinct acts committed against separate victims." Id. Finally, this Court found that the sentence imposed was not excessive. Id.

19. In a letter dated February 20, 2007, defendant, by Ms. Plank, applied for leave to appeal to the Court of Appeals, seeking review of all claims that had been raised in defendant's two briefs. In a pro se letter dated April 4, 2007, defendant supplemented the leave application.

20. In a letter dated April 6, 2007, the People opposed defendant's leave application.

21. By certificate dated April 20, 2007, defendant's application for leave to appeal to the Court of Appeals was denied. People v. Ayala, 8 N.Y.3d 943 (2007) (Graffeo, J.).

The First Motion to Vacate Judgment

22. By pro se motion dated August 3, 2007, defendant sought in the Supreme Court an order vacating the judgment of conviction pursuant to C.P.L. § 440.10 and setting aside the sentence pursuant to C.P.L. § 440.20. Defendant claimed that he received ineffective assistance of trial counsel, because, according to defendant, counsel had failed to (a) adequately object to the insufficiency of the evidence, (b) properly cross-examine and impeach the People's witnesses, (c) object to the alleged improper relationship between the arresting officer and a member of the jury, (d) prepare defendant's alibi witness and subpoena any available information before trial, (e) subpoena defendant's medical records, (f) move to suppress the line-up and in-court identifications, and (g) advise defendant about the favorable plea offer of seven years. Defendant also claimed that the court had illegally imposed consecutive sentences.

23. In papers dated October 2, 2007, the People opposed defendant's motion to vacate the judgment and to set aside the

sentence. The People argued that defendant's ineffective assistance of counsel claim lacked merit because counsel's performance was within the broad range of professional reasonableness and because counsel's alleged errors had no effect on the verdict and did not deny defendant a fair trial. The People argued that defendant's consecutive sentencing claim was procedurally barred because the Appellate Division had rejected that claim on direct appeal and because there had been no retroactive change in the law affecting the claim. See C.P.L. § 440.20(2). The People also argued that the sentencing claim lacked merit because each of the three counts of first-degree burglary was based upon a separate act against a separate victim. See P.L. § 70.25(2).

24. In a pro se affidavit and memorandum of law dated October 25, 2007, defendant replied to the People's opposition papers.

25. By memorandum decision and order, dated March 17, 2009, the Supreme Court (Lott, J.) denied without a hearing defendant's motion to vacate the judgment of conviction and to set aside his sentence. The court held that defendant's claim of ineffective assistance of counsel, to the extent it was based upon matters of record, was procedurally barred because defendant had failed to raise the claim on appeal. See C.P.L.

§ 440.10(2)(c). The court held, in the alternative, that defendant's claim lacked merit, and that defendant did not establish that he was prejudiced by any alleged error of trial counsel. Finally, the court held that defendant's challenge to his consecutive sentences was procedurally barred because the Appellate Division had already rejected that claim on the merits in defendant's direct appeal. See C.P.L. § 440.20(2).

26. By order dated July 8, 2009, a justice of this Court denied defendant's application for leave to appeal from the Supreme Court's denial of his motion to vacate the judgment of conviction. People v. Ayala, No. 2009-03516 (2d Dep't July 8, 2009) (Belen, J.).

The Petition for a Federal Writ of Habeas Corpus

27. By pro se petition dated July 22, 2009, defendant applied to the United States District Court, Eastern District of New York (hereinafter, the "District Court"), for a federal writ of habeas corpus. All claims raised by defendant in his habeas petition were raised either on his direct appeal or in his motion to vacate the judgment of conviction and set aside his sentence.

28. In papers dated December 4, 2009, the People opposed defendant's petition for a federal writ of habeas corpus.

29. In a pro se traverse and memorandum of law dated February 16, 2010, defendant supplemented his habeas petition.

30. In a report and recommendation filed on June 28, 2011, a United States Magistrate Judge recommended that defendant's habeas petition should be denied. Ayala v. Ercole, No. 09-CV-3400 (DLI) (LB), 2011 U.S. Dist. LEXIS 153054 (E.D.N.Y. June 28, 2011). The Magistrate Judge found that defendant's sentence, both in the aggregate and for each conviction, fell within the range prescribed by state law, and, consequently, that defendant's sentencing claims did not present a federal constitutional issue for habeas corpus review and should be denied. Id. at *19-22. The Magistrate Judge found that defendant's ineffective assistance of counsel claims were procedurally barred from habeas corpus review by an independent and adequate state ground. Id. at *27-28. The Magistrate Judge held that, even if it were to reach the merits of defendant's ineffective assistance of counsel claims, the claims should be denied because the state court decision was not contrary to or an unreasonable application of clearly established Federal law. Id. at *29-36. Finally, the Magistrate Judge held that defendant had failed to demonstrate that he was prejudiced by any of the alleged errors of counsel. Id. at *35.

31. In pro se papers dated August 5, 2011, defendant filed his objections to the Magistrate Judge's report and recommendation.

32. By order dated February 9, 2012, a United States District Court Judge adopted the report and recommendation of the Magistrate Judge in its entirety, denied defendant's habeas petition, and denied a certificate of appealability. Ayala v. Ercole, 09-CV-3400 (DLI) (LB), 2012 U.S. Dist. LEXIS 16420 (E.D.N.Y. Feb. 9, 2012). Defendant subsequently applied to the United States Court of Appeals for the Second Circuit for a certificate of appealability and to the United States Supreme Court for a writ of certiorari, and both applications were denied. Ayala v. Lee, 568 U.S. 1146 (2013).

The Motion to Renew the First Motion to Vacate Judgment

33. In pro se papers dated March 20, 2013, defendant moved in the Supreme Court pursuant to C.P.L.R. 2221(e)(2) to renew his motion to vacate the judgment of conviction of August 3, 2007. Defendant claimed that the court's determination of his prior motion would be different because of (1) a purported change in the governing law regarding whether counsel was ineffective for failing to advise defendant about whether to accept an advantageous seven-year plea offer, and (2) purported new evidence obtained by defendant, namely, an affirmation

requesting payment and timesheets from his trial counsel, Mr. Goldberg.

34. In papers dated May 24, 2013, the People opposed defendant's motion.

35. In a pro se affidavit and memorandum of law dated June 13, 2013, defendant replied to the People's opposition papers.

36. By memorandum decision and order, dated September 16, 2013, the Supreme Court (Ozzi, J.) denied without a hearing defendant's motion to renew his prior motion to vacate judgment. The court held that defendant had not demonstrated a change in the law that would have changed the determination of the original motion. The court also rejected defendant's claim that the affirmation and timesheets submitted from trial counsel constituted new evidence that would change the court's ruling.

37. By order dated March 3, 2014, a justice of this Court denied defendant's application for leave to appeal from the Supreme Court's denial of his motion to renew his prior motion to vacate judgment. People v. Ayala, No. 2013-09954 (2d Dep't Mar. 3, 2014) (Hall, J.).

The First Motion for a Writ of Error Coram Nobis

38. By pro se motion dated July 13, 2015, defendant applied to this Court for a writ of error coram nobis.

Defendant claimed that his appellate counsel rendered ineffective assistance by failing to raise the following claims on direct appeal:

> (a) the trial court erred in refusing to grant a mistrial on the ground that the People failed to disclose in a timely manner the cellular telephone records of alibi witness Magdalena Perez (citing Brady v. Maryland, 373 U.S. 83 [1963]);
>
> (b) the prosecutor made improper comments during summation by vouching for the credibility of the Santiagos;
>
> (c) trial counsel rendered ineffective assistance by failing to argue that the use of photographs as a basis for an in-court identification by Mrs. Santiago was improper and suggestive;
>
> (d) trial counsel rendered ineffective assistance when he failed to object to the prosecutor's improper comments on summation;
>
> (e) trial counsel rendered ineffective assistance when he failed to argue that there was insufficient evidence to support the conclusion that the assault of Marin occurred in the immediate flight from the burglary;
>
> (f) trial counsel rendered ineffective assistance when he failed to object to the introduction of Perez's cellular telephone records;
>
> (g) trial counsel rendered ineffective assistance with respect to counsel's performance regarding the exclusion from evidence of Perez's cellular telephone records; and

(h) trial counsel rendered ineffective assistance when he failed to argue that the prosecutor failed to comply with the notice requirement set forth in C.P.L. § 250.20(4).

39. In papers dated October 7, 2015, the People opposed defendant's motion for a writ of error coram nobis. The People provided the following exhibits to this Court with their opposition papers:

(a) Defendant's Appellate Division Brief, dated March 2006 (Respondent's Exhibit A);

(b) People's Appellate Division Brief, dated May 31, 2006 (Respondent's Exhibit B);

(c) Defendant's Pro Se Motion, dated March 20, 2006, for permission to file a supplemental brief (Respondent's Exhibit C);

(d) Letter of Tonya Plank, Esq., dated April 5, 2006 (Respondent's Exhibit D);

(e) People's Answer, dated April 10, 2006, in opposition to defendant's motion (Respondent's Exhibit E);

(f) Defendant's Pro Se Supplemental Brief, dated May 23, 2006 (Respondent's Exhibit F);

(g) People's Supplemental Brief, dated July 31, 2006 (Respondent's Exhibit G).

40. In addition, Barry Stendig, Esq., who was then employed by the office of Lynn W. L. Fahey, filed an affirmation in this Court, dated September 11, 2015, in connection with defendant's motion for a writ of error coram nobis. Mr. Stendig affirmed that he had edited defendant's main brief, which Ms.

Plank had prepared and filed in 2006 (9/11/15 Affirmation of Appellate Counsel at ¶¶ 3, 8). Ms. Plank left the office of Lynn W. L. Fahey in 2010 (9/11/15 Affirmation of Appellate Counsel at ¶ 8). Mr. Stendig affirmed that he had no independent recollection of defendant's case and that his office did not have the trial minutes, and that, consequently, he was "not in a position to respond to the specific allegations in [defendant's] motion" (9/11/15 Affirmation of Appellate Counsel at ¶ 8).[2]

41. In a memorandum of law dated November 9, 2015, defendant submitted a reply to the People's opposition to his motion for a writ of error coram nobis.

42. By decision and order dated March 2, 2016, this Court denied defendant's motion for a writ of error coram nobis, holding that defendant had failed to establish that he was denied the effective assistance of appellate counsel. People v. Ayala, 137 A.D.3d 804 (2d Dep't 2016).

43. By order dated May 20, 2016, defendant's application for leave to appeal from this Court's denial of his motion for a writ of error coram nobis to the Court of Appeals was denied. People v. Ayala, 27 N.Y.3d 1065 (2016) (Pigott, J.).

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[2] On August 7, 2017; the People provided an electronic copy (a .pdf document) of the record of defendant's hearings, trial, and sentence to the office of Lynn W. L. Fahey.

The Second Motion to Vacate Judgment

44. By pro se motion dated December 21, 2015, defendant sought in the Supreme Court for the second time an order vacating the judgment of conviction pursuant to C.P.L. § 440.10. Defendant again claimed that he received ineffective assistance of trial counsel, because, according to defendant, counsel had failed to:

> (a) convey a plea offer involving a ten-year prison term and to advise defendant with respect to that offer;
>
> (b) argue that the prosecutor had failed to disclose cellular telephone records in a timely manner;
>
> (c) request an adjournment to review the prosecutor's alibi rebuttal evidence under C.P.L. § 250.20(4);
>
> (d) argue that the use of photographs as a basis for an in-court identification was improper and suggestive;
>
> (e) object to the prosecutor's improper comments on summation;
>
> (f) argue that there was insufficient evidence to support the conclusion that an assault occurred in the immediate flight from the burglary;
>
> (g) object to the introduction of the cellular telephone records at trial;
>
> (h) have the cellular telephone records made part of the trial record;

(i) argue that the prosecutor did not give reciprocal notice of the rebuttal witness in compliance with C.P.L. § 250.20(4); and

(j) argue that defendant should have been convicted of only one of the two counts of Burglary in the First Degree under P.L. § 140.30(2).

45. In papers dated March 10, 2016, the People opposed defendant's second motion to vacate the judgment. The People argued that defendant's ineffective assistance of counsel claim was mandatorily barred from collateral review, because all but one of defendant's complaints against his attorney (grounds [b]-[j], supra) were based on matters appearing on the record and could have been, but were not, raised on his direct appeal. See C.P.L. § 440.10(2)(c). As to defendant's complaint that his attorney had neither conveyed nor advised him with respect to the ten-year plea offer (ground [a], supra) the People asserted that that claim was based partly on matters appearing on the record, and partly on off-the-record communications between defendant and his attorney. The People argued that, nonetheless, the claim was permissively barred from collateral review because: (1) a variation of that claim, regarding the seven-year plea offer, had already been rejected on the merits by the District Court (see C.P.L. § 440.10[3][b]), and (2) to the extent defendant's claim differed from his original claim, defendant did not raise it in his first motion to vacate

judgment (see C.P.L. § 440.10[3][c]). In any event, the People argued that defendant's ineffective assistance of counsel claim was meritless.

46. In a pro se affidavit dated April 11, 2016, defendant replied to the People's opposition papers.

47. By memorandum decision and order, dated April 20, 2016, the Supreme Court (Gerstein, J.) denied without a hearing defendant's second motion to vacate the judgment of conviction. The court held that defendant's claim of ineffective assistance of counsel, to the extent it was based upon matters of record, was procedurally barred because defendant had failed to raise the claim on appeal (4/20/16 Decision at 9-10). See C.P.L. § 440.10(2)(c). To the extent defendant's claim was based partly on matters appearing off the record, the court held that the claim was procedurally barred pursuant to C.P.L. § 440.10(3)(b) and (c) (4/20/16 Decision at 10-12). The court held, in the alternative, that defendant's ineffective assistance of counsel claim was meritless (4/20/16 Decision at 12-18).

48. By order dated September 23, 2016, a justice of this Court denied defendant's application for leave to appeal from the Supreme Court's denial of his second motion to vacate the judgment of conviction. People v. Ayala, No. 2016-05333,

2016 N.Y. App. Div. LEXIS 8843, 2016 NY Slip Op 86567(U) (2d Dep't Sept. 23, 2016) (Hall, J.).

49. By order dated December 19, 2016, a judge of the Court of Appeals dismissed defendant's application for leave to appeal from this Court's order denying leave to appeal from the Supreme Court's denial of his motion to vacate judgment. People v. Ayala, 28 N.Y.3d 1122 (2016) (Rivera, J.). By order dated February 16, 2017, defendant's motion for reconsideration of his leave application to the Court of Appeals was denied. People v. Ayala, 28 N.Y.3d 1181 (2017) (Rivera, J.).

The Second Motion for a Writ of Error Coram Nobis

50. By pro se motion dated May 22, 2017, defendant now applies to this Court a second time for a writ of error coram nobis. Defendant claims that his appellate counsel rendered ineffective assistance by failing to raise the following claims on direct appeal:

> (a) trial counsel rendered ineffective assistance by not challenging the prosecutor's alleged misuse of the subpoena process to obtain defendant's cellular telephone records;
>
> (b) trial counsel rendered ineffective assistance by not investigating defendant's personal data in his cellular telephone found on his person and the cellular telephone records produced at trial by the People;

(c) trial counsel rendered ineffective assistance by presenting a flawed alibi defense;

(d) two counts charging defendant with burglary in the first degree were multiplicitous; and

(e) defendant received an illegal sentence as a second felony offender because of non-compliance with the statutory mandates of C.P.L. § 400.21.

For the reasons stated in the accompanying memorandum of law, defendant's motion for a writ of error coram nobis should be held in abeyance, and defendant should be granted permission to file a new brief on the issues of whether defendant's convictions of two counts of Burglary in the First Degree under P.L. § 140.30(2) were multiplicitous and whether the trial court's imposition of consecutive sentences on the three burglary counts was proper. Defendant's motion for coram nobis relief should be denied as to his remaining claims of ineffective assistance of appellate counsel, and defendant should be precluded from raising any claims in the new brief other than the claims that the counts were multiplicitous and that consecutive sentences were not authorized.

Dated: Brooklyn, New York
September 29, 2017

Jill Oziemblewski
JILL OZIEMBLEWSKI
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Kings County, New York
(718) 250-3128

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

BENJAMIN AYALA,

Defendant-Petitioner.

MEMORANDUM OF LAW

Kings County
Indictment Number
8275/2003

Appellate Division
Case Number 2005-00576

POINT I

DEFENDANT'S *CORAM NOBIS* APPLICATION SHOULD BE HELD IN ABEYANCE AND DEFENDANT SHOULD BE PERMITTED TO SERVE AND FILE A NEW BRIEF LIMITED TO THE ISSUES OF WHETHER DEFENDANT'S CONVICTIONS OF TWO COUNTS OF FIRST-DEGREE BURGLARY UNDER P.L. § 140.30(2) WERE MULTIPLICITOUS, AND WHETHER THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES FOR THE THREE COUNTS OF BURGLARY WAS PROPER. DEFENDANT'S MOTION FOR *CORAM NOBIS* RELIEF SHOULD BE DENIED AS TO DEFENDANT'S REMAINING CLAIMS.

In his current pro se motion for a writ of error coram nobis, defendant claims that his appellate counsel rendered ineffective assistance by failing to claim on direct appeal that: (a) trial counsel was ineffective for not challenging the prosecutor's alleged misuse of the subpoena process to obtain defendant's cellular telephone records; (b) trial counsel was ineffective for not investigating defendant's personal data in his cellular telephone found on his person and the cellular telephone records produced at trial by the People; (c) trial

counsel was ineffective for presenting a flawed alibi defense; (d) two counts charging defendant with first-degree burglary were multiplicitous; and (e) defendant received an illegal sentence as a second felony offender because of non-compliance with the statutory mandates of C.P.L. § 400.21.

This Court should hold defendant's coram nobis application in abeyance and permit defendant to serve and file a new brief on appeal on the issues of (1) whether defendant's convictions of two counts of Burglary in the First Degree under P.L. § 140.30(2) were multiplicitous, and (2) whether the trial court's imposition of consecutive sentences for the three counts of burglary was proper. See, e.g., People v. Tucker, 33 A.D.3d 635, 636 (2d Dep't 2006) (coram nobis application held in abeyance and leave granted to defendant to serve and file a brief on issue of whether the imposition of consecutive sentences was illegal); People v. Howard, 24 A.D.3d 798, 799 (2d Dep't 2005) (coram nobis application held in abeyance and leave granted to defendant to serve and file a brief on limited, designated issue); see also People v. Morales, 88 A.D.3d 744 (2d Dep't 2011); People v. Turner, 309 A.D.2d 884 (2d Dep't 2003). Although defendant has not asserted in his instant motion that his appellate counsel rendered ineffective assistance by failing to raise a claim on appeal that the

consecutive sentences on the three counts of burglary were illegal, a finding that the burglary counts were multiplicitous would affect the legality of the consecutive sentences.

First, defendant's claim that the two counts of Burglary in the First Degree under P.L. § 140.30(2) were multiplicitous (see Defendant's Motion at 16-17), while not preserved for appellate review, may have merit. See People v. Aarons, 296 A.D.2d 508 (2d Dep't 2002); People v. Griswold, 174 A.D.2d 1038 (4th Dep't 1991); People v. Perrin, 56 A.D.2d 957 (3d Dep't 1977); cf. People v. Davis, 165 A.D.2d 610 (4th Dep't 1991) (declining to vacate one of defendant's convictions of two counts of first-degree burglary where defendant was convicted under different subdivisions of P.L. § 140.30). Pursuant to the holdings of Aarons, Griswold, and Perrin, a defendant may be convicted of only one count of Burglary in the First Degree under the same subdivision of the statute defining that crime when there is only one unlawful entry into a dwelling. 296 A.D.2d at 508-09; 174 A.D.2d at 1038; 56 A.D.2d at 958. Therefore, defendant should be permitted to file a new brief in which to assert the claim that the two counts of Burglary in the First Degree under P.L. § 140.30(2) of which he was convicted (one count for the physical injury to Angel Santiago and the other for the physical injury to Erik Marin) were multiplicitous.

However, this Court should reject the variation of defendant's claim, as presented in the written submission of Paul Skip Laisure, Esq., that all three counts of first-degree burglary -- the two counts involving physical injury and the count involving the threatened use of a weapon against Claudia Santiago -- were multiplicitous and, consequently, that the convictions of two of those three counts should be vacated (see Laisure Affirmation at ¶¶ 7-11). Mr. Laisure argues that this Court has not adopted the distinction, which the Fourth Department articulated in Griswold, upholding multiple convictions of first-degree burglary if those convictions were based on violations of different subdivisions of the first-degree burglary statute, i.e., P.L. § 140.30(2) and (3) (see Laisure Affirmation at ¶ 9).[3] This Court has not had an opportunity to address whether separate counts of burglary under different subdivisions of the statute are multiplicitous, because, in Aarons, the defendant was convicted of four counts

[3] In Griswold, the defendant was convicted of two counts of Burglary in the First Degree under P.L. § 140.30(2) and one count of Burglary in the First Degree under P.L. § 140.30(3), and the Fourth Department reversed only one of the two convictions under subdivision 2 and upheld two of defendant's first-degree burglary convictions under the different subdivisions of the statute (P.L. § 140.30[2] and [3]). See 174 A.D.2d at 1038. Similarly, in Davis, the Fourth Department upheld the defendant's convictions of two counts of first-degree burglary under different subdivisions of the statute (P.L. § 140.30[2] and [4]). See 165 A.D.2d at 611.

of first-degree burglary under the same subdivision (P.L. § 140.30[4]) for displaying a weapon to four different individuals inside the dwelling. See 296 A.D.2d at 508-09.

Second, relief on defendant's multiplicity claim would be inconsistent with and irreconcilable with the trial court's imposition of consecutive sentences for the burglary counts. Although defendant raised a claim on appeal in his pro se supplemental brief that his consecutive sentences were illegal (see Oziemblewski Affirmation at ¶ 16), the claim was not developed in a brief by his appellate counsel. The People opposed that claim, and this Court held that the claim was meritless. Moreover, in view of the holdings of Aarons, Griswold, and Perrin that multiple counts of burglary under the same subdivision of the burglary statute may be multiplicitous if they are based on a single entry, the claim that consecutive sentences were illegal appears to have merit. Thus, defendant should not have received consecutive sentences on his convictions of two counts of first-burglary under P.L. § 140.30(2) if those counts were multiplicitous. Furthermore, because defendant's convictions of first-degree burglary under P.L. § 140.30(2) and (3) all were based on a single unlawful entry, defendant should be permitted to file a new brief in which he could argue that the trial court was required to direct

defendant's sentences on those counts to be served concurrently. See Davis, 165 A.D.2d at 612-14 (counts of first-degree burglary under P.L. § 140.30[2] and P.L. § 140.30[4] were concurrent counts because they were committed through a single act or omission).

Ultimately, if, after defendant were to file a new brief, this Court vacated one of defendant's convictions of first-degree burglary under P.L. § 140.30(2) and dismissed the multiplicitous count, and if this Court found that concurrent sentences should have been imposed on defendant's convictions under the remaining two counts of first-degree burglary, under P.L. § 140.30(2) and (3), then the proper remedy would be a remittal of defendant's case to the trial court for a restructuring of the sentence. See People v. Rodriguez, 25 N.Y.3d 238, 241-42 (2015) (Appellate Division properly remitted defendant's case to trial court for resentencing, following appellate court's correction of the unlawful imposition of consecutive sentences with respect to two of defendant's convictions, "to allow the court to 'restructure the sentences to arrive lawfully at the aggregate sentence which it clearly intended to impose upon defendant'" [quoting People v. Rodriguez, 79 A.D.3d 644, 645 (1st Dep't 2010)]).

Here, defendant's aggregate sentence of imprisonment is thirty years (three consecutive sentences of twelve years, reduced by operation of law to thirty years, see P.L. § 70.30[1][e][i]). If defendant's three sentences were ordered to run concurrently, then defendant's aggregate sentence would be only twelve years. The sentencing court obviously concluded that defendant deserved an aggregate sentence much greater than twelve years (S. 5-8). Accordingly, if the sentencing court had concluded that consecutive sentences were not authorized, then the sentencing court presumably would have imposed sentences closer to the maximum sentence of twenty-five years on each count. Indeed, the prosecutor recommended that the court sentence defendant to three concurrent prison terms of twenty-five years (S. 2-3). Defense counsel asked the court not to give defendant the maximum sentence (S. 4). Under these circumstances, a twelve-year aggregate sentence for defendant would be an undeserved windfall. Therefore, if defendant is granted relief on his claim of multiplicitous burglary counts and on the related claim that consecutive sentences were not authorized, then the appropriate remedy would be to remit the case to the trial court for resentencing.

POINT II

BECAUSE THE RECORD IS INSUFFICIENT FOR A DETERMINATION OF DEFENDANT'S SPECIFIC CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, BECAUSE TRIAL COUNSEL'S OVERALL PERFORMANCE WAS REASONABLE, AND BECAUSE TRIAL COUNSEL'S ALLEGED ERRORS DID NOT PREJUDICE DEFENDANT, APPELLATE COUNSEL REASONABLY CHOSE NOT TO RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

(Responding to Defendant's Arguments I-III)

The Standard

To prevail on a claim of ineffective assistance of appellate counsel under the State Constitution, a defendant must demonstrate that he or she was denied "meaningful representation." People v. Stultz, 2 N.Y.3d 277, 284 (2004); see People v. Borrell, 12 N.Y.3d 365, 368 (2009); People v. Ramchair, 8 N.Y.3d 313, 316 (2007). "Appellate advocacy is meaningful if it reflects a competent grasp of the facts, the law and appellate procedure, supported by appropriate authority and argument." Stultz, 2 N.Y.3d at 285. Appellate attorneys have latitude in deciding which issues to raise, and "[e]ffective appellate representation by no means requires counsel to brief or argue every issue that may have merit." Id. "The essential inquiry in assessing the constitutional adequacy of appellate representation is . . . not whether a better result might have been achieved, but whether, viewed objectively, counsel's actions [were] consistent with those of a reasonably

competent appellate attorney." Borrell, 12 N.Y.3d at 368 (citing People v. Satterfield, 66 N.Y.2d 796, 798-99 [1985]). Appellate courts should not second-guess counsel's efforts "with the clarity of hindsight." People v. Turner, 5 N.Y.3d 476, 480 (2005) (quoting People v. Benevento, 91 N.Y.2d 708, 712 [1998]); see People v. Davis, 185 A.D.2d 989, 990 (2d Dep't 1992).

In addition, to establish ineffective assistance of appellate counsel under the State Constitution, a defendant must show that counsel's mistakes were so egregious that they denied the defendant a fair appeal. Stultz, 2 N.Y.3d at 283-84; see People v. Henry, 95 N.Y.2d 563, 566 (2000); Benevento, 91 N.Y.2d at 713-14; People v. Maldonado, 278 A.D.2d 513, 514 (2d Dep't 2000). Only in "rare" cases is "a single failing in an otherwise competent performance . . . so 'egregious and prejudicial' as to deprive a defendant of his constitutional right." Turner, 5 N.Y.3d at 480 (quoting People v. Caban, 5 N.Y.3d 143, 152 [2005]); see Borrell, 12 N.Y.3d at 368-69.

Under the Federal Constitution, a defendant must establish that appellate counsel's conduct fell outside the "wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690 (1984); see Smith v. Robbins, 528 U.S. 259, 285-86 (2000) (applying the two-prong standard set forth in Strickland v. Washington, 466 U.S. 668 [1984], to claim of

ineffective assistance of appellate counsel); Aparicio v. Artuz, 269 F.3d 78, 95 (2d Cir. 2001) (citing Evitts v. Lucey, 469 U.S. 387, 396-97 [1985]); Abdurrahman v. Henderson, 897 F.2d 71, 74 (2d Cir. 1990); Gulliver v. Dalsheim, 739 F.2d 104, 107 (2d Cir. 1984). Under the first prong of the Strickland standard, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689; see Jones v. Barnes, 463 U.S. 745, 754 (1983) (appellate courts should not second-guess the reasonable professional judgments of counsel).

Under the second prong of the Strickland standard, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; see Smith, 528 U.S. at 285-86; Abdurrahman, 897 F.2d at 74; Gulliver, 739 F.2d at 107. Thus, a defendant must show both that appellate counsel's omission of a particular claim was objectively unreasonable, and "that there was a reasonable probability that [the omitted] claim would have been successful before the state's highest court." Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994) (citation and internal quotation marks

omitted); see Smith, 528 U.S. at 285, 288-89; Barnes, 463 U.S. at 750-53.

In the context applicable here, where appellate counsel prepared and filed a 26-page merits brief on defendant's behalf, appellate counsel's choice of the issues to present on appeal is presumed to have been reasonable. See Strickland, 466 U.S. at 690. The brief contained a detailed statement of facts that recounted, in a manner favorable to defendant, the evidence introduced at the trial. The statement of facts was supported by appropriate citations to the record and highlighted the matters relevant to the legal argument.

In the argument section of the brief, appellate counsel raised two viable, albeit ultimately unsuccessful, claims. Appellate counsel, maximizing on the inability of two of three eyewitnesses to make in-court identifications of defendant, claimed that the evidence of defendant's guilt was legally insufficient, and argued that the identification of defendant as one of the burglars was unreliable. Appellate counsel also claimed that the verdict was against the weight of the evidence and that defendant's sentence was excessive. Appellate counsel's arguments were supported by relevant citations to the law and to the record. The competent presentation of nonfrivolous issues, supported by reasoned argument and relevant

citations to the law and to the record, generally constitutes effective assistance of appellate counsel. See Stultz, 2 N.Y.3d at 285-86 (defendant received effective assistance of appellate counsel where counsel filed a 53-page brief advancing several viable issues supported by compelling argument and relevant citations to the law and to the record); People v. Rodriguez, 174 A.D.2d 700 (2d Dep't 1991) (defendant received effective assistance of appellate counsel where counsel capably presented nonfrivolous issues for the court's consideration); People v. Rivera, 170 A.D.2d 543, 543-44 (2d Dep't 1991) (same).

This Court Should Exercise Its Discretion Not to Consider Defendant's Repetitive Claim of Ineffective Assistance of Trial Counsel. In Any Event, Appellate Counsel Reasonably Chose Not to Raise a Claim of Ineffective Assistance of Trial Counsel, and Defendant Was Not Prejudiced by Appellate Counsel's Decision Not to Raise that Claim.

Appellate counsel acted reasonably by not raising a claim of ineffective assistance of trial counsel. As a preliminary matter, defendant's first pro se motion for a writ of error coram nobis, which this Court denied on March 2, 2016 (People v. Ayala, 137 A.D.3d 804 [2d Dep't], lv. denied 27 N.Y.3d 1065 [2016]), alleged six grounds of ineffective assistance of trial counsel (see Oziemblewski Affirmation, supra, at ¶ 38). In denying defendant's first motion for a writ of error coram

nobis, this Court has already implicitly rejected the merits of the underlying claim of ineffective assistance of trial counsel.[4]

While no statute prohibits a defendant from making multiple motions for a writ of error coram nobis, a remedy which originated under the common law (see generally People v. Bachert, 69 N.Y.2d 593, 598-600 [1987]), a court has the discretion to deny summarily coram nobis relief based on the same ground as was raised in a previous coram nobis motion. See People v. Mazzella, 13 N.Y.2d 997, 998 (1963) ("While a denial of coram nobis relief is not res judicata as to a subsequent petition on the same grounds, the question whether to entertain such an application is ordinarily one of discretion . . . . [e]ven when new or additional evidence is claimed to have been found"); People v. Newkirk, 41 A.D.2d 744 (2d Dep't 1973) (same); but see People v. D'Alessandro, 13 N.Y.3d 216, 219-21 (2009) (remitting matter to the Appellate Division for that court to consider the merits of claims raised in defendant's second application for a writ of error coram nobis, which "raised new arguments not raised in his previous application," and "the Appellate Division erred in characterizing the second

[4] The trial court and the District Court have also previously rejected the merits of defendant's ineffective assistance of trial counsel claim (see Oziemblewski Affirmation at ¶¶ 25, 30, 47).

application as a motion to reargue"). The instant motion, like defendant's first coram nobis motion, is based on the claim that defendant's appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel on defendant's direct appeal. Although defendant's instant motion is predicated on different acts and omissions of his trial counsel than those alleged previously, the gravamen of the two motions is the same: that he received the ineffective assistance of trial counsel. There is no reason why defendant could not have included his current allegations against trial counsel in his previous motion. Given that circumstance, this Court should exercise its discretion to deny coram nobis relief as to the ineffective assistance of trial counsel claim without entertaining the merits.

Moreover, in the instant motion, defendant fails to show that the record was sufficient for his claim of ineffective assistance of trial counsel to have been reviewed on direct appeal. Defendant alleges that trial counsel erred in three ways: (1) not challenging the prosecutor's alleged misuse of the subpoena process to obtain defendant's cellular telephone records (see Defendant's Motion at 7-8); (2) not investigating defendant's personal data in his cellular telephone found on his person and the cellular telephone records produced at trial by

the People (see Defendant's Motion at 8-13); and (3) presenting a flawed alibi defense (see Defendant's Motion at 13-16). To the extent these claims can be reviewed, defendant fails to show that trial counsel's overall performance was outside the broad range of what is professionally reasonable, or that trial counsel's alleged errors prejudiced him under either the state or federal standards. Accordingly, defendant fails to show that appellate counsel's not raising the claim of ineffective assistance of trial counsel, on any of the three grounds alleged in defendant's motion, prejudiced him because he fails to show that the claim would have prevailed on appeal.

Ordinarily, claims of ineffective assistance of trial counsel cannot be reviewed on direct appeal because the record will not show defense counsel's reasons for his or her alleged errors, thereby forcing the reviewing appellate court to "resort[] to supposition and conjecture rather than a thorough evaluation of each claim based on a complete record." People v. Rivera, 71 N.Y.2d 705, 709 (1988); see also People v. Love, 57 N.Y.2d 998, 1000 (1982) ("[W]e cannot conclude that defendant's counsel was ineffective simply by reviewing the trial record without the benefit of additional background facts that might have been developed had an appropriate after-judgment motion been made pursuant to CPL 440.10.") (citation and

internal quotation omitted); People v. Gilbert, 295 A.D.2d 275, 277 (1st Dep't 2002) (claim of ineffective assistance of counsel for failure to move to reopen Wade hearing "should have been raised via a C.P.L. § 440.10 motion so that the record could be expanded to permit trial counsel to explain his trial tactics"); People v. Lynn, 251 A.D.2d 250 (1st Dep't 1998) ("The existing record, which defendant has not sought to amplify by way of a C.P.L. § 440.10 motion whereby counsel's strategic decisions could have been explored, fails to support defendant's claim of ineffective assistance" for not moving to reopen suppression hearing). Only in "rare case[s]" is the record sufficient "to reject all legitimate explanations for counsel's failure." Rivera, 71 N.Y.2d at 709.

Under the New York State Constitution, a defendant's constitutional right to effective assistance of trial counsel is satisfied when, under the totality of the circumstances existing at the time of the representation, counsel provided the defendant with "meaningful representation." People v. Baldi, 54 N.Y.2d 137, 146-47 (1981); see Caban, 5 N.Y.2d at 152; Benevento, 91 N.Y.2d at 712. Similarly, under the United States Constitution, a defendant is entitled to "reasonably effective assistance," which, in light of all the circumstances, does not

fall "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 687, 690.

Under both the state and the federal tests, a reviewing court must presume that counsel's performance was professionally reasonable and "avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis." Baldi, 54 N.Y.2d at 146; see Strickland, 466 U.S. at 690. The defendant, therefore, bears the burden to "demonstrate the absence of strategic or other legitimate explanations for counsel's allegedly deficient conduct." Caban, 5 N.Y.3d at 152 (internal quotations omitted); see Strickland, 466 U.S. at 689; People v. Baker, 14 N.Y.3d 266, 270-71 (2010).

Additionally, under federal constitutional law, to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate prejudice, i.e., a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. Id. Although, under the state constitution, a defendant need not show a reasonable probability of a different result, defendant

nevertheless must show that counsel's errors deprived him of a fair proceeding. Benevento, 91 N.Y.2d at 711-14.

A. The Prosecutor's Use of the Subpoena Process to Obtain Defendant's Cellular Telephone Records Was a Matter Dehors the Record. To the Extent that the Claim Could Have Been Reviewed on Defendant's Appeal, Trial Counsel's Performance Was Reasonable. Furthermore, Because the Prosecutor's Subpoena Complied with the Criminal Procedure Law, Defendant Was Not Prejudiced by the Alleged Error.

The prosecutor's use of the subpoena process to obtain defendant's cellular telephone records was a matter dehors the record and, consequently, was unreviewable on direct appeal. See People v. Pearson, 69 A.D.3d 962 (2d Dep't 2010) (defendant's claim that the prosecutor improperly obtained his medical records from the Department of Correctional Services could not be reviewed on direct appeal because it was based on matter dehors the record); see also People v. Davis, 83 A.D.3d 860 (2d Dep't 2011) (ineffective assistance of counsel claim was unreviewable on direct appeal to the extent that it was predicated on matter dehors the record); People v. Reyes, 60 A.D.3d 873, 875 (2d Dep't 2009) (same); People v. Haynes, 39 A.D.3d 562, 564 (2d Dep't 2007) (same). To the extent that the claim could have been reviewed, the claim had no merit.

First, trial counsel had no basis to know that the prosecutor had served a subpoena to obtain defendant's cellular telephone records, because the prosecutor was not required to

provide defendant with notification of service of a subpoena for the records. The procedures governing the securing of documents and the attendance of witnesses by subpoena in a criminal action are set forth in Article 610 of the Criminal Procedure Law. Criminal Procedure Law section 610.20(2) grants district attorneys the power to issue subpoenas, and section 610.20(3) grants subpoena power to defense attorneys. The statute specifies that an attorney for a defendant cannot issue a subpoena duces tecum unless the subpoena is court-ordered "pursuant to the rules applicable to civil cases" (C.P.L. § 610.20[3]), and civil practice rules include the service of a copy of the subpoena on all parties to the action (see C.P.L.R. § 2303[a]). By contrast, C.P.L. § 610.20(2) lacks any such notice provision with respect to a subpoena issued by a district attorney. Where the natural significance of a statute is clear, "there is no room for construction and courts have no right to add or take away from that meaning." Reddington v. Staten Island Univ. Hosp., 11 N.Y.3d 80, 91 (2008) (quoting Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583, 696 [1998] [additional citation omitted]); see also McKinney's Statutes § 74 ("A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit").

Nor was there a right to notice of the subpoena under Article 240 of the Criminal Procedure Law, which is the statute governing the scope and timing of disclosure in criminal cases. See Miller v. Schwartz, 72 N.Y.2d 869, 870 (1988) ("There is no general constitutional right to discovery in a criminal prosecution . . . . Where no statutory right of discovery is provided, no substantive right of discovery exists"). Criminal Procedure Law section 240.20 enumerates the categories of documents and property that must be disclosed to a criminal defendant, and the list does not include subpoenas issued by the prosecution.

Accordingly, there was no statutory right, under C.P.L. § 240.20 or § 610.20(2), that entitled defendant to disclosure of the subpoena issued by the prosecutor to obtain defendant's cellular telephone records, and such disclosure was not required as a matter of due process. See Brown v. Grosso, 285 A.D.2d 642, 644 (2d Dep't 2001) ("discovery in excess of that which is authorized may not be granted based upon principles of due process"). Thus, where trial counsel had no right even to know that the prosecutor had served a subpoena, counsel cannot be faulted for not challenging the format of that document.

Second, during the trial, when counsel learned that the prosecutor had obtained the cellular telephone records of both

defendant and of alibi witness Magdalena Perez, counsel moved for a mistrial based on the prosecutor's unforeseen use of the records to impeach Perez (366-70), but counsel reasonably opted not to challenge the alleged subpoena-return impropriety. Even at that time, counsel was not entitled to production of the subpoena, a document which defendant obtained much later by filing a FOIL request with the District Attorney's Office (see Defendant's Motion at 7). In any event, where counsel was no doubt aware that the Criminal Procedure Law granted authority to the prosecutor to obtain such records by service of a subpoena (see C.P.L. § 610.20[2]), counsel had no basis to believe that the prosecutor had violated the statutory provisions in obtaining them.

Moreover, defendant's assertion that the prosecutor improperly directed that defendant's subpoenaed cellular telephone records be delivered to the District Attorney's Office is without merit. Defendant, presumably in support of his off-the-record claim, has appended to his motion a redacted photocopy of a subpoena to "T-Mobil[e]," which the prosecutor assigned to this case had prepared. Although the target cellular telephone number has been redacted on the document provided, the account number displayed on the subpoena corresponds with the account number on defendant's T-Mobile

cellular telephone records, which are also appended to his motion.[5]

Defendant claims that the prosecutor's subpoena violated C.P.L. § 610.25(1), which provides:

> Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.

In People v. Natal, 75 N.Y.2d 379, 385 (1990), the Court of Appeals stated that C.P.L. § 610.25(1) "makes clear that where the District Attorney seeks trial evidence the subpoena should be made returnable to the court."

Here, the subpoena directed T-Mobile to mail the requested phone records -- limited to the dates from November 17, 2003 to November 19, 2003 -- to the prosecutor "care of the Kings Co. Supreme Court - Criminal Term, 360 Adams St., Brooklyn, NY 11201," and not to the District Attorney's Office. Thus, because the prosecutor's subpoena was made returnable to the "Kings Co. Supreme Court - Criminal Term," at the court's address in 2004, the subpoena complied with C.P.L. § 610.25(1).

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[5] Defendant has failed to provide "Page 14 of 28" of his cellular telephone records, on which calls placed and received on the relevant crime date of November 18, 2003 would have appeared.

Although the prosecutor also provided her fax number, as a means of customary practice and convenience, the record is devoid of any support for defendant's claim that the subpoenaed cellular telephone records were faxed to the prosecutor's office as opposed to mailed to the prosecutor care of the Supreme Court.

Therefore, contrary to defendant's assertion, the prosecutor's use of the subpoena process was proper. Even if trial counsel had an opportunity to challenge the subpoena, the challenge would not have been successful. Accordingly, if appellate counsel had claimed on direct appeal that trial counsel was ineffective for not challenging the subpoena, the claim would not have prevailed. See Caban, 5 N.Y.3d at 152 ("There can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success.'") (quoting Stultz, 2 N.Y.3d at 287).

B. Trial Counsel's Investigation into Defendant's Cellular Telephone Records Was a Matter Dehors the Record. Furthermore, Trial Counsel's Performance Was Reasonable, and Defendant Was Not Prejudiced by the Alleged Error.

Defendant's claim that he was deprived of the right to the effective assistance of trial counsel because counsel did not investigate "defendant's personal data in his cellular telephone found on his person and the cellular telephone records produced

at trial by the People" (Defendant's Motion at 8-13) was unreviewable on direct appeal, because defendant failed to create an adequate record for review of the claim. "[T]he lack of an adequate record bars review on direct appeal not only where vital evidence is plainly absent, . . . but wherever the record falls short of establishing conclusively the merit of the defendant's claim." People v. McLean, 15 N.Y.3d 117, 121 (2010); see People v. Kinchen, 60 N.Y.2d 772, 773-74 (1983). Accordingly, appellate counsel was reasonable for not raising this claim on defendant's direct appeal. To the extent that the claim could have been reviewed, trial counsel's performance was reasonable and defendant was not prejudiced by the alleged error.

To be sure, a defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; see People v. Bussey, 6 A.D.3d 621, 623 (2d Dep't 2004). However, as with "any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691 (emphasis added); see People v. Reid, 31 Misc. 3d 712, 717 (Sup. Ct. N.Y. County 2011) (only "[a] complete

abdication of the duty to investigate, for no strategic reason, renders counsel ineffective") (citing People v. Fogle, 10 A.D.3d 618, 619 [2d Dep't 2004]).

Here, the record of defendant's trial does not reflect the investigation or the lack of investigation that trial counsel conducted into defendant's case. A claim that is based on off-the-record facts -- such as one involving a defense counsel's investigation -- is properly brought in a motion pursuant to C.P.L. § 440.10. See People v. Browder, 127 A.D.3d 777 (2d Dep't 2015) (ineffective assistance of counsel claim based partly on counsel's alleged failure to investigate the crime scene could not be "resolved without reference to matter outside the record," and "a CPL 440.10 proceeding [was] the appropriate forum for reviewing the claim in its entirety") (citations omitted); People v. Blackwood, 108 A.D.3d 678, 679 (2d Dep't 2013) ("[t]he appropriate vehicle to allege ineffective assistance of counsel grounded in allegations referring to facts outside of the record is pursuant to CPL 440.10, where matters dehors the record may be considered") (citations and internal punctuation marks omitted); People v. Craft, 104 A.D.3d 786, 788 (2d Dep't 2013) (where the record contained insufficient evidence for the appellate court to review the defendant's claim, such claim could "properly be reviewed only in the

context of a motion to vacate the judgment of conviction pursuant to CPL 440.10, which is designed for the purpose of developing matter dehors the trial record") (citations omitted); Fogle, 10 A.D.3d at 618-19 (trial counsel's "complete failure to investigate" was revealed at a hearing which the trial court had conducted on defendant's motion to vacate the judgment of conviction pursuant to C.P.L. § 440.10).

Consequently, a claim that trial counsel was ineffective for not investigating defendant's cellular telephone records was unreviewable on direct appeal, because it was predicated on matter dehors the record. See Browder, 127 A.D.3d at 777 (ineffective assistance of counsel claim based partly on counsel's alleged failure to investigate involved matter dehors the record and could not be reviewed on direct appeal); Davis, 83 A.D.3d at 860 (same); People v. Reyes, 60 A.D.3d 873, 875 (2d Dep't 2009) (same); Haynes, 39 A.D.3d at 564 (same).

To the extent that trial counsel's exclamation that he was "sandbagged" (366) by the prosecutor's unforeseen use of cellular telephone records during the cross-examination of Magdelena Perez implied that counsel had not himself investigated those records, counsel had reasonably believed the alibi that defendant had presented to him. The record demonstrates that Perez was involved in defendant's case from

its earliest stages, in that she had testified on defendant's behalf in the grand jury (Perez: 308-09, 312-13, 318-19, 326). Thus, defendant had asserted his alibi before trial counsel, Martin Goldberg, Esq., came to represent defendant.[6] Presumably defendant told Mr. Goldberg about his alibi and presented Perez as his witness. Without the clarity of hindsight, it would not have been unreasonable for trial counsel to presume that Perez was credible. Therefore, it would not have been unreasonable for counsel not to investigate defendant's cellular telephone records covering the time when defendant and Perez had said that they were together. Indeed, as the Magistrate Judge stated in recommending that defendant's petition for a writ of habeas corpus be denied:

> Petitioner's claim that counsel failed to adequately prepare his alibi witness Magdelena Perez for trial and failed to investigate the cell phone records used against Perez during cross-examination is insufficient to establish constitutionally ineffective assistance. Counsel's failure to subpoena Perez's cell phone records was not unreasonable, as only in hindsight would counsel know that the records would undermine the witness's credibility.

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[6] Defendant was represented by a different attorney, Jerilyn Bell, Esq., then of The Legal Aid Society, through the completion of the hearings (12/09/04 at 18). Mr. Goldberg told the court: "She did an extensive investigation. She did a lot more work than most lawyers would ever conceive of doing. I looked at what she did. And I know she discussed with [defendant] what this is all about." (12/09/04 at 18).

> Indeed, counsel acknowledged at sentencing that "[t]he alibi witness I put on did not make a very favorable impression at all and had I known she would testify as she did, I would have kept her off, obviously." (S. 4.)[.] Furthermore, although petitioner asserts that there is "no doubt that petitioner's trial counsel failed to interview Ms. Perez," petitioner submits no evidence relating to whether he made counsel aware that Perez had called to "a cell phone registered to petitioner." (Pet. Mem., p.31.)[.] Defense counsel could not have prepared for this issue unless it had been raised prior to Perez's testimony.

Ayala v. Ercole, No. 09-CV-3400 (DLI) (LB), 2011 U.S. Dist. LEXIS 153054, at *31-32 (E.D.N.Y. June 28, 2011). In any event, given the portable nature of a cellular telephone, defendant could have been using his cellphone from any location, so an investigation into the call logs themselves would not have been conclusive of defendant's whereabouts.

In the instant motion, defendant argues that an investigation into his cellular telephone records would have supported his alibi defense in that, had trial counsel conducted such an investigation, he would have found that "defendant did not actually possess the cellular telephone involved in the 23 minute call," and that "the cellular telephone was continuously in use by someone else while the defendant was incarcerated" (Defendant's Motion at 10-11). While defendant's assertion that his cellular telephone was still being used while he was

incarcerated supports an inference that another person had access to his cellphone at that time, an investigation of the call logs for the cellphone registered to defendant on the date of the crime -- November 18, 2003 -- would not support the same inference. Furthermore, while defendant contends that the cellphone he possessed on November 18, 2003 was not the same cellphone that the prosecutor had "falsely accuse[d]" him of possessing (Defendant's Motion at 11), the evidence that defendant challenges as objectionable came not from the prosecutor, but from the testimony of his own witness.

The pertinent facts are as follows: Perez testified that she met defendant at a dance hall on October 18, 2003, and that she and defendant left together and went to a hotel (Perez: 304, 309-11). She said that she gave defendant her two cellphone numbers and that they spoke a few times after meeting (Perez: 304, 309). Perez testified that, on November 18, 2003, defendant had called and wanted to see her (Perez: 304-05, 319-20). Perez claimed that she picked defendant up at 5:15 or 5:30 p.m. and that, at around 6:00 p.m., they arrived at the same hotel they had gone to the first time (Perez: 305-06, 315-17, 320). Perez said that defendant paid cash for the room and that she threw away the receipt (Perez: 306, 317-19). Perez testified that they left the hotel at around 9:30 p.m. and she

drove defendant to the corner of Third Avenue and Butler Street (Perez: 306). Perez maintained that it was almost 10:00 p.m. when she dropped defendant off (Perez: 306-07).

On cross-examination, the prosecutor, who possessed Perez's cellular telephone records, asked Perez to explain an outgoing 23-minute telephone call to defendant's cellphone that was made at around 5:24 p.m., given Perez's testimony that she was in her car with defendant at that time (Perez: 319-23). Perez said that she had called defendant to tell him that she was near and to wait, and that her phone might have remained on when it was in the pocket of her purse (Perez: 320-23). The prosecutor then showed Perez's telephone records to Perez (Perez: 320-21). Because Perez could not recall defendant's cellphone number, the prosecutor also showed defendant's cellular telephone records to Perez to refresh her recollection (Perez: 321-22). Perez confirmed that the number she had called at 5:24 p.m. belonged to defendant (Perez: 321-23).

Thus, contrary to defendant's assertion that "the prosecutor misled the jury in[to] believing that the cellular telephone records show that Perez called the defendant and that the call lasted 23 minutes" (Defendant's Motion at 10-11), the prosecutor had merely inquired about the call, giving Perez an opportunity to explain, and Perez testified that she had called

defendant's cellphone. Defendant's cellular telephone records were never entered into evidence, and were used for the limited purpose of refreshing Perez's recollection as to defendant's cellular telephone number (369-70). Furthermore, trial counsel was given access to the records during the trial and an opportunity to review them before conducting redirect examination of his witness (367-68). The document consisted of only three pages, including subscriber information and a list of phone calls made on November 18, 2003 (371-72). The court stated that it had "allowed both parties to go up and show the witness the portion of the document that was being utilized to refresh [her] recollection" (370).

In any event, even without the production of defendant's cellular telephone records, the prosecutor could have incorporated defendant's number into the trial by other means, such as by calling a rebuttal witness who might have known or recorded defendant's number.

Finally, in light of the overwhelming evidence of defendant's guilt (see infra at 35-36), defendant cannot establish that, had trial counsel investigated his cellular telephone records before trial, there was a significant probability that the outcome of the trial would have been different. See People v. Crimmins, 36 N.Y.2d 230, 241-42 (1975)

(no prejudice where no significant probability exists that jury would have acquitted but for the alleged error); see also Pearson, 69 A.D.3d at 963 (any error in the prosecutor's use of subpoenaed medical records was harmless). Contrary to defendant's claim, defendant's cellular telephone records were not material. The 5:24 p.m. telephone call at issue occurred more than four hours before, at 9:40 p.m., defendant and his accomplice pushed their way into the Santiago's apartment. Thus, the telephone records were not probative of defendant's conduct or whereabouts at the time the crime was committed.

C. Trial Counsel's Presentation of an Alibi Defense Concerned Trial Strategy Which Reviewing Courts Have Refused to Second-Guess on Appeal. Furthermore, the Record Demonstrates that Trial Counsel's Overall Performance Was Reasonable.

Defendant's claim that trial counsel was ineffective for presenting a "flawed alibi defense" (Defendant's Motion at 13-16) concerns the strategic decisions of trial counsel, which reviewing courts have refused to second-guess on appeal. See People v. Prescott, 63 A.D.3d 1090 (2d Dep't 2009) (defendant was not deprived of effective assistance of counsel where counsel presented an alibi witness whose testimony was impeached, and defendant "failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings") (quoting People v. Taylor, 1 N.Y.3d 174, 176

[2003]); Bussey, 6 A.D.3d at 623 ("the emphasis of some defenses over others is a matter of trial strategy that will not be second-guessed on appeal") (quoting People v. Rodriguez, 132 A.D.2d 682 [2d Dep't 1987]); see also Satterfield, 66 N.Y.2d at 799-800 (reviewing court should not second-guess "whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation"); People v. Tuzzio, 201 A.D.2d 595, 596 (2d Dep't 1994) (same). Furthermore, the record demonstrates that trial counsel's overall performance was reasonable.

Trial counsel cogently presented three theories of defense: misidentification, third-party guilt, and alibi. In his opening statement, counsel told the jury that no fingerprint evidence or DNA evidence linked defendant to the case, and that he was going to focus on showing the jury how "limited" the opportunity was for the victim, an "elderly woman," to see defendant (23). Counsel suggested that someone close to the Santiago family, who knew detailed information about the family, i.e., the $29,000 amount of a loan from a member of the Santiago family to a third party, had committed the crime (23-26). Finally, counsel told the jury that "[t]he defense part of this case if there is a defense part will be that there was a reason [defendant] was in

that area at that time" that had "nothing to do with burglary" (27). Counsel asserted that defendant was with a woman at a motel before the burglary occurred, and that the woman then dropped him off at a location a short distance from his home (27-28). Thus, trial counsel presented defendant's alibi as a supplemental defense theory.

Although trial counsel's decision to present the alibi defense by calling Magdalena Perez to testify was not ultimately a winning strategy, the strategy was "reasonable and legitimate" under the circumstances and evidence presented. Benevento, 91 N.Y.2d at 712-13. Trial counsel reasonably presented the alibi defense in an attempt to counter the People's evidence that defendant had been identified as one of the burglars who was inside the Santiago's apartment, and to explain defendant's presence on the street when defendant engaged in a physical altercation with Erik Marin. Moreover, the presentation of the alibi defense did not undermine the viability of the primary defenses that defendant had been misidentified and that someone else had committed the crime (335-49).

In addition, the record otherwise fails to support defendant's claim of ineffective assistance of trial counsel inasmuch as it demonstrates that trial counsel rendered meaningful representation to defendant at all stages of the

proceedings. See Davis, 83 A.D.3d 860; Haynes, 39 A.D.3d at 564; see also People v. Valath, 56 A.D.3d 578 (2d Dep't 2008) ("defendant failed to demonstrate that he was denied meaningful representation or that there were no strategic or other legitimate explanations for counsel's alleged shortcomings"). Counsel was more than adequately prepared and possessed an in-depth familiarity of the facts of defendant's case. Counsel argued in opposition to the People's Sandoval motion and successfully limited the scope of the admissible evidence in defendant's criminal history, where the court precluded the People from eliciting the underlying facts of defendant's prior felony convictions and the fact that defendant was on parole (12/09/04 at 7-11). As discussed, supra, counsel made a cogent opening statement in which he set forth the defense theories of misidentification, third-party guilt, and alibi.

Counsel cross-examined the prosecution witnesses about their opportunities to view defendant, and he highlighted the evidence that the amount of money demanded from Claudia and Angel Santiago during the burglary -- $29,000 -- was the same amount as a loan that Mrs. Santiago had co-signed for the third-party, Roberto Inguanzo. Counsel also made appropriate objections, requested appropriate charges, and called Magdalena Perez as a witness to present defendant's alibi. Counsel moved

for a mistrial based on the prosecutor's use of cellular telephone records during her cross-examination of Perez, given that the prosecutor had not disclosed those records to the defense (366-70).

Finally, counsel gave a comprehensive closing argument, in which he attempted to rehabilitate Perez from the prosecutor's challenge to her credibility and the prosecutor's suggestion that "[Perez] was here because she was paid to be here or because she [was] the wife's friend" (333-35). But counsel also told the jury that, even if they rejected the alibi witness, and even if they concluded that the alibi was "a total fabrication, totally false," that that was "not a reason by itself for conviction" (335). Counsel then reviewed all the evidence in a manner that challenged the testimony of the People's witnesses and advanced the defense theories of misidentification and third-party guilt (335-49). Therefore, counsel's overall performance was within the broad range of what is professionally reasonable. See People v. Charles, 309 A.D.2d 873 (2d Dep't 2003) (defendant received meaningful representation where counsel "presented a reasonable defense, interposed appropriate objections, effectively cross-examined witnesses, and delivered a cogent summation").

In any event, even if trial counsel's presentation of the alibi defense was objectively unreasonable, defendant was not prejudiced. Defendant was convicted of three counts of first-degree burglary not because of counsel's errors, but because the People adduced evidence beyond a reasonable doubt at trial of defendant's guilt of those crimes. Even if defendant's counsel had taken the actions that defendant would have had him take, there is no reasonable probability that the outcome of the trial would have been more favorable to defendant.

In this case, there was no dispute that the burglary occurred. Rather, the disputed issue was defendant's identity as one of the burglars, and the evidence of defendant's identity as one of the burglars was overwhelming. Erik Marin, who identified defendant at trial, had seen defendant's face and had made eye contact with him twice -- the first opportunity was outside the Santiago's apartment, and the other was outside their house. Marin and Edwin Sandino then chased defendant from the house immediately after the burglary. During the chase, defendant was out of Marin and Sandino's sight for only one minute or less when defendant rounded a street corner on foot. Defendant was not out of their sight after he entered a livery cab. That span of time when defendant was out of their sight

was too short for either Marin or Sandino to forget defendant's appearance or to misidentify defendant as one of the robbers.

Furthermore, Claudia Santiago identified defendant in a lineup as one of the robbers. Mrs. Santiago also identified the box cutter recovered from defendant upon his arrest as the one used in the robbery. Defendant's alibi witness, Magdelena Perez, was unable to undermine this strong and convincing evidence of defendant's identity as one of the robbers. Thus, in light of the overwhelming evidence, none of defendant's allegations of trial counsel error affected the verdict or denied defendant the right to a fair trial.

* * *

In sum, appellate counsel was reasonable for not raising a claim of ineffective assistance of trial counsel on defendant's direct appeal. First, defendant's allegations against trial counsel are based primarily on matter dehors the record and, consequently, the claims were unreviewable on direct appeal. Furthermore, defendant's allegations of ineffective assistance of trial counsel are without merit and would not have resulted in a reversal of defendant's conviction. In any event, defendant has failed to meet his high burden of demonstrating that appellate counsel provided him with less than meaningful representation. Even if the claim of ineffective assistance of

trial counsel had merit, that claim was not so clearly stronger than the claims appellate counsel raised so that appellate counsel's performance was outside the broad range of what is professionally unreasonable. Accordingly, defendant's motion for coram nobis relief should be denied as to this claim.

POINT III

APPELLATE COUNSEL REASONABLY CHOSE NOT TO RAISE A CLAIM THAT DEFENDANT WAS NOT SENTENCED AS A SECOND FELONY OFFENDER IN COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF C.P.L. § 400.21. FURTHERMORE, DEFENDANT HAS NOT SHOWN THAT HE WAS PREJUDICED BY APPELLATE COUNSEL'S DECISION NOT TO RAISE THE CLAIM.

(Responding to Defendant's Argument V)

Appellate counsel acted reasonably by not raising a claim that defendant was not sentenced as a second felony offender in compliance with the procedural requirements of C.P.L. § 400.21 (see Defendant's Motion at 17-19). Defendant's proposed claim that he was improperly sentenced as a second felony offender was unpreserved for appellate review. In addition, defendant has not established that he was prejudiced by appellate counsel's decision not to raise the claim.

Criminal Procedure Law section 400.21 sets forth the procedure that must be complied with when a defendant is sentenced as a second felony offender. That provision, in pertinent part, directs the prosecutor to file a predicate felony statement, setting forth the date and place of each alleged predicate felony conviction, "in any case where it appears that a defendant who stands convicted of a felony has previously been convicted of a predicate felony and may be a second felony offender as defined in section 70.06 of the penal law." C.P.L. § 400.21(1), (2). If a defendant chooses to

challenge the convictions enumerated in the predicate felony statement, the People must prove beyond a reasonable doubt the existence of the defendant's predicate felony convictions, and the defendant may challenge the constitutionality of those prior convictions. See People v. Diggins, 11 N.Y.3d 518, 524 (2008) (People are required to prove existence of predicate felony conviction, not its constitutionality); People v. Harris, 61 N.Y.2d 9, 15 (1983) (defendant has burden of proving that prior conviction used for predicate felony offender adjudication was unconstitutionally obtained); People v. Pelkey, 63 A.D.3d 1188 (3d Dep't 2009) (same); People v. Smith, 56 A.D.3d 695 (2d Dep't 2008) (same).

Defendant's claim that the prosecutor and the court failed to comply with the requirements of C.P.L. § 400.21 before he was sentenced was not preserved for appellate review, because defendant's trial attorney did not argue at sentencing that the court did not comply with the proper procedure. See C.P.L. § 470.05(2); People v. White, 144 A.D.3d 1057, 1058 (2d Dep't 2016) (declining to review unpreserved claim that defendant was improperly adjudicated a second felony offender); People v. Brown, 123 A.D.3d 732 (2d Dep't 2014) (same); People v. Sanabria, 110 A.D.3d 1012, 1013 (2d Dep't 2013) (same); cf. People v. Smith, 127 A.D.3d 790, 791 (2d Dep't 2015) (this Court

exercised its interest of justice jurisdiction to review defendant's unpreserved claim that he was improperly adjudicated a second felony offender); People v. Puca, 106 A.D.3d 758 (2d Dep't 2013) (same); People v. Feder, 96 A.D.3d 970, 971 (2d Dep't 2012) (same). Appellate counsel cannot be considered ineffective for choosing not to raise an unpreserved claim on defendant's appeal. See People v. Bolling, 297 A.D.2d 686 (2d Dep't 2002); People v. Vilante, 292 A.D.2d 638 (2d Dep't 2002); Luna v. Artus, No. 10 Civ. 2565, 2011 U.S. Dist. LEXIS 106170, at *12 (E.D.N.Y. July 20, 2011); Munoz v. Burge, No. 02-CV-6198, 2010 U.S. Dist. LEXIS 88100, at *34 (E.D.N.Y. Aug 20, 2010), aff'd, 442 Fed. Appx. 602 (2d Cir. 2011). Furthermore, unless a defendant can show that this Court would have considered the unpreserved claim in the interest of justice and that relief on the claim would have been granted, the defendant will fail to show prejudice from appellate counsel's choice not to raise it. See D'Amico v. Miller, No. 09 Civ. 4571, 2012 U.S. Dist. LEXIS 82989, at *3 (S.D.N.Y. June 13, 2012) ("because interests-of-justice review is entirely a matter of discretion, Petitioner cannot meet Strickland's requirement that he demonstrate that a reasonable probability that but for an unprofessional error by his counsel, the result of the proceeding would have been different"); Cummings v. Conway,

No. 09-CV-740, 2011 U.S. Dist. LEXIS 67127, at *14 (W.D.N.Y. June 23, 2011) (appellate counsel not unreasonable for not raising unpreserved claims, because "claims not raised in the trial court are reviewed 'sparingly' and 'interests of justice' review is not routinely performed").

In addition, defendant has not shown that he was prejudiced by appellate counsel's decision not to raise the claim that the sentencing was not in compliance with the procedural requirements of C.P.L. § 400.21. First, while the sentence and order of commitment in this case states that defendant was sentenced as a second felony offender, the court, at sentencing, referred to the fact that defendant had five prior felony convictions, but did not say that it was sentencing defendant as a second felony offender.

Moreover, even assuming that defendant was in fact sentenced as a second felony offender, defendant has not shown that he was prejudiced by the alleged non-compliance with the procedural requirements of C.P.L. § 400.21. In order to show prejudice, defendant must establish that there is a reasonable probability that he would not have been found to be a second felony offender if he had been afforded the proper procedure under C.P.L. § 400.21. In his current motion, defendant does not deny that he was convicted of five prior felonies, nor does

he raise any grounds for controverting the constitutionality of those prior convictions. Accordingly, defendant has not shown that he had any viable ground on which to challenge any of his five prior felony convictions, such that he would have prevailed in precluding the use of each of the five prior felony convictions as a predicate felony that would constitute a basis for adjudicating him a second felony offender. See Sanabria, 110 A.D.3d at 1013 (defendant's failure to allege grounds on appeal for controverting constitutionality of his prior convictions rendered harmless the court's error in failing to specifically ask defendant if he wished to controvert prior convictions); People v. Chase, 101 A.D.3d 1141 (2d Dep't 2012) (same).

In sum, defendant's claim that the court did not follow the proper procedure at sentencing is unpreserved, and defendant has not shown that he was prejudiced by the court's alleged non-compliance with C.P.L. § 400.21. Accordingly, defendant's claim that he was deprived of the effective assistance of appellate counsel by counsel's choice not to challenge the sentence on this ground should be rejected, because defendant has shown neither deficient performance nor prejudice.

CONCLUSION

FOR THE FOREGOING REASONS, DEFENDANT'S *CORAM NOBIS* APPLICATION SHOULD BE HELD IN ABEYANCE AND DEFENDANT SHOULD BE PERMITTED TO SERVE AND FILE A NEW BRIEF LIMITED TO THE ISSUES OF WHETHER HIS CONVICTIONS OF TWO COUNTS OF BURGLARY IN THE FIRST DEGREE UNDER P.L. § 140.30(2) WERE MULTIPLICITOUS AND WHETHER THE COURT'S IMPOSITION OF CONSECUTIVE SENTENCES ON THE BURGLARY COUNTS WAS PROPER. DEFENDANT'S REMAINING CLAIMS DO NOT WARRANT *CORAM NOBIS* RELIEF AND DEFENDANT SHOULD BE PRECLUDED FROM RAISING THOSE CLAIMS, AND ANY OTHER CLAIMS, IN THE NEW BRIEF.

Dated: Brooklyn, New York
September 29, 2017

Respectfully submitted,

ERIC GONZALEZ
Acting District Attorney
Kings County

LEONARD JOBLOVE
JILL OZIEMBLEWSKI
Assistant District Attorneys
of Counsel

APPENDIX C

AFFIRMATION
APPELLATE COUNSEL

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,	
Respondent,	: A.D. No. 05-00576
-against-	: Ind. No. 8275/03
BENJAMIN AYALA,	: AFFIRMATION OF APPELLATE COUNSEL
Defendant-Appellant.	: IN RESPONSE TO CORAM NOBIS PETITION

PAUL SKIP LAISURE, an attorney admitted to practice in the courts of this State, hereby affirms under the penalties of perjury that the following statements are true, except those made on information and belief, which he believes to be true:

1. I am associated with the office of Lynn W. L. Fahey, assigned by this Court on March 22, 2005, to represent appellant on his appeal from a judgment of the Supreme Court, Kings County, rendered on January 11, 2005, convicting him, after a jury trial, of three counts of burglary in the first degree, two under P.L. §140.30 (2) (caused physical injury), and one under P.L. §140.30 (3), (used a dangerous instrument), and sentencing him to three consecutive prison terms of 12 years (Collini, J., at trial and sentence).

2. I make this affirmation in response to appellant's motion for a writ of error *coram nobis* alleging that he received ineffective assistance of appellate counsel because our office should have raised several additional issues on his direct appeal. This case was

briefed by an attorney who is no longer in this office and supervised by an attorney who has since retired.

3. Appellant was indicted for first-degree burglary and related charges in connection with a November 2003 Brooklyn burglary. The first three counts of the indictment charged that he entered a dwelling and caused physical injury to Angel Santiago inside (Count 1), that in his flight from that dwelling he caused physical injury to Erick Marin (Count 2), and that before leaving the dwelling he displayed a box cutter (Count 3).

4. The trial testimony was that two men entered the apartment of Claudia and Angel Santiago and demanded the exact amount of money involved in a dispute between Claudia and someone who had been at the apartment before the incident. After the men injured Angel and then fled, Claudia's two grandsons, Erick and Edwin, wielding broomsticks, ran into the street after them. After losing sight of the men, Erick and Edwin saw appellant and another man exiting another building. Erick assumed they were the burglars because they ran when he chased them. When Erick hit appellant on the head with his broomstick, appellant stabbed him. Claudia Santiago identified appellant at a line-up the following day, but neither she nor Edwin identified appellant at trial. Erick could not state with certainty that appellant was one of the burglars. Appellant was convicted of all three counts of first-degree burglary.

5. This Office filed a brief arguing that the People failed to prove appellant's guilt of the charges beyond a reasonable doubt, and that the verdict was against the weight of the evidence. Appellant filed a *pro se* supplemental brief arguing that the trial court illegally imposed consecutive sentences.

6. In a decision and order dated January 23, 2007, this Court affirmed the judgment, holding that the People had proven guilt beyond a reasonable doubt, and that the conviction was not against the weight of the evidence. People v. Ayala, 36 A.D.3d 827 (2nd Dept. 2007). The court also held that the imposition of consecutive sentences was proper. Id. Appellant's application for leave to appeal to the Court of Appeals was denied by Judge Graffeo on April 20, 2007.

7. In his current motion for a writ of error *coram nobis*, appellant claims, among other things, that our office should that the indictment was multiplicitous in that it charged one burglary in separate counts.[1] This claim appears to have merit. Appellant was indicted on three counts of first degree burglary: two under P.L. § 140.30(2) (caused

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[1] Appellant also claims we should have raised four additional issues: 1) ineffective assistance of trial counsel for failure to challenge the prosecutor's subpoena for cellular telephone records because it was returnable to the prosecutor rather than the court; 2) ineffective assistance of trial counsel for failing to investigate the cellular telephone records before the prosecutor used them at trial; 3) ineffective assistance of trial counsel for interposing an alibi defense that was contradicted by the telephone records; and 4) the sentencing was invalid due to lack of a pre-sentence report. As to the first and fourth of these, to the extent there was any error, it was harmless. And as to the two ineffective assistance of trial counsel claims, both involve matters not on the record and, therefore, could not have been raised on direct appeal.

physical injury) and one under P.L. § 140.30(3) (threatened the use of a dangerous instrument) (see Indictment 8275/2003, Exhibit A attached). He was convicted of all three counts and sentenced to consecutive prison terms. Citing People v. Aaron, 296 A.D.2d 508 (2d Dept. 2002), appellant argues that the indictment was multiplicitous — that is, more than one count charged a single crime — because the three counts were all predicated upon a single unlawful entry (Petition at 17-18).

8. In Aaron, two counts of the indictment charged the defendant with unlawfully entering the same dwelling while displaying a weapon to four people inside. The People argued that as many as four counts, one as to each victim, were permissible but this Court held that, since "there was only one unlawful entry . . . . the defendant could be convicted of only one count." Id. at 508. The Court reversed the defendant's conviction on the second burglary count in the interest of justice notwithstanding defense counsel's failure to object. Id. It appears that appellant's multiplicitous indictment claim in this case has merit under Aarons because all three of the burglary counts of which he was convicted involved precisely the same illegal entry.

9. The Fourth Department has drawn a distinction between multiple burglary counts charging a single unlawful entry under the same subdivision (P.L. § 140.2), and burglary counts charging a single unlawful entry under different subdivisions (P.L. §§ 140.30(2) & (3)). People v. Griswold, 174 A.D.2d 1038 (4th Dept. 1991). In that case,

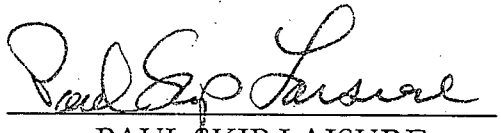
the court held that two counts charging first-degree burglary under subdivision 2 for injury to separate victims after a single unlawful entry were multiplicitous, but that a third count charging first-degree burglary under subdivision 3 for using a dangerous instrument after the same unlawful entry was not. Id. at 1038. This Court has not adopted that dubious distinction.

10. Accordingly, had we raised appellant's multiplicitous indictment claim on direct appeal, this Court, as it did in Aarons, could have exercised its interest of justice jurisdiction and dismissed at least one of the burglary counts under subdivision 2, and possibly the third burglary count under subdivision 3 as well.

11. The fact that this Court rejected the sentencing claim appellant made in his pro se supplemental brief on direct appeal does not lead to a different conclusion. In that brief, appellant argued that his consecutive sentences were illegal because he had committed only one *actus reus* (Pro Se Supplemental Brief at 7-8, Exhibit B attached). He did not make clear, as he does now, that his claim was based on there having been a single unlawful entry. Dismissing two counts of conviction now, therefore, would not conflict with this Court's direct appeal rejection of appellant's pro se consecutive sentence claim.

WHEREFORE, I support appellant's application for a writ of error *coram nobis*, and ask this Court to assign new counsel who can litigate the multiplicitous indictment issue for him.

Dated: New York, New York
September 1, 2017



PAUL SKIP LAISURE

Exhibit A

INDICTMENT

UPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

121

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

BENJAMIN AYALA - VFO
DEFENDANT
2003KN069603

INDICTMENT NO. 8275/2003
ORANGE ZONE

OUNTS

BURGLARY IN THE FIRST DEGREE (3 COUNTS)
BURGLARY IN THE SECOND DEGREE
ATTEMPTED ROBBERY IN THE FIRST DEGREE
ATTEMPTED ROBBERY IN THE SECOND DEGREE
CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH DEGREE (2 COUNTS)
ASSAULT IN THE SECOND DEGREE
ASSAULT IN THE THIRD DEGREE

A TRUE BILL

FOREPERSON

CHARLES J. HYNES
DISTRICT ATTORNEY

1R

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF BURGLARY IN THE FIRST DEGREE [PL 140.30-2] COMMITTED AS FOLLOWS:

THE DEFENDANT, ACTING IN CONCERT WITH ANOTHER PERSON, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS KNOWINGLY ENTERED AND REMAINED UNLAWFULLY IN THE DWELLING OF ANGEL SANTIAGO WITH INTENT TO COMMIT A CRIME THEREIN, AND IN EFFECTING ENTRY AND WHILE IN THE DWELLING AND IN IMMEDIATE FLIGHT THEREFROM, THE DEFENDANT AND ANOTHER CAUSED PHYSICAL INJURY TO ANGEL SANTIAGO, WHO WAS NOT A PARTICIPANT IN THE CRIME.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF BURGLARY IN THE FIRST DEGREE [PL 140.30-2] COMMITTED AS FOLLOWS:

THE DEFENDANT, ACTING IN CONCERT WITH ANOTHER PERSON, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS KNOWINGLY ENTERED AND REMAINED UNLAWFULLY IN THE DWELLING OF ANGEL SANTIAGO WITH INTENT TO COMMIT A CRIME THEREIN, AND IN EFFECTING ENTRY AND WHILE IN THE DWELLING AND IN IMMEDIATE FLIGHT THEREFROM, THE DEFENDANT AND ANOTHER CAUSED PHYSICAL INJURY TO ERICK MARIN, WHO WAS NOT A PARTICIPANT IN THE CRIME.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF BURGLARY IN THE FIRST DEGREE[P.L. 140.30-3] COMMITTED AS FOLLOWS:

THE DEFENDANT, ACTING IN CONCERT WITH ANOTHER PERSON, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS, KNOWINGLY ENTERED OR REMAINED UNLAWFULLY IN THE DWELLING OF CLAUDIA SANTIAGO, WITH INTENT TO COMMIT A CRIME THEREIN, AND IN EFFECTING ENTRY OR WHILE IN THE DWELLING OR IN IMMEDIATE FLIGHT THEREFROM, THE DEFENDANT USED OR THREATENED THE IMMEDIATE USE OF A DANGEROUS INSTRUMENT, NAMELY: A BOXCUTTER.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF BURGLARY IN THE SECOND DEGREE [PL 140.25-2] COMMITTED AS FOLLOWS:

THE DEFENDANT, ACTING IN CONCERT WITH ANOTHER PERSON, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS KNOWINGLY ENTERED AND REMAINED UNLAWFULLY IN THE DWELLING OF CLAUDIA SANTIAGO, WITH INTENT TO COMMIT A CRIME THEREIN.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF ATTEMPTED ROBBERY IN THE FIRST DEGREE[P.L. 110/160.15-3] COMMITTED AS FOLLOWS:

THE DEFENDANT, ACTING IN CONCERT WITH ANOTHER PERSON, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS, ATTEMPTED TO FORCIBLY STEAL CERTAIN PROPERTY FROM CLAUDIA SANTIAGO, AND IN THE COURSE OF THE COMMISSION OF THE CRIME OR OF IMMEDIATE FLIGHT THEREFROM, THE DEFENDANT USED OR THREATENED THE IMMEDIATE USE OF A DANGEROUS INSTRUMENT, NAMELY: A BOXCUTTER.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF ATTEMPTED ROBBERY IN THE SECOND DEGREE [PL 110/160.10-1] COMMITTED AS FOLLOWS:

THE DEFENDANT, AIDED BY ANOTHER PERSON ACTUALLY PRESENT, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS , ATTEMPTED TO FORCIBLY STEAL CERTAIN PROPERTY, NAMELY: A QUANTITY OF UNITED STATES CURRENCY FROM CLAUDIA SANTIAGO AND ANGEL SANTIAGO.

SEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH DEGREE[P.L. 265.01-2] COMMITTED AS FOLLOWS:

THE DEFENDANT, ACTING IN CONCERT WITH ANOTHER PERSON, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS, KNOWINGLY AND UNLAWFULLY POSSESSED A DANGEROUS INSTRUMENT, NAMELY: A BOXCUTTER, WITH INTENT TO USE UNLAWFULLY AGAINST ANOTHER, NAMELY: CLAUDIA SANTIAGO.

EIGHTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH DEGREE[P.L. 265.01-2] COMMITTED AS FOLLOWS:

THE DEFENDANT, ACTING IN CONCERT WITH ANOTHER PERSON, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS, KNOWINGLY AND UNLAWFULLY POSSESSED A DANGEROUS INSTRUMENT, NAMELY: A BOXCUTTER, WITH INTENT TO USE UNLAWFULLY AGAINST ANOTHER, NAMELY: ERICK MARIN.

NINTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF ASSAULT IN THE SECOND DEGREE[P.L. 120.05-2] COMMITTED AS FOLLOWS:

THE DEFENDANT, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS, WITH INTENT TO CAUSE PHYSICAL INJURY TO ERICK MARIN, CAUSED SUCH INJURY TO ERICK MARIN BY MEANS OF A DANGEROUS INSTRUMENT, NAMELY: A BOXCUTTER.

TENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF ASSAULT IN THE THIRD DEGREE [PL 120.00(1)] COMMITTED AS FOLLOWS:

THE DEFENDANT, ACTING IN CONCERT WITH ANOTHER PERSON, ON OR ABOUT NOVEMBER 18, 2003, IN THE COUNTY OF KINGS WITH INTENT TO CAUSE PHYSICAL INJURY TO ANGEL SANTIAGO, CAUSED SUCH INJURY TO ANGEL SANTIAGO.

CHARLES J. HYNES
DISTRICT ATTORNEY

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND DEPARTMENT

The People of the State of New York,

Respondent,

-v-

Ind. #8275-03

App. # 05-00575

Benjamin Ayala,

Defendant.

SUPPLEMENTAL BRIEF FOR DEFENDANT APPELLANT

Benjamin Ayala, 05A 0302
Upstate Correctional Facility
P.O. Box 2001
Malone, N.Y. 12953

TABLE OF CONTENTS

ARGUMENT:

POINT ONE: The Appellant received three (3) consecutive twelve (12) year sentences, which in this case are illegal pursuant to P.L. §70.25(2).

TABLE OF CASES

PRELIMINARY STATEMENT

This is an appeal of a conviction in the Kings County Supreme Court before Judge Collini, J.S.C., on January 11, 2005. The appellant's appeal counsel in this matter, Tonya Plank, Appellate Advocates, 2 Rector Street, 10 Floor, New York, N.Y. 10006, filed the direct appeal in this matter. A copy of the brief was received by the Appellant on the date of March 9, 2006. The appellant is using the appendix method pursuant to 22 NYCRR § 670.10.2(c).

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION - SECOND DEPARTMENT
The People of the State of New York,
Respondent,

-v-

Benjamin Ayala,
Defendant
Statement pursuant to C.P.L.R. § 5531

1. The Indictment # :8275-03.

The Appellate Division Docket # :05-00576.

2. Defendant-Appellant: Benjamin Ayala.

Respondent: The People of the State of New York

3. Defendant-Appellant was convicted after a jury trial in Kings County Supreme Court before the Hon. Justice Collini, J.S.C. of 3 counts of Burglary in the First Degree, (P.L. 140.30), for which he was sentenced to three (3) consecutive twelve (12) year determinate sentences.

4. Defendant-Appellant filed timely his notice of appeal dated March 22, 2005.

5. Tonya Plank of Appellate Advocates filed a brief on the matter, which was received by Defendant-Appellant on the date of March 9, 2006.

6. Defendant-Appellant was granted permission to submit a Supplemental Brief on the date of :

QUESTION PRESENTED

1. Were the sentences that the Appellant received, three (3) consecutive twelve (12) year sentences, illegal pursuant to P.L. §70.25(2)?

STATEMENT OF FACTS

As an initial matter, the appellant continues to contend that he is innocent of the charges for which he has been convicted. This supplemental brief should in no way conflict with his direct appeal brief submitted by his appellate attorney. The appellant hopes that the Court will construe the pleadings he has submitted in the broadest terms possible under the given circumstances, he being a layman of the law and a pro se litigant.

This supplemental brief is to directly contest the illegality of the three (3) consecutive sentences imposed by the Kings County Supreme Court (SEE: Exhibit "A"). The crimes for which the appellant was charged with and convicted of are all part of a single act, which constitute all three offenses. They are all interrelated element crimes of one another. One (1) burglary occurred at (1) one residence and one (1) address in Kings County at one (1) specific time.

Therefore, although the appellant is innocent of the three (3) burglary charges for which he was convicted, he contends that even though he was wrongfully convicted he was also wrongfully sentenced to three consecutive twelve (12) year sentences (SEE: Exhibit "B").

These sentences should have been concurrent pursuant to Penal Law §70.25(2). These sentences are more than excessive. They are by their very nature illegal. The appellant was sentenced to three (3) determinate twelve (12) year consecutive sentences for one (1) burglary that occurred at 596 Baltic Street, in Kings County. There were two victims (Claudio and Angel Luis Santiago), present at the residence when the burglary occurred in their apartment. It should also be noted as well, from considering the police and court records that there was no one else present at the burglarized residence.

Erik Marin and Edwin Sandino, the victim's grandsons came upon the Appellant a city block from the incident. At that time they assaulted him with broomsticks upon his head because they assumed that he was one of the burglars. This was due to the fact that he ran from them when they approached him in a hostile manner with their weapons. In the process of trying to defend himself from their assault, the appellant fought a sheet rock knife away from his assailants and cut Erik Marin. Even though Erik Marin was not present at the burglary that the appellant was charged with, he became the third charge of burglary for which the appellant was found guilty.

In this supplemental brief the appellant directly asks the Court for a modification of the sentences that were imposed upon him by the Kings County Supreme Court. The Kings County Supreme Court, although obligated by law to establish the legality of the sentences that they imposed upon this appellant, never established their legality at or before the time of sentencing.

It is evident that in this instance that the sentencing court failed to examine the statutory definitions of the crimes by which the appellant was charged and convicted. If the court had done so it would most likely have determined that consecutive sentences are illegal in this case. Therefore, the court would have realized that in this instance it was left with no other alternative than to impose concurrent sentences upon the appellant.

Because the people failed to establish that the burglary of the home of the two victims constitutes separate and distinct acts, based on the facts alleged within the indictment, this Court should modify these sentences from consecutive sentences to concurrent sentences in accordance with the legally imposed statutory requirements of Penal Law §70.25(2), concerning sentences of this nature.

It clearly appears to the appellant as if the sentencing judge levied three (3) consecutive twelve (12) year sentences upon the appellant to impress upon the appellant the fact he would not tolerate the appellant's alleged actions in his court, as he stated in the sentencing transcript. However, if the sentencing judge was attempting to impress this upon the appellant, it would have been in his best interest not to have sentenced the appellant to such illegal (consecutive) sentences conflicting with the statutory requirements of New York Penal Law. There are numerous presiding cases in which New York courts dealt with this same issue of sentencing modification from consecutive to concurrent after illegal sentences have been imposed, which the appellant will point to in his enclosed memorandum of law.

Finally, the appellant hopes that the court recognizes the fact that he stands convicted of a violent crime for the first time. His previous dealings with the court system have resulted in dismissal or conviction for charges that are nonviolent by nature. It appears from the court record that the judge did not considered this herein.

Although the appellant contests the fact that his sentences are more than excessive and that they are illegal, he also hopes the Court will recognize that the sentencing judge did not take this illegality into consideration at or before his sentencing. This should be evident from the annexed Exhibit "B".

It should be further noted that the sentencing judge could not have been observing the statutory requirements he was supposed to maintain in his court at the time that the appellant was sentenced. This is evident by the very fact that the judge imposed consecutive sentences herein when statutory law called for concurrent sentences.

The appellant prays that a careful review of the appellant's prior criminal history as well as consideration of Penal Law §70.25(2) "concurrent and consecutive sentences", would most definitely now afford the appellant more lenient sentences. Sentences that are legally in line with his conviction at the time of his sentencing are in order.

Wherefore, because three (3) consecutive twelve (12) year sentences were illegally imposed in this instance in violation of the statutory requirements of Penal Law § 70.25(2), this appellant prays that the Court modify the judgment, converting his three (3) consecutively imposed twelve sentences into three (3) concurrent twelve (12) year sentences.

Dated: May 23, 2006

Benjamin Ayala

MEMORANDUM OF LAW

POINT ONE

The Appellant received three consecutive twelve year sentences, which in this case are illegal pursuant to Penal Law §70.25(2).

Sentences imposed for two or more offenses may not run consecutive where a single act constitutes two offenses or where a single act constitutes one of the offenses and a material element of the other. Penal Law § 70.25(2); see also: People v. Laureano, 87 N.Y.2d 640 (N.Y. 1996) , People v. Parks, 95 N.Y.2d 811 (N.Y. 2000). When consecutive sentences are imposed, the people are obligated to establish their legality. In determining whether concurrent offenses are required, the sentencing court (at the time of sentence or before sentence is imposed) must examine the statutory definitions of the crimes for which the defendant (appellant) has been convicted. Penal Law § 70.25(2); see also: People v. Laureano, id.

The statute that provides that concurrent sentences must be imposed for two or more offenses committed through an act or omission which in itself constituted one of the offenses was also a material element of the other(s) requires only incorporation of the "act or omission," that is, the bodily movement or failure to act that constitutes the offense; the statute does not require incorporation of every element of the first offense into any material element of the second or successive offenses. Penal Law § 15.00, subs. 1,3; see also: Penal Law § 70.25(2).

To establish their claim that concurrent sentences are not required because the crimes involve two separate and distinct acts, the People must identify the facts which support their view and they may offer facts from the trial record. People v. DiLapo, 14 N.Y.2d 170, 173 (N.Y. 1964).

In determining whether concurrent sentences are mandated for convictions arising from a single act, analysis required is whether the actus reus elements in all offenses for which the appellant was convicted, by definition, are the same, or if the actus reus for one offense, by definition, a material element of the other. People v. Bryant, 92 N.Y.2d 216 (N.Y. 1998); see also: People v. Pettus, 22 A.D.2d. 869 (N.Y.A.D. 2 Dept. 2005) and People v. Hamilton, 4 N.Y.3d 54 (N.Y. 2005).

The sentencing court is required to examine statutory definitions of crimes for which the defendant (appellant) has been convicted to determine whether concurrent sentences are in order. In examining such, where as has occurred herein, multiple counts rendered three criminal convictions in the same trial the court should consider whether or not the actus reus for the three counts was a single inseparable act pursuant to McKinney's Penal Law § 70.25(2). People v. Ramirez, 89 N.Y.2d 444 (N.Y. 1996); see also: People v. Daly, 20 A.D.2d 237 (N.Y.A.D. 2 Dept. 2005), People v. Sims, 18 A.D. 3d 372 (N.Y.A.D. 1st Dept. 2005).

Because these crimes of conviction involve an actus reus wherein they are "merely an inseparable act violative of more than one statute" which hereby warrants a single punishment. People ex. rel. Maurer v. Jackson, 2 N.Y. 259, 264; see also: People v. Laureano, supra.; see also: People v. Davis, 12 A.D.3d. 237 (N.Y.A.D. 1st Dept. 2004) and People v. Randolph, 16 A.D.3d. 1151 (N.Y.A.D. 4th Dept. 2005).

In this instance, inasmuch as the People are unable to point to any testimony or evidence which would support the view that the two successive first degree burglary offenses involved disparate or separate acts from the other first degree burglary offense, they must all run concurrently. People v. Gabbidon, 272 A.D.2d 411, (N.Y.A.D. 2 Dept. 2000), see also: People v. Laureano, 87 N.Y.2d 640; and People v. Sturkey, 77 N.Y.2d 979.

Imposition of consecutive sentences for these crimes was an error because all of these convictions arose out of a single, contemporaneous incident that requires concurrent sentencing pursuant to McKinney's Penal Law § 70.25(2). People v. Lyde, 258 A.D.2d 669 (N.Y.A.D. 2 Dept. 1999); see also: People v. Velez, 206 A.D.2d 554, (N.Y.A.D. 2 Dept. 1994).

There is no conclusion in this matter to be drawn other than the fact that the appellant's convictions arose from a single act that could not be considered anything other than one inseparable event. Therefore, the sentences for these convictions should run concurrently pursuant to McKinney's Penal Law § 70.25(2). People v. Darvie, 224 A.D.2d 442, N.Y.A.D. 2 Dept. 1996); see also: People v. Walsh, 44 N.Y. 2d 631, (N.Y. 1978), People v. Wallace, 152 A.D.2d 713, (N.Y.A.D. 2 Dept. 1989), People v. Day, 73 N.Y.2d 208 (N.Y. 1989), and People v. Miller, 170 A.D.2d 623, (N.Y.A.D. 1989).

The double jeopardy clause of the Fifth Amendment of the United States Constitution affords this appellant protection against multiple punishments for the same offenses imposed in a single proceeding. Jones v. Thomas, 491 U.S. 376 (1989); see also: Wright v. Smith, 434 F. Supp. 339 (W.D.N.Y. 1977).

CONCLUSION

WHEREFORE, because the sentences that the appellant received are in this case illegal pursuant to P.L. §70.25(2), the appellant prays that the Court modifies them to concurrent sentences in the interest of justice.

Dated: May 23, 2006

Benjamin Ayala

PRINTING SPECIFICATIONS STATEMENT

This brief was prepared in Lotus WordPro, using a 14 point fully justified Garamond font, and totaled 1881 words.

APPENDIX D

REPLY ON AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

BENJAMIN AYALA,
Defendant-Petitioner.

Kings County Indictment No. 8275/2003

REPLY TO AFFIRMATION IN RESPONSE TO A PETITION FOR A WRIT OF ERROR CORAM NOBIS

App. Div. No. 2005-00576

ARGUMENT I

DEFENDANT'S CLAIM THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE TRIAL COUNSEL'S PERFORMANCE DURING TRIAL IS A CLAIM THAT IS SUFFICIENTLY MERITORIOUS TO WARRANT A SECOND WRIT OF ERROR CORAM NOBIS.

Defendant's claims that his appellate counsel rendered ineffective assistance by failing to raise the issue on direct appeal that (a) trial counsel rendered ineffective assistance by not challenging the prosecutor's alleged misuse of the subpoena process to obtain defendant's cellular telephone records, (b) trial counsel rendered ineffective assistance by not investigating defendant's personal data in his cellular telephone found on his person and the cellular telephone records produced at trial by the People, and (c) trial counsel rendered ineffective assistance by presenting a flawed alibi defense, are "different and more substantial argument[s] than those previously raised".

Here, the prosecutions introduction of the cellular telephone records at trial "sandbagged" defendant's alibi defense. A proper investigation and preparation of the defendant's case would had reveal to counsel that the defendant did not possess the cellular telephone involved in the 23 minute call. At the time of his arrest the defendant had a NOKIA Pre-paid cellular telephone. The T-Mobile that made the 23 minute call was continuously in use by an unknown person while the defendant was at all times incarcerated. The cellular telephone records led the jury to believe that Perez had given a false alibi. By presenting that the defendant had given a false alibi, that evidence was reinforced by the prosecution's capitalization of those records in summation. Having evidence that proves that defendant did not possess the T-Mobile, supports his alibi defense and that there is evidence of a culpable third-party.

This Court will abuse it's discretion if it refuses to entertain this application (see People v. D'Alessandro, 13 NY3d 216, 220-221 [2009]). See also People v. Stultz, 2 NY3d 277 (2004); Aparicio v. Artuz, 269 F3d 78, 95 (2d Cir. 2001).

ARGUMENT II

A FAILURE TO FILE A PREDICATE FELONY STATEMENT MAKES THE DEFENDANT'S SENTENCE INVALID AS A MATTER OF LAW.

While the defendant claims that he was improperly adjudicated a second felony offender is unpreserved for appellate review, this Court may consider the matter in the exercise of it's

interest of justice jurisdiction (see People v. Smith, 127 AD3d 790, 791 [2d Dept. 2015]).

Respectfully submitted,

Benjamin Ayala

Benjamin Ayala, Pro Se

Sworn to before me

This 24th day of October, 2017.

NOTARY PUBLIC

CHRISTINA M PETERSON
NOTARY PUBLIC-STATE OF NEW YORK
No. 01PE6347329
Qualified in Dutchess County
My Commission Expires 08-29-2020

APPENDIX E

APPELLATE DECISION

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M247171
E/rr

CHERYL E. CHAMBERS, J.P.
LEONARD B. AUSTIN
SANDRA L. SGROI
COLLEEN D. DUFFY, JJ.

2005-00576

The People, etc., respondent,
v Benjamin Ayala, appellant.

DECISION & ORDER ON MOTION

(Ind. No. 8275/03)

Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated January 23, 2007 (*People v Ayala*, 36 AD3d 827), affirming a judgment of the Supreme Court, Kings County, rendered January 11, 2005.

Upon the papers filed in support of the application and the papers filed in opposition and in relation thereto, it is

ORDERED that on the Court's own motion, the appellant is granted leave to serve and file a brief on the issue of whether the counts charging him with burglary in the first degree were multiplicitous; and it is further,

ORDERED that pursuant to County Law § 722, the following named attorney is assigned as counsel to prosecute the application:

Mark Diamond
Box 287356
Yorkville Station, New York 10128

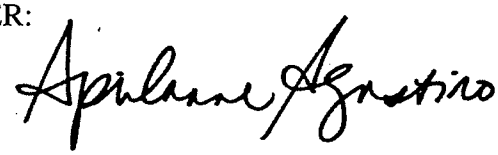
and it is further,

ORDERED that assigned counsel shall file the brief expeditiously in accordance with this Court's rules (*see* 22 NYCRR 670.1, *et seq.*), and written directions; and it is further,

ORDERED that the application is held in abeyance in the interim.

CHAMBERS, J.P., AUSTIN, SGROI and DUFFY, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

Appellant's address:
05-A-0302
Green Haven Corr. Fac.
P.O. Box 4000
Stormville, NY 12582

APPENDIX F

APPELLATE BRIEF

Appellate Division 2005-00576

Submitted by MARK DIAMOND

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE, etc.,

Respondent,

-v-

BENJAMIN AYALA,

Appellant.

(Ind. Nos. 8275/03)

APPELLANT'S BRIEF

On Application For Writ Of Error Coram Nobis

HEARD ON THE ORIGINAL RECORD

MARK DIAMOND
Attorney for Appellant
Box 287356 Yorkville Station
New York, NY 10128
(917) 660-8758

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE, etc.,

respondent,

-v-

BENJAMIN AYALA,

appellant.

(Ind. Nos. 8275/03)

CPLR § 5531
STATEMENT

A.D. # 2005-00576

---

1. The Kings County indictment number is 8275/2003.

2. The full name of the appellant is Benjamin Ayala.

3. There were no co-defendants at trial.

4. Mr. Ayala was convicted in Supreme Court of two counts of burglary 1° (PL § 140.30[2]) and one count of burglary 1° (PL § 140.30[3]). He received an effective sentence of 36 years in prison consisting of three consecutive sentences of 12 years in prison and 5 years of post-release supervision.

5. This is an application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of the Appellate Division dated January 23, 2007. The Decision and Order affirmed a judgment of the Supreme Court, Kings County, rendered January 11, 2005. Mr. Ayala's pro se application is dated May 22, 2017.

6. On March 16, 2018, on the Court's own motion, the application was held in abeyance and the appellant was granted leave to serve and file a brief on the issue of whether the counts charging him with burglary 1° are multiplicitous. Counsel was assigned to represent him for this purpose.

7. The appellant is incarcerated.

QUESTION INVOLVED

QUESTION 1

WAS MR. AYALA'S RIGHT AGAINST DOUBLE JEOPARDY VIOLATED BY HIS CONVICTION OF THREE MULTIPLICITOUS COUNTS OF BURGLARY 1°?. WERE HIS THREE CONSECUTIVE PRISON SENTENCES IMPROPER BECAUSE HIS CONVICTIONS WERE MULTIPLICITOUS?

QUESTION 2

DID APPELLATE COUNSEL RENDER INEFFECTIVE ASSISTANCE BY FAILING TO RAISE THIS REVERSIBLE ERROR OF LAW THAT WAS CLEAR FROM THE RECORD? WAS THE ERROR NOT HARMLESS SINCE IT RESULTED IN A 36-YEAR PRISON SENTENCE THAT SHOULD HAVE BEEN A 12-YEAR SENTENCE?

NATURE OF THE CASE AND FACTS INVOLVED

In 2003, the applicant ("Mr. Ayala") was indicted for burglary 1° (three counts); burglary 2°; attempted robbery 1°; attempted robbery 2°; criminal possession of a weapon 4° (two counts); assault 2°; and assault 3° for an incident that occurred on November 18, 2003. At jury trial, it was alleged that he 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 grandson's was stabbed.

A suppression hearing was held on August 23, 2004. Trial took place from December 13 to 16, 2004. Mr. Ayala was convicted of three counts of burglary 1° only. On January 15, 2005, he was sentenced to twelve years in prison and five years of post-release supervision on each count, the sentences to run consecutively, for a total effective prison sentence of thirty-six years.

Direct Appeal

Mr. Ayala filed a notice of appeal on March 22, 2005. On March 9, 2006, counsel perfected his appeal and raised only two issues: (1) There was insufficient evidence to convict Mr. Ayala and (2) his sentence was excessive because he was 36 years old and had no violent criminal history. In a pro se supplemental brief, Mr. Ayala argued that he should have received concurrent

instead of consecutive sentences under PL § 70.25(2) because all of the charges involved the same, single burglary. The Court affirmed judgment in *People v. Ayala*, 36 AD3d 827 (2d Dept. 2007) holding (1) there was legally sufficient evidence to convict Mr. Ayala and the weight of the evidence supported his conviction, and (2) and 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. (*People v. Ayala*, 8 NY3d 943 (2007)

On August 3, 2007, Mr. Ayala filed a motion to vacate judgment because he was actually innocent; his consecutive sentence was illegal; and he received ineffective assistance from trial counsel, who did not object to insufficiency of the evidence, properly cross examine witnesses, object to an improper relationship between the arresting officer and a member of the jury, prepare Mr. Ayala's alibi witness, subpoena medical records, move to suppress a lineup ID, and tell Mr. Ayala about a plea offer of seven years in prison. (CPL § 440.10) On March 17, 2009, the motion was denied. (Lott, J.) Mr. Ayala 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.

Mr. Ayala 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 the Appellate Division (*People v. Ayala*, 2016 WL 5328604 (2d Dept. 2016) and

the Court of Appeals (*People v. Ayala*, 28 NY3d 1122 (2016). A motion for reconsideration was denied. (*People v. Ayala*, 28 NY3d 1181 (2017)

Mr. Ayala filed a federal petition for a writ of habeas corpus in 2009. It was denied in 2012. (*Ayala v. Ercole*, 09-CV-3400 (EDNY 2012) His petition for a writ of certiorari was denied. (*Ayala v. Lee*, 133 S.Ct. 987 (2013)

On July 13, 2015, Mr. Ayala 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, object to prosecutorial misconduct during summation, argue there was insufficient evidence of assault on the grandson, object to the introduction of a witness' cell phone records, and argue that the prosecutor failed to comply with the notice requirement of CPL § 250.20(4). The coram nobis petition was denied. (*People v. Ayala*, 137 AD3d 804 2d Dept. 2016) His applications for leave to appeal were denied by the Appellate Division (*People v. Ayala*, 2016 WL 5328604 (2d Dept. 2016) and dismissed by the Court of Appeals (*People v. Ayala*, 27 NY3d 1065 (2016).

On May 22, 2017, Mr. Ayala filed a second petition for a writ of error coram nobis, which is the subject of this appeal. 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. He also argued that his appellate attorney was ineffective for failing argue that his trial attorney raised a flawed alibi defense, failed to object to the multiplicitous of the counts of burglary 1°, and failed to argue that the sentence was illegal because the trial court did not comply with CPL § 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 respondent admirably acknowledged that Mr. Ayala's multiplicitousness argument has merit because all three burglary 1° counts arose out of a single entry into the dwelling. The respondent noted that even though this Court rejected the claim that Ayala made in his pro se supplemental brief on 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 respondent concluded that the burglary sentences should run concurrently and not consecutively because they arose from a single entry into a single residence at a single time. The respondent asked that the case be returned to the trial court for resentencing if relief on the coram nobis petition is granted.

In a Decision and Order dated March 16, 2018, this Court held the following:

> Application by appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this court dated January 23, 2007 (*People v. Ayala*, 36 AD3d 827), affirming a judgment of the Supreme Court, Kings county, rendered January 11, 2005.
>
> ORDERED that on the Court's own motion, the appellant is granted leave to serve and file a brief on the issue of whether the counts charging him with burglary in the first degree were multiplicitous.

POINT 1

MR. AYALA'S RIGHT AGAINST DOUBLE JEOPARDY WAS VIOLATED BY HIS CONVICTION OF THREE MULTIPLICITOUS COUNTS OF BURGLARY 1°. HIS THREE CONSECUTIVE PRISON SENTENCES WERE IMPROPER BECAUSE HIS CONVICTIONS WERE MULTIPLICITOUS.

Introduction

Mr. Ayala received ineffective assistance from both his trial and appellate attorneys. Under well-established law in existence at the time of his direct appeal, and current to this day, multiple counts of burglary 1° that allege unlawful entry into a single dwelling at a single time are multiplicitous as a matter of law. (*People v. Aaron*, 296 AD2d 508 (2d Dept. 2002); see also, *People v. Olson*, 116 AD3d 427 760 (1st Dept. 2014); *People v. Perrin*, 56 AD2d 957 (3d Dept. 1977); *People v. Griswold*, 174 AD2d 1038 (4th Dept. 1991) Charging a defendant with multiple counts of burglary 1° based upon a single entry into a dwelling violates our right against double jeopardy because they convict a defendant multiple times for the same crime. (U.S. Const. 5th, 14th Amends.; N.Y. Const art. 1, § 6)

All three of Mr. Ayala's burglary 1° arose out of entry or flight therefrom of a single dwelling at 9:40 P.M. on November 18, 2003. Despite the clear violation of Mr. Ayala's right against double jeopardy, trial counsel failed to seek dismissal

of two of the three multiplicitous counts of burglary 1°. Making matters worse, appellate counsel failed to seek reversal of two of the three burglary counts in the interest of justice and because failure to preserve the issue for appeal was caused by trial counsel's ineffectiveness, which was clear from the record.

The error was not harmless because the Supreme Court imposed three consecutive prison sentences of twelve years on each count of burglary 1°. As a result, what should have been a prison sentence of twelve years wrongly became a prison sentence of thirty-six years. For these reasons, Mr. Ayala's current petition for a writ of error coram nobis should be granted. The respondent honorably and admirably agrees. (See, "Affirmation in Response to Motion for a Writ of Error Coram Nobis" of 9/29/17, p. 22, and "Memorandum of Law," p. 3)

Discussion

Mr. Ayala was charged and convicted on three counts of burglary 1°. The relevant portion of PL § 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 PL § 140.30(2) alleges that Mr. Ayala unlawfully entered the dwelling of Angel and Claudia Santiago on November 18, 2003, and while in the dwelling or in immediate flight therefrom caused physical injury to Angel. Count 2 of the indictment, also under PL § 140.30(2) alleges that Mr. Ayala unlawfully entered the dwelling of Angel and Claudia Santiago on November 18, 2003, and while in the dwelling or in immediate flight therefrom caused physical injury to Erick Marin. Count 3 of the indictment for burglary 1° under PL § 140.30(3) alleges that Mr. Ayala unlawfully entered the dwelling of Angel and Claudia Santiago on November 18, 2003, and while in the dwelling or in immediate flight therefrom used a dangerous instrument, a boxcutter.

Reflecting the language of the indictment, in its final charge, the Supreme Court instructed the jury that all three counts of burglary 1° involved unlawful entry into the same home at the same time. The parties did not object to this charge. (See, trial transcript of 12/15/04, pp. 393-398, 408-410) Thus, all three counts of burglary 1° were based upon a single entry. (See also, "Respondent's Brief" of 5/31/06, p. 2)

"An indictment is multiplicitous when two or more counts charge the same crime." (*People v. Aarons*, 296 AD2d 508, 508 (2d Dept 2002) These include counts in which the defendant's conduct involves the same mental state, the same act, and the same course of conduct. (*People v. Senisi*, 196 AD2d 376, 382 (2d Dept 1994); see also, *Brown v. Ohio*, 432 U.S. 161 (1977) Charges that are multiplicitous deprives a defendant of his state and federal right against double jeopardy, because such charges convicts the defendant twice for the same crime. (U.S. Const. 5th, 14th Amends.; N.Y. Const art. 1, § 6)

In *People v. Alonzo*, 16 NY3d 267, 269 (2011) the Court of Appeals held the following:

> Prosecutors and grand juries must steer between the evils known as "duplicity" and "multiplicity." An indictment is duplicitous when a single count charges more than one offense (e.g. *People v. Bauman*, 12 NY3d 152, 878 NYS2d 235, 905 NE2d 1164 [2009]; *People v. Keindl*, 68 NY2d 410, 509 NYS2d 790, 502 NE2d 577 [1986]). It is multiplicitous when a single offense is charged in more than one count (e.g. *People v. Senisi*, 196 AD2d 376, 610 NYS2d 542 [2d Dept. 1994]).
>
> If an indictment is multiplicitous it creates the risk that a defendant will be punished for, or stigmatized with a conviction of, more crimes than he actually committed.

In *People v. Saunders*, 290 AD2d 461,463 (2d Dept. 2002) this Court held the following:

> An indictment is multiplicitous when two separate counts charge the same crime (see, *People v. Jackson*, 264 AD2d 857, 695 NYS2d 582; *People v. Demetsenare*, 243 AD2d 777, 779–780, 663 NYS2d 299; *People v. Kindlon*, 217 AD2d 793, 629 NYS2d 827).

That is precisely what occurred in Mr. Ayala'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 counts of burglary 1° against Mr. Ayala were multiplicitous because they all occurred during a single entry or flight therefrom. As a matter of law, there was only one burglary, not three. While he could have been tried on three different counts of assault, for instance, each involving a different victim, when it comes to burglary 1° there was but one criminal act.

In *People v. Aaron*, 296 AD2d 508, 508-09 (2d Dept. 2002) this Court held the following:

> The defendant's contention that the counts charging him with burglary in the first degree are multiplicitous is unpreserved for appellate review (see *People v. Cruz*, 96 NY2d 857). Nevertheless, in the exercise of our interest of justice jurisdiction, we vacate the defendant's convictions of burglary in the first degree under counts fifteen, sixteen and seventeen of the indictment.
>
> An indictment is multiplicitous when two or more counts charge the same crime (see *People v. Senisi*, 196 AD2d 376). Counts fourteen through seventeen in the indictment charged

> the defendant with unlawfully entering and remaining in the same dwelling and, in the course thereof, displaying a weapon (see Penal Law § 140.30[4]). Although the People contend that four separate burglary counts were permissible because the weapon was displayed to four individuals who lived in the dwelling, there was only one unlawful entry. Thus, the defendant could be convicted of only one count under Penal Law § 140.30(4) (see *People v. Griswold*, 174 AD2d 1038; *People v. Martinez*, 126 AD2d 942).

(See also, *People v. Olson*, 116 AD3d 427, 428 (1st Dept. 2014): "The record establishes that defendant made successive unlawful entries into two places, each constituting a separate and distinct building under the definition contained in Penal Law § 140.00(2), and thus committed two separate crimes.")

The other appellate departments have held likewise. Thus, in *People v. Griswold*, 174 AD2d 1038 (4th Dept. 1991) the Fourth Department held, "Where, as here, there is but one unlawful entry and the indictment charges two counts of burglary in the first degree under the same subdivision of the statute, defendant may be convicted of only one count of burglary.... Although the issue is unpreserved, the People concede that one count of burglary should be dismissed."

In *People v. Brinson*, 216 AD2d 900, 900 (4th Dept. 1995) the court held, "Although two different individuals were injured, defendant may be convicted of only one count of robbery because there was only one forcible taking of property."

In *People v. Davis*, 165 AD2d 610 (4th Dept. 1991) the court held, "No matter how many persons defendant injured while in the dwelling, he was guilty of

only one crime. Thus, the decision in *People v Perrin* (supra) did not violate the directives of CPL 200.30 (2), CPL 380.20, CPL 300.30 (3), and Penal Law § 70.25 (2), that each subdivision or paragraph which provides different ways in which an offense may be committed defines a separate offense which must be set forth in a separate count and that sentence must be imposed on each count of which defendant is convicted."

And in *People v. Rodrigues*, 74 AD3d 1818, 1819 (4th Dept. 2010) the court held, "As the People correctly concede, we further conclude that defendant should have been convicted of only one of the two counts of burglary in the first degree under Penal Law § 140.30(2). 'Regardless of how many persons are injured by the defendant inside the dwelling, the defendant can ... be convicted of [only] one count of burglary [in the first degree under section 140.30(2) where] there has been only one entry' [*People v. Perrin*, 56 AD2d 957, 958]."

The Third Department has held likewise. In *People v. Perrin*, 56 AD2d 957 (3d Dept. 1977) the Third Department held, "(I)it 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."

In *People v. McCray*, 61 AD2d 860, 860 (3d Dept. 1978) the court held, "Having resolved that a burglary conviction was proper, we must nonetheless dismiss one of the two burglary counts because there was only one entry into the mobile home." And in *People v. Barnes*, 64 AD3d 890, 892-93 (3d Dept. 2009) the court held, "Although this issue was not properly preserved, we exercise our interest of justice jurisdiction to modify the judgment to dismiss two of said counts because the only distinguishing feature of each offense as charged in the indictment is the type of weapon or dangerous instrument displayed by defendant while he was inside the victim's apartment.... While three different weapons were displayed by defendant during his encounter with the victim, there was but one break-in committed during the attack. As a result, the multiple charges of burglary in the first degree as set forth in the indictment were clearly multiplicitous.")

Other states have held the same way. In the law as laid by the appellate court in Hawaii, "The 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 appurtenant intents with respect to two or more crimes committed." (*State v. Harper*, 104 Haw. 146, 147 (Sup. Crt. Hawaii 2004)

In *Walker v. State*, 394 NW2d 192, 198 (Minn.Ct.App. 1986) the appellate court in Minnesota held, "There can be only one conviction ... for armed burglary, regardless of how many people the perpetrator assaults once inside the dwelling. (*Green v. State*, 694 So.2d 876, 877 (Fla.Dist.Ct.App. 1997); *Bowman v. United States*, 652 A.2d 64, 70 (D.C. 1994); People v. Griswold, 174 AD2d 1038 (4th Dept. 1991); *People v. Newbern*, 276 Ill.App.3d 623 (Ill.App.Ct. 1995)."

In *People v. Fuentes*, 258 P.3d 320, 325 (Colo. App. 2011) the appellate court in Colorado held, "Other states with statutes similar to Colorado's first degree burglary statute have also concluded that when a person enters only once, but commits multiple assaults, the perpetrator can be convicted of only one burglary charge. See *Gorham v. State*, 968 So.2d 717, 718 (Fla.Dist.Ct.App. 2007); *Commonwealth v. Gordon*, 42 Mass.App.Ct. 601 (1997); *State v. DeWitt*, 324 Mont. 39 (2004); *People v. Griswold*, 174 AD2d 1038 (N.Y.App.Div. 1991); *State v. Marriott*, 189 Ohio App.3d 98 (2010); *State v. Brooks*, 113 Wash.App. 397 (2002)."

And in *State v. Allen*, 125 Ariz. 158, 159 (Ct. App. 1980) the appellate court in Arizona held, "The crime of burglary is complete when entrance to a specific structure is gained with the requisite criminal intent. *State v. Taylor*, 25 Ariz.App. 497 (1976).... Regardless of how many different items he stole or intended to steal he can only be convicted of one count of burglary because there was only one

entry. Cf. *People v. Perrin*, 56 AD2d 957 (1977) (single entry can support conviction of only one count of burglary despite multiple assaults)."

The Fourth Department in *People v. Griswold* (supra) made a distinction between multiple charges of burglary 1° that charged different subsections of that statute. It held that while multiple convictions of burglary 1° under PL § 140.30(2) for causing physical injury must be reversed as mutliplicitous, a charge under a different subdivision of the burglary 1° statute – PL § 140.30(3) for using a dangerous instrument – was not multiplicitous of burglary 1° for causing physical injury. The Second Department has not made this distinction. There is none.

Burglary is a criminal trespass in a building, which includes a dwelling, "with intent to commit a crime therein." (PL § 140.20) If, in effecting entry or while in a dwelling or in immediate flight from the dwelling, the defendant or another participant in the crime is armed with explosives or a "deadly weapon"; or uses or threatens the immediate use of a "dangerous instrument"; or displays what appears to be a firearm; or causes "physical injury" to any person who is not a participant in the crime, the defendant is guilty of burglary 1°. (PL § 140.30) As this Court held in *People v. Barnes*, 64 AD3d 890, 893 (2d Dept. 2009) where there is one break in, multiple charges of burglary 1° are clearly multiplicitous. (See also, *People v. McCray*, supra; *People v. Barnes*, supra) For this reason, judgment on counts 2 and 3 of the indictment should be reversed.

Since the Supreme Court's error in charging the jury on three burglary 1° counts is clear from the record and violated Mr. Ayala's fundamental constitutional right against double jeopardy, appellate counsel rendered ineffective assistance by failing to raise this issue on appeal as an error that was clear from the record. Had appellate counsel done so, judgment on two counts of burglary 1° would have been reversed, reducing a 36-year prison sentence to a 12-year prison sentence. For the foregoing reasons, judgment on two of Mr. Ayala's burglary 1° convictions should be reversed since they violate his state and federal constitutionally guaranteed rights against double jeopardy.

POINT 2

APPELLATE COUNSEL INEFFECTIVELY FAILED TO RAISE THIS REVERSIBLE ERROR OF LAW THAT WAS CLEAR FROM THE RECORD. THE ERROR WAS NOT HARMLESS SINCE IT RESULTED IN A 36-YEAR PRISON SENTENCE THAT SHOULD HAVE BEEN A 12-YEAR SENTENCE.

Trial and appellate counsels' failures to raise the issue of multiplicitousness constituted ineffective assistance on the part of both attorneys. The right to effective assistance of counsel is guaranteed by both the New York and United States constitutions. (*People v. Baldi*, 54 NY2d 137 (1981); *Strickland v. Washington*, 466 U.S. 668 (1984) Ineffective assistance of counsel violates our most protected rights including those of representation, due process, a fair trial, and against self-incrimination. (U.S. Const. 5th, 6th Amends.; NY Const. art. 1, § 6). Since the ineffectiveness of trial counsel in failing to object to the clear double jeopardy violation is clear in the record, the issue could properly be raised on direct appeal. It was not. Appellate counsel's failure to do so constituted ineffectiveness of counsel that is ripe for coram nobis relief. (*People v. Mendoza*, 298 AD2d 532 (2d Dept 2002)

New York retains the standard enunciated in *People v Baldi*, as opposed to the federal standard of *Strickland v. Washington*. (*People v. Stultz*, 2 NY3d 277

(2004) Under *People v. Baldi*, an attorney is ineffective when he fails to render "meaningful representation," a lesser standard than the federal "farce and mockery" test. In New York under *People v. Baldi,* prejudice will generally be presumed as a result of an attorney's poor performance. Under *Strickland v. Washington*, both poor performance and prejudice must be shown.

Under either standard, both Mr. Alaya's trial and appellate attorneys were ineffective. Under the New York standard, there was no strategic or tactical basis for Mr. Ayala's trial attorney to fail to move to dismiss the multiplicitous counts of the indictment. The law on this issue, as discussed, was long established at the time of Mr. Ayala's trial. Had trial counsel moved to dismiss the multiplicitous counts the Supreme Court would have had to dismiss those counts. If it erroneously failed to dismiss the counts, at least the issue would have been properly preserved for direct appeal.

There was no downside for trial counsel to object to the multiplicitous counts. Counsel's failure to do so can only be explained by poor performance. Since trial counsel's constitutionally poor performance is clear in the record, Mr. Ayala's appellate attorney should have argued for reversal of judgment despite the fact that trial counsel did not object to the multiplicitous counts and seek their dismissal. In any event, appellate counsel could have asked the Appellate Division to exercise its interest of justice jurisdiction to reverse judgment on charges that

violated Mr. Ayala's fundamental constitutional rights against double jeopardy under clearly established substantive law at the time of direct appeal.

Under federal standard, a defendant is entitled to assigned counsel who shows reasonable competence, whose shortcomings do not fall to the level of ineffective assistance, and whose efforts do not render a trial a farce or mockery of justice. (*Wiggins v. Smith*, 539 U.S. 510 (2003); *U.S. v. Kirsch*, 54 F.3d 1062 (2d Cir. 1995) Counsel is expected to represent a client zealously within the bounds of the law. (Code of Professional Responsibility, Canon 7)

The test under *Strickland* for determining whether counsel was effective or not is twofold:

1. Do the facts establish that counsel's conduct fell short of constitutionally required assistance; that is, did counsel fail to exercise the skills and diligence that a reasonably competent attorney would provide under similar circumstances?
2. Can it be said that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different?

Any reasonably competent criminal trial attorney would have moved to dismiss the multiplicitous counts of the indictment at trial. Any reasonably competent criminal appeals attorney would have sought to reverse judgment on appeal. There is no conceivable reason for counsels' not to have done so except

ineffectiveness. Had counsels done so, the trial court would have had to dismiss the multiplicitous counts and the appellate court reverse them.

For these reasons, two of the burglary 1° charges should be reversed. Judgment on these counts violated Mr. Ayala's constitutionally protected state and federal rights against double jeopardy. Trial counsel's failure to move to dismiss these counts violated his right to the effective assistance of trial counsel. Appellate counsel's failure to seek reversal of judgment violated his right to the effective assistance of appellate counsel.

Even if this court finds that Mr. Ayala's right to effective assistance of counsel was not abrogated, he respectfully asks this Court to exercise its interest of justice authority to review and reverse this unpreserved but clear double jeopardy error that is of constitutional magnitude. (CPL 470.05[2]; *People v. Cruz*, 96 NY2d 857 (2001); *People v. Quinones*, 8 AD3d 589 (2d Dept. 2004); *People v. Aarons*, supra)

CONCLUSION

Mr. Ayala respectfully asks the Court to reverse the convictions and vacate the sentences on counts two and three of the indictment for burglary 1°, and for such further relief that it deems appropriate.

Respectfully submitted:

MARK DIAMOND
Attorney for Appellant
Box 287356 Yorkville Station
New York, NY 10128
Tel.: (917) 660-8758

APPENDIX G

RESPONSE BRIEF

To be argued by:
DMITRIY POVAZHUK
(15 minutes)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

BENJAMIN AYALA,

Defendant-Appellant.

Appellate Division
Docket Number
2005-00576

Kings County
Indictment Number
8275/2003

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

Defendant, Benjamin Ayala, submits a brief, as per this Court's order dated March 16, 2018, in support of his motion for a writ of error coram nobis. Defendant's motion challenges this Court's order, dated January 23, 2007, affirming a judgment of the Supreme Court, Kings County, rendered January 11, 2005, convicting him, after a jury trial, of three counts of Burglary in the First Degree (two counts of Penal Law § 140.30[2] and one count of Penal Law § 140.30[3]), and sentencing him to three consecutive determinate terms of twelve-years of imprisonment followed by five years of post-release supervision (Collini, J., at trial and sentence).

STATEMENT OF FACTS

Introduction

On November 18, 2003, at approximately 9:40 p.m., defendant and an unapprehended accomplice pushed their way into the apartment of Claudia Santiago and Angel Luis Santiago at 596 Baltic Street in Brooklyn. While defendant grabbed Mrs. Santiago by the neck and demanded money, his accomplice punched the sleeping Mr. Santiago in the face and threw him to the floor. Mr. and Mrs. Santiago's grandsons Erik Marin and Edwin Sandino, who also lived in the building, interrupted the home invasion by pounding on the door.

Defendant and his accomplice fled from the building on foot. Marin and Sandino chased the assailants. Defendant's accomplice got away, but Marin and Sandino caught up to defendant. A scuffle ensued, during which defendant pulled out a box cutter and stabbed Marin in the neck and arm.

A jury found defendant guilty of three counts of first-degree burglary: one count aggravated by his display of the box cutter (Penal Law § 140.30[3]), and two counts aggravated by, respectively, defendant's stabbing of Marin and defendant's accomplice's punching of Angel Santiago (Penal Law § 140.30[2]). The trial court imposed consecutive sentences on each count. On appeal, this Court affirmed the conviction and the sentences.

On May 22, 2017, defendant, pro se, petitioned this Court for a writ of error coram nobis, claiming, in relevant part, that his appellate counsel was ineffective for

failing to argue, on direct appeal, that the counts charging defendant with burglary in the first degree were multiplicitous. On March 16, 2018, this Court, with the People's consent, granted leave to defendant to serve and file a brief on the issue of whether the counts charging him with burglary in the first degree were multiplicitous.

The Trial[1]

The People's Case

On November 18, 2003, ANGEL LUIS SANTIAGO and his wife, CLAUDIA SANTIAGO, lived at 596 Baltic Street in Brooklyn (C. Santiago: 171-72).[2] The Santiagos owned the building and lived on the second floor, with other members of their family living on other floors of the building (A. Santiago: 145, 149; C. Santiago: 173). EDWIN SANDINO and ERIK MARIN, the grandsons of the Santiagos, lived on the second and first floors of the building, respectfully (Marin: 46; Sandino: 124).

At approximately 9:30 p.m., Mrs. Santiago heard a knock on her door, with the person on the other side calling her "Mita" and asking for a cigarette. Mr.

[1] The ensuing recitation of facts is limited to those necessary to the resolution of the claims raised in defendant's current brief. For a full recitation of the facts adduced at trial, respondent respectfully refers this Court to pages 3 through 15 of the People's response brief, dated May 31, 2006, in defendant's direct appeal.

[2] Numbers in parentheses refer to the trial transcript dated December 10, 2004, et. seq. Numbers preceded by "S"" refer to the sentencing proceeding. Names of witnesses precede references to their testimony.

Marin was taken to the hospital and received fourteen stitches to his neck and twelve stitches to his arm (Marin: 72). Mr. Santiago sustained bruising and bleeding to his face (Police Officer VINCENT CAMPOS: 116).

Mrs. Santiago identified defendant in a lineup on November 19, 2003, as the man who attacked her, but was able to identify defendant only from a photo in court because he had changed his appearance since the incident. Marin identified defendant in court (Marin: 58; C. Santiago: 183; Detective TIMOTHY GIBBONS: 276).

The Defense Case

MAGDALENA VENUS PEREZ testified that on the day of the burglary, she picked up defendant "around 5:15, 5:30" and spent the night with him in a hotel on Emmons Avenue. Defendant allegedly paid for the room in cash and threw away the receipt (Perez: 304-06, 315). When Perez was confronted with a telephone bill at the trial that reflected a 23-minute call between her and defendant's telephone that began at 5:24 p.m., she suggested that it was possible that her phone "remained on" after she hung up and met defendant in person (Perez: 322-23). A stipulation was entered into evidence, indicating that the managers of the only two hotels in the area would testify that no one named Benjamin Ayala signed in under that name during the night of November 18, 2003 (328-29). Perez admitted that, since defendant's arrest, she visited him several times, accompanied by defendant's wife (Perez: 312).

She also admitted that she received several calls per month from defendant's cell phone after defendant was incarcerated (Perez: 313-314).

The Charge on Burglary in the First Degree

Prior to the conclusion of testimony, at the charge conference, the court declared that it would submit five counts for the jury's consideration: two counts of first-degree burglary "dealing with physical injury to a non-participant," one count of first-degree burglary "dealing with a dangerous instrument," one count of attempted first-degree robbery, and one count of second-degree assault (295). Defendant did not object to these being the counts submitted to the jury or request that any counts not be submitted (295-96).

In the charge, as to the first count, the court instructed the jury that, to find defendant guilty of first-degree burglary, it must find that the People proved, beyond a reasonable doubt, four elements with the fourth being

> that while gaining entry or while in the dwelling or in the immediate flight from the dwelling the defendant or another participant in the crime caused physical injury to Angel Santiago, a person who wasn't a participant in the crime.

(408). As to the second count, the court instructed the jury identically to the first count, but with the fourth element being

> that while gaining entry or while in the dwelling or in the immediate flight from the - - therefrom the defendant or another participant in the crime used or threatened the immediate use of a dangerous instrument.

that the evidence was legally sufficient to establish defendant's identity as one of the burglars, and that the verdict of guilt was not against the weight of the evidence. Id. This Court also held that the consecutive sentences imposed upon defendant were not illegal, because the evidence "established that the crimes involved separate and distinct acts committed against separate victims." Id. Finally, this Court found that the sentence imposed was not excessive. Id.

By certificate dated April 20, 2007, defendant's application for leave to appeal to the Court of Appeals was denied. People v. Ayala, 8 N.Y.3d 943 (2007) (Graffeo, J.).

Defendant's First Motion to Vacate Judgment and Set Aside Sentence

By pro se motion dated August 3, 2007, defendant sought in the Supreme Court an order vacating the judgment of conviction pursuant to C.P.L. § 440.10 and setting aside the sentence pursuant to C.P.L. § 440.20. Defendant claimed that he received ineffective assistance of trial counsel, because of seven alleged errors by counsel. Defendant also claimed that his consecutive sentences were illegal.

In papers dated October 2, 2007, the People opposed defendant's motion to vacate the judgment and to set aside the sentence. For the sentencing claim, the People argued that it was procedurally barred because the Appellate Division had rejected that claim on direct appeal and because there had been no retroactive change in the law affecting the claim. See C.P.L. § 440.20(2). The People also argued that

the sentencing claim lacked merit because each of the three counts of first-degree burglary was based upon a separate act against a separate victim. See P.L. § 70.25(2).

By memorandum decision and order, dated March 17, 2009, the Supreme Court (Lott, J.) denied without a hearing defendant's motion to vacate the judgment of conviction and to set aside his sentence. The court held that defendant's challenge to his consecutive sentences was procedurally barred because the Appellate Division had already rejected that claim on the merits in defendant's direct appeal. See C.P.L. § 440.20(2).

By order dated July 8, 2009, a justice of this Court denied defendant's application for leave to appeal from the Supreme Court's denial of his motion to vacate the judgment of conviction and to set aside the sentence. People v. Ayala, No. 2009-03516 (2d Dep't July 8, 2009) (Belen, J.).

In pro se papers dated March 20, 2013, defendant moved in the Supreme Court pursuant to C.P.L.R. 2221(e)(2) to renew his motion to vacate the judgment of conviction, but not his motion to set aside the sentence.

By memorandum decision and order, dated September 16, 2013, the Supreme Court (Ozzi, J.) denied without a hearing defendant's motion to renew his prior motion to vacate judgment.

Defendant's Second Motion to Vacate Judgment

By pro se motion dated December 21, 2015, defendant sought in the Supreme Court for the second time an order vacating the judgment of conviction pursuant to C.P.L. § 440.10. Defendant again claimed that he received ineffective assistance of trial counsel. Among the ten alleged errors by counsel was the allegation that counsel failed to argue that defendant should have been convicted of only one of the two counts of Burglary in the First Degree under P.L. § 140.30(2).

In papers dated March 10, 2016, the People opposed defendant's second motion to vacate the judgment. The People argued that defendant's ineffective assistance of counsel claim was mandatorily barred from collateral review, because all but one of defendant's complaints against his attorney were based on matters appearing on the record and could have been, but were not, raised on his direct appeal. See C.P.L. § 440.10(2)(c).

By memorandum decision and order, dated April 20, 2016, the Supreme Court (Gerstein, J.) denied without a hearing defendant's second motion to vacate the judgment of conviction. The court held that defendant's claim of ineffective assistance of counsel, to the extent it was based upon matters of record, was procedurally barred because defendant had failed to raise the claim on appeal (4/20/16 Decision at 9-10). See C.P.L. § 440.10(2)(c). To the extent defendant's claim was based partly on matters appearing off the record, the court held that the

claim was procedurally barred pursuant to C.P.L. § 440.10(3)(b) and (c) (4/20/16 Decision at 10-12). The court held, in the alternative, that defendant's ineffective assistance of counsel claim was meritless (4/20/16 Decision at 12-18).

By order dated September 23, 2016, a justice of this Court denied defendant's application for leave to appeal from the Supreme Court's denial of his second motion to vacate the judgment of conviction. People v. Ayala, No. 2016-05333, 2016 N.Y. App. Div. LEXIS 8843, 2016 NY Slip Op 86567(U) (2d Dep't Sept. 23, 2016) (Hall, J.).

By order dated December 19, 2016, a judge of the Court of Appeals dismissed defendant's application for leave to appeal from this Court's order denying leave to appeal from the Supreme Court's denial of his motion to vacate judgment. People v. Ayala, 28 N.Y.3d 1122 (2016) (Rivera, J.). By order dated February 16, 2017, defendant's motion for reconsideration of his leave application to the Court of Appeals was denied. People v. Ayala, 28 N.Y.3d 1181 (2017) (Rivera, J.).

Defendant's Second Motion for a Writ of Error Coram Nobis

By pro se motion dated May 22, 2017, defendant, a second time, applied to this Court for a writ of error coram nobis. Defendant claimed that his appellate counsel rendered ineffective assistance by failing to raise the following claims on direct appeal:

POINT I

THE COUNTS CHARGING DEFENDANT WITH FIRST-DEGREE BURGLARY WERE NOT MULTIPLICITOUS.[3]

With permission from this Court, defendant has briefed the issue that the three counts charging him with first-degree burglary were multiplicitous. The counts were not multiplicitous because each of the counts involved different conduct, and the two counts with the common element of causing physical injury to a non-participant in the burglary were committed by different principal actors against different victims at different points in the criminal transaction. As such, each of the offenses was properly charged and submitted to the jury as a separate count.

An indictment is multiplicitous when two separate counts charge the same offense. People v. Alonzo, 16 N.Y.3d 267, 269 (2011); People v. Jackson, 264 A.D.2d 857 (2d Dep't 1999); People v. Kindlon, 217 A.D.2d 793, 794-95 (2d Dep't 1995). Consequently, a court's submission of multiplicitous counts to the jury would permit the jury to find the defendant guilty more than once for a single offense. Alonzo, 16 N.Y.3d at 269.

[3] Defendant also claims that his sentence should be modified to have the terms of imprisonment on each count run concurrently to one another. In addition to being outside the bounds of this Court's order directing defendant to solely address the issue of multiplicity (see People v. Ayala, 2018 NY Slip Op 67074[U]), this claim has already been addressed by this Court in its decision on defendant's first direct appeal and need not be revisited. People v. Ayala, 36 A.D.3d 827 (2d Dep't 2007).

Conversely, duplicitous counts, or counts which charge more than one offense, are likewise prohibited. See C.P.L. § 200.30(1) ("[e]ach count of an indictment may charge one offense only"); Alonzo, 16 N.Y.3d at 269. The prohibition against duplicity, in addition to providing notice to a defendant, is meant to assure the reliability of a unanimous verdict. People v. Ribowsky, 77 N.Y.2d 284, 289 (1991). "Prosecutors and grand juries must steer between the evils" of duplicity and multiplicity. Alonzo, 16 N.Y.3d at 269. And, "the ultimate question is which result is more consistent with the Legislature's intention." Id. at 270.

"There is no infallible formula for deciding how many crimes are committed in a particular sequence of events." Id. at 269; compare People v. Saperstein, 2 N.Y.2d 210, 219 (1957) (defendant guilty of five counts of contempt when he refused, while testifying before the Grand Jury, of revealing the participants in five telephone conversations), with People v. Chestnut, 26 N.Y.2d 481, 491-92 (1970) (defendants guilty of only one count of contempt despite refusing to answer multiple questions from the District Attorney); People v. Riela, 7 N.Y.2d 571, 578 (1960) (defendant guilty of only a single contempt despite refusing to answer seventeen questions while invoking an erroneous claim of privilege). But,"[a]s a general rule . . . where a defendant, in an uninterrupted course of conduct directed at a single victim, violates a single provision of the Penal Law, he commits but a single crime." Alonzo, 16 N.Y.3d at 269.

People v. Davis, 165 A.D.2d 610, 611 (4th Dep't 1991) (finding convictions under Penal Law §§ 140.30[2] and [4] not multiplicitous).

Neither were the two counts of Penal Law § 140.30(2) multiplicitious. Each of the counts, although relating to the same unlawful entry, involved two factors that individually made the conduct on one count a separate act from the other: the identity of the victim and the place and time where the act occurred. The count of first-degree burglary relating to physical injury caused to Mr. Santiago stemmed from conduct committed by defendant's accomplice while in the dwelling, whereas the count of first-degree burglary relating to the injury caused to Marin stemmed from conduct committed by defendant in immediate flight from the burglary. Therefore, each count involved a different step in the criminal transaction and a different victim. See Kindlon, 217 A.D.2d at 795 ("[h]ere, there is no multiplicity, for the counts which allege a violation of the same provision of the Penal Law refer to different victims"); see also People v. Saunders, 290 A.D.2d 461, 463 (2d Dep't 2002) (indictment charging defendant with two counts of Penal Law § 125.27(1)(a)(viii) not multiplicitous where each count alleged the intentional killing of a different victim); People v. Poulos, 144 A.D.3d 1389, 1389 (4th Dep't 2016) (two counts of aggravated harassment of an employee by an inmate not multiplicitous where defendant kicked toilet water onto two officers). And, as charged to the jury, a conviction under one count would not have been inconsistent with an acquittal under

the other. Henry, 119 A.D.3d at 609 ("[s]eparate counts are not multiplicitous where a conviction on one count would not be inconsistent with acquittal on the other") (internal quotations omitted).

People v. Aarons, 296 A.D.2d 508, 509 (2d Dep't 2002), is not to the contrary. In Aarons, this Court held that multiple counts of Penal Law § 140.30(4) pertaining to the display of a weapon to multiple victims were multiplicitous because "there was only one unlawful entry." Id. at 509. Left unsaid, however, was that there was only one weapon displayed. Although the weapon was displayed to four different victims, the identity and the number of victims is not an element of subdivision (4) of Penal Law § 140.30 as it is under subdivision (2). Therefore, even when there is one unlawful entry, each time a defendant or accomplice causes physical injury to a new victim, a new count of burglary under subsection (2) is complete. This Court should decline to follow the Appellate Division, Fourth Department, in treating subdivision (2) physical injury the same as subdivision (4) display of a weapon the same when resolving the issue of multiplicity. See, e.g., People v. Rodrigues, 74 A.D.3d 1818 (4th Dep't 2010), People v. Martinez, 126 A.D.2d 942 (4th Dep't 1987). Indeed, the Fourth Department has stated that Rodrigues was based on an incorrect concession by the People on the multiplicity issue and should no longer be followed. See People v. Ali, 89 A.D.3d 1417, 1418-19 (4th Dep't 2011).

offense that the actor intended to commit." Commentary to Model Penal Code § 221.1.

Although the New York burglary statute is largely structured after that of the Model Code, New York did not adopt the suggestion of the commentary to aggregate the charge of burglary with a separate charge for the crime inside. Instead of relying on aggregation, the New York legislature enacted a statute which, in addition to keeping the two initial levels of burglary proposed by the Model Code, created a third, more serious, level of burglary which governs burglaries of a dwelling where the perpetrator or an accomplice commits an additional aggravating act. This strongly suggests that the legislature was uniquely concerned with perpetrators who invade people's homes, and, among other things, cause injury to inhabitants in the process. Unmistakably, the legislature intended for the burglary statute to be the juridical means by which to punish the conduct committed by burglars in the course of their burglaries; otherwise, the legislature would have simply adopted the Model Code's hierarchy and, thereby, the commentary's suggestion that the aggravating offenses be accounted for by being run consecutive to the unlawful entry. Therefore, for perpetrators such as defendant, who cause injuries to multiple victims, to face only one conviction under the burglary statute would be inconsistent with the legislature's intention. See Alonzo, 16 N.Y.3d at 270.

In sum, the counts of burglary arising from the same Penal Law subsection were not multiplicitous because they involved physical injury caused to different victims, at different stages of the criminal transaction, perpetrated by different principal actors. Each of the counts, even arising under different subsections, required proof of facts that the other did not, namely, that physical injury was caused to different victims or that a dangerous instrument be used or threatened regardless of the identity of the potential victim. As such, the counts submitted to the jury were not multiplicitous.

If defendant's multiplicity claim were to have merit so that any count be dismissed and its sentence vacated, the case should be remitted to the trial court for the opportunity to restructure the sentences on the remaining count (see People's Memorandum of Law dated September 29, 2017, at 6-7). See People v. Rodriguez, 25 N.Y.3d 238, 241-42 (2015).

v. Lucey, 469 U.S. 387, 396-97 [1985]); Abdurrahman v. Henderson, 897 F.2d 71, 74 (2d Cir. 1990); Gulliver v. Dalsheim, 739 F.2d 104, 107 (2d Cir. 1984). Under the first prong of the Strickland standard, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689; see Jones v. Barnes, 463 U.S. 745, 754 (1983) (appellate courts should not second-guess the reasonable professional judgments of counsel).

Under the second prong of the Strickland standard, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; see Smith, 528 U.S. at 285-86; Abdurrahman, 897 F.2d at 74; Gulliver, 739 F.2d at 107. Thus, a defendant must show both that appellate counsel's omission of a particular claim was objectively unreasonable, and "that there was a reasonable probability that [the omitted] claim would have been successful before the state's highest court." Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994) (citation and internal quotation marks omitted); see Smith, 528 U.S. at 285, 288-89; Barnes, 463 U.S. at 750-53.

As is argued thoroughly in the People's responses to defendant's first and second petitions for a writ of error coram nobis, defendant received effective

assistance of appellate counsel in her overall performance. With respect to counsel's alleged failure to raise a multiplicity claim, this error was not so egregious or prejudicial as to deprive defendant of his constitutional right to appellate counsel. Appellate counsel may have readily determined that, as a strategic matter, focusing the direct appeal on the sufficiency and weight of the evidence would have served defendant better by obtaining a complete dismissal of all charges, rather than dismissal of one or two charges.[8] Additionally, the multiplicity claim would have required the Court to exercise its interest of justice jurisdiction. Counsel could have reasonably determined that the Court would not exercise that jurisdiction for defendant, who claims that his legal exposure under the burglary statute should be the same regardless of the number of victims he injured.

Therefore, counsel was not ineffective for omitting the claim of multiplicity. However, were this Court to find otherwise, defendant's remedy should solely be the dismissal of the multiplicitous counts. See, e.g., Aarons, 296 A.D.2d at 509. The case should then be remitted to the lower court for restructuring of the sentences on the remaining counts (see People's Memorandum of Law dated September 29, 2017, at 6-7). See Rodriguez, 25 N.Y.3d at 241-42.

[8] In connection with the People's opposition to defendant's first application for a writ of error coram nobis, the attorney who edited defendant's main brief filed an affirmation stating that he had no independent recollection of defendant's case (see People's Memorandum of Law dated September 29, 2017, at 16-17).

APPENDIX H

DECISION

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D59304
M/afa

_____AD3d_____

CHERYL E. CHAMBERS, J.P.
LEONARD B. AUSTIN
JEFFREY A. COHEN
COLLEEN D. DUFFY, JJ.

2005-00576

DECISION & ORDER

The People, etc., respondent,
v Benjamin Ayala, appellant.

(Ind. No. 8275/03)

Mark Diamond, New York, NY, for appellant, and appellant pro se.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove, Thomas M. Ross, Dmitriy Povazhuk, and Jill Oziemblewski of counsel), for respondent.

Paul Skip Laisure, New York, NY, former appellate counsel.

Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated January 23, 2007 (*People v Ayala*, 36 AD3d 827), affirming a judgment of the Supreme Court, Kings County, rendered January 11, 2005.

ORDERED that the application is denied.

The appellant was convicted of three counts of burglary in the first degree. Contrary to the appellant's contention, the counts charging him with burglary in the first degree were not multiplicitous (*see People v Alonzo*, 16 NY3d 267, 269; *People v Campbell*, 120 AD3d 827). The first and third counts of the indictment were not multiplicitous because they involved separate subsections of the relevant burglary statute (Penal Law § 140.30[2], [3]) and, furthermore, 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 constitute separate offenses (*see* CPL 200.30[2]; *People v Griswold*, 174 AD2d 1038; *People v Davis*, 165 AD2d 610).

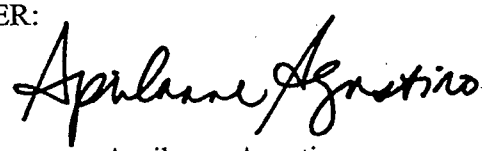
The first and second counts of the indictment both charged the appellant under Penal Law § 140.30(2) and resulted in convictions of the same subsection of the burglary statute. Nevertheless, the counts were not multiplicitous, since they involved physical injury to different victims with different methods of injury, occurring at different times and places during the criminal transaction (*see People v Ramirez*, 89 NY2d 444; *cf. People v Rodrigues*, 74 AD3d 1818; *People v Aarons*, 296 AD2d 508). Multiplicity does not exist when each count requires proof of an additional fact that the other does not (*see People v Henry*, 119 AD3d 607; *People v Olson*, 116 AD3d 427), and a conviction of one count would not have been inconsistent with acquittal on the other (*see People v Henry*, 119 AD3d 607).

As the claim of multiplicity has no merit, trial counsel was not ineffective for failing to raise it (*see People v McLoyd*, 34 AD3d 498), and the appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745; *People v Stultz*, 2 NY3d 277).

The appellant's remaining contentions are without merit.

CHAMBERS, J.P., AUSTIN, COHEN and DUFFY, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

APPENDIX I

APPLICATION TO THE NEW YORK STATE COURT OF APPEALS

MARK DIAMOND
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June 3, 2019

Hon. Leslie E. Stein
Court of Appeals Hall
20 Eagle Street
Albany, NY 12207-1095

Re: People v. Benjamin Ayala

Dear Judge Stein:

Please accept this letter in support of the defendant's application for a certificate of leave to appeal to the Court of Appeals, pursuant to CPL § 450.90. The decision and order appealed from was entered by the Appellate Division, Second Department, on May 15, 2019. It denied Mr. Ayala's petition for a writ of error coram nobis to vacate the Order of the Appellate Division dated January 23, 2007, which affirmed judgment of the Supreme Court, Kings County, dated December 11, 2007.

There were no co-defendants in the underlying action. No application has been made to the Appellate Division for similar relief. I represent the applicant as assigned counsel, pursuant to County Law 722. Oral argument is not requested at this time. The applicant's coram nobis petition, the respondent's opposition, and the record on appeal were submitted to the Court of Appeals on May 21, 2019.

BACKGROUND OF CASE

Following a jury trial, Mr. Ayala was convicted of three counts of burglary 1°. On January 15, 2005, he received an effective sentence of thirty-six years in prison and fifteen years of post-release supervision. In a timely direct appeal, Mr. Ayala claimed there was insufficient evidence to convict him and his sentence was excessive. In a supplemental pro se brief he argued that he should have received concurrent instead of consecutive sentences. The Appellate Division affirmed. (*People v. Ayala*, 36 AD3d 827 (2d Dept. 2007) Leave to appeal was denied. (*People v. Ayala*, 8 NY3d 943 (2007)

On May 22, 2017, Mr. Ayala filed a 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. He also argued that his appellate attorney 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 1°, and failed to argue that the sentence was illegal because the trial court did not comply with CPL § 400.21 concerning predicate felony sentencing. In a Decision and Order dated March 16, 2018, the Appellate Division granted leave to serve and file a brief on the issue of whether the counts charging him with burglary in the first degree were multiplicitous.

On May 15, 2019, the Appellate Division denied coram nobis relief. It held that the three counts of burglary 1° were not multiplicitous because they involved different subsections of the burglary statute and different victims. It held that his remaining contentions "are without merit."

SUMMARY OF ALLEGATIONS

It was alleged that Mr. Ayala 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 grandson's was stabbed

ERRORS IN LAW AS BASES FOR FURTHER APPEAL

POINT 1: MR. AYALA'S RIGHT AGAINST DOUBLE JEOPARDY WAS VIOLATED BY HIS CONVICTION OF THREE MULTIPLICITOUS COUNTS OF BURGLARY 1°.

Mr. Ayala received ineffective assistance from both his trial and appellate attorneys. Under well-established law, including at the time of his direct appeal, multiple counts of burglary 1° that allege unlawful entry into a single dwelling at a single time are multiplicitous as a matter of law. (*People v. Aaron*, 296 AD2d 508 (2d Dept. 2002); see also, *People v. Olson*, 116 AD3d 427 760 (1st Dept. 2014); *People v. Perrin*, 56 AD2d 957 (3d Dept. 1977); *People v. Griswold*, 174 AD2d 1038 (4th Dept. 1991) Charging a defendant with multiple counts of burglary 1° based upon a single entry into a dwelling violates the accused's right against double jeopardy because they

140.30(4) (see *People v. Griswold*, 174 AD2d 1038; *People v. Martinez*, 126 AD2d 942).

The other appellate departments have held likewise. Thus, in *People v. Griswold*, 174 AD2d 1038 (4th Dept. 1991) the Fourth Department held, "Where, as here, there is but one unlawful entry and the indictment charges two counts of burglary in the first degree under the same subdivision of the statute, defendant may be convicted of only one count of burglary.... Although the issue is unpreserved, the People concede that one count of burglary should be dismissed."

In *People v. Perrin*, 56 AD2d 957 (3d Dept. 1977) the Third Department held, "(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."

Other states have held the same way. In the law as laid by the Hawaii appellate court, "The 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 appurtenant intents with respect to two or more crimes committed." (*State v. Harper*, 104 Haw. 146, 147 (Sup. Crt. Hawaii 2004)

In *Walker v. State*, 394 NW2d 192, 198 (Minn.Ct.App. 1986) the appellate court in Minnesota held, "There can be only one conviction ... for armed burglary, regardless of how many people the perpetrator assaults once inside the dwelling. (*Green v. State*, 694 So.2d 876, 877 (Fla.Dist.Ct.App. 1997); *Bowman v. United States*, 652 A.2d 64, 70 (D.C. 1994); People v. Griswold, 174 AD2d 1038 (4th Dept. 1991); *People v. Newbern*, 276 Ill.App.3d 623 (Ill.App.Ct. 1995)."

In *People v. Fuentes*, 258 P.3d 320, 325 (Colo. App. 2011) the appellate court in Colorado held, "Other states with statutes similar to Colorado's first degree burglary statute have also concluded that when a person enters only once, but commits multiple assaults, the perpetrator can be convicted of only one burglary charge. See *Gorham v. State*, 968 So.2d 717, 718 (Fla.Dist.Ct.App. 2007); *Commonwealth v. Gordon*, 42 Mass.App.Ct. 601 (1997); *State v. DeWitt*, 324 Mont. 39 (2004); *People*

v. Griswold, 174 AD2d 1038 (N.Y.App.Div. 1991); *State v. Marriott*, 189 Ohio App.3d 98 (2010); *State v. Brooks*, 113 Wash.App. 397 (2002)."

And in *State v. Allen*, 125 Ariz. 158, 159 (Ct. App. 1980) the appellate court in Arizona held, "The crime of burglary is complete when entrance to a specific structure is gained with the requisite criminal intent. *State v. Taylor*, 25 Ariz.App. 497 (1976).... Regardless of how many different items he stole or intended to steal he can only be convicted of one count of burglary because there was only one entry. Cf. *People v. Perrin*, 56 AD2d 957 (1977) (single entry can support conviction of only one count of burglary despite multiple assaults)."

The Fourth Department in *People v. Griswold* (supra) made a distinction between multiple charges of burglary 1° that charged different subsections of that statute. It held that while multiple convictions of burglary 1° under PL § 140.30(2) for causing physical injury must be reversed as mutliplicitous, a charge under a different subdivision of the burglary 1° statute – PL § 140.30(3) for using a dangerous instrument – was not multiplicitous of burglary 1° for causing physical injury. The Second Department has not made this distinction. There is none.

Burglary is a criminal trespass in a building, which includes a dwelling, "with intent to commit a crime therein." (PL § 140.20) If, in effecting entry or while in a dwelling or in immediate flight from the dwelling, the defendant or another participant in the crime is armed with explosives or a "deadly weapon"; or uses or threatens the immediate use of a "dangerous instrument"; or displays what appears to be a firearm; or causes "physical injury" to any person who is not a participant in the crime, the defendant is guilty of burglary 1°. (PL § 140.30) As the Second Department held in *People v. Barnes*, 64 AD3d 890, 893 (2d Dept. 2009) where there is one break in, multiple charges of burglary 1° are clearly multiplicitous. For this reason, judgment on counts 2 and 3 of the indictment should be reversed.

Since the Supreme Court's error in charging the jury on three burglary 1° counts is clear from the record and violated Mr. Ayala's fundamental constitutional right against double jeopardy, appellate counsel rendered ineffective assistance by failing to raise this issue on appeal as an error that was clear from the record. Had appellate counsel done so, judgment on two counts of burglary 1° would have been reversed, reducing a 36-year prison sentence to a 12-year prison sentence. For the foregoing reasons, judgment on two of Mr. Ayala's burglary 1° convictions should have been reversed on double jeopardy grounds.

POINT 2: APPELLATE COUNSEL INEFFECTIVELY FAILED TO

APPENDIX J

PRO SE

SUPPLEMENTAL APPLICATION

MR. BENJAMIN AYALA
DIN 05-A-0302
Green Haven Corr. Fac.
P. O. Box 4000
Stormville, NY 12582

June 4, 2019

Hon. Janet DiFiore
Chief Justice of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, NY 12207-1095

RE: Pro Se Supplemental Application
For Leave to Appeal
People v. Benjamin Ayala
Kings County Indictment No.: 8275/03

TO THE HONORABLE JANET DIFIORE, CHIEF JUDGE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK:

I am a pro se defendant-appellant in the above referenced action and as such am fully familiar with the facts and circumstances of this matter as set forth herein. I make this letter, pursuant to New York Court Rules Section 500.20(a), respectfully requesting issuance of a certificate pursuant to CPL §460.20 granting permission to appeal and certifying that there is a question of law in the above referenced cause which ought to be reviewed by the Court of Appeals, and allowing an appeal to the said court from the order of Appellate Division, Second Judicial Department, entered on the 15th day of May, 2019, denying application by the appellant for a writ of error coram nobis to vacate from a decision and Order of Appellate Division, Second Judicial Department, entered on the 23rd day of January, 2007 (**People**

v. Ayala, 36 A.D.3d 827 [2nd Dept. 2007]), affirming a judgment of the Supreme Court, Kings County, rendered on the 11th day of January, 2005.

Al application for leave to appeal has not been made to a Justice of the Appellate Division, Second Judicial Department.

Oral argument is not requested. There were no co-defendants in this matter.

The issues to be raised on appeal to the Court of Appeal is: (a) Whether the defendant appellant may be convicted of only one count of burglary when there is but one unlawful entry and the indictment charges three counts of burglary in the first degree; and (b) if yes, whether the defendant appellant's right to effective counsel was violated when appellate counsel failed to raise on direct appeal the issue of trial counsel's performance with respect to the multiplicitous counts charging defendant appellant with burglary in the first degree.

The grounds upon which leave is sought:

Defendant appellant received ineffective assistance from his trial and appellate counsels, under well established law in existence at the time of defendant-appellant's conviction or present law applied under recognized principles of retroactivity, multiple counts of burglary in the first degree that allege unlawful entry into a single dwelling at a single time are multiplicitous as a matter of law (See **People v. Aaron, 296 AD2d 508 [2d Dept. 2002]; People v. Davis, 165**

AD2d 610 [4th Dept. 1991]; People v. Perrin, 56 AD2d 957 [3rd Dept. 1977]). Charging a defendant with multiple counts of burglary in the first degree based upon a single entry into a dwelling violates his or her right against double jeopardy because it convicts a defendant multiple times for the same crime (U.S. Const. Amends. V, XIV; N.Y. Const. Art. I, §6).

All three of defendant-appellant's burglary in the first degree arose out of entry of a single dwelling. Despite the clear violation of defendant-appellant's right against double jeopardy trial counsel failed to seek dismissal of two of the three multiplicitous counts of burglary in the first degree. What compounds that error, appellate counsel failed to seek reversed of two of the three burglary counts in the interest of justice and because failure to preserve the issue for appeal was caused by trial counsel's ineffectiveness, which was clear from the record.

The error was not harmless because the trial court imposed three consecutive sentences of 12 years imprisonment on each count of burglary in the first degree. As a result, what should have been a 12 years determinate sentence wrongly became a 36 years determinate sentence. For these reasons, defendant-appellant's petition for a writ of error coram nobis should be granted.

Defendant appellant was charged and convicted on three counts of burglary in the first degree. The relevant portion of **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 §140.30(2)** alleges that the defendant-appellant 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 §140.30(2)** alleges that the defendant appellant 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 the defendant-appellant 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 counts of burglary in the first degree were based upon a single entry (See also **Respondent's Brief, p. 2**).

"An indictment is multiplicitous when two or more counts charge the same crime" (See **People v. Aaron, 296 AD2d 508, 508 [2d Dept. 2002]**). These include counts in which the defendant's conduct involves the same mental state, the same act, and the same course of conduct (See **People v. Senisi, 196 AD2d 376, 382 [2d Dept. 1994]**), See also **Brown v. Ohio, 432 U.S. 161 (1977)**. Charges that are multiplicitous deprives a defendant of his State and Federal right against double jeopardy, because such charges convicts the defendant twice for the same crime (U.S. Const., Amends. V, XIV; N.Y. Const. Art. I, §6).

On May 22, 2019, the defendant-appellant field a petition for a **Writ of Error Coram Nobis**, and he argued, among others, that his right to effective counsel was violated when appellate counsel failed to raise on direct appeal the issue of trial counsel's performance with respect to the multiplicitous counts charging defendant-appellant with burglary in the first degree.

In its affirmation in response to the petition the respondent acknowledge that the defendant appellant's multiplicitousness argument has merit because all three burglary in the first degree counts arose out of single entry into the dwelling. The respondent noted that even though the Appellate Division rejected the claim that the defendant-appellant made in his pro se supplemental brief on 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 respondent concluded that the burglary sentences should run concurrently and not

consecutively because they arose form a single entry into a single residence at a single time. The respondent asked that the case be returned to the trial court for resentencing if relief o the coram nobis petition is granted.

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

> "[T]he counts charging [appellant] with burglary 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 Appellate Division, Second Judicial Department's decision and order exacerbated a growing divergence of opinion in the Third and Fourth Departments regarding multiplicitous counts rebutting in convictions of the same subsection under **Penal Law §140.30(2)**. Compare the defendant-appellant's case, **People v. Ayala, __ AD3d __ (2d Dept. 2019)** with **People v. Perrin, 56 AD2d 957 (3d Dept. 1977)** ("[I]t is clear that the defendant could only be convicted of one count of burglary...Regardless of how may 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 minimum of 5 years."); **People v. McCray, 61 AD2d 860 (3d Dept. 1978)** (same); **People v. Davis, 165 AD2d 610 (4th Dept. 1991)** (same); **People v. Griswold, 174 AD2d 1038 (4th Dept. 1991)** (same); **People v. Rodriguez, 74 AD3d 1818 (4th Dept. 2010)** (same). Other statutes have held the same way, in the law as by the appellate court in Hawaii, "[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. Hawaii 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. 1997)** (same); **Bowman v. United States, 652 A2d 64, 70 (D.C. 1994)** (same); **People v. Newbern, 276 Ill. App. 623 (Ill. App. Ct. 1995)** (same); **People v. Fuentes, 258 P3d 320, 325 (Colo. App. 2011)** (same); **Commonwealth v. Gordon, 42 Mass. App. Ct. 601 (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 defendant-appellant'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 counts of burglary in the first degree against the defendant-appellant were multiplicitous because they all occurred during a single entry. As a matter of law, there was only one burglary, not three. While he could have been tried on 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.

Since the trial court's error in charging the jury on three burglary in the first degree counts is clear from the record and violated the defendant appellant's fundamental constitutional right against double jeopardy, appellate counsel rendered ineffective assistance by failing to raise this issue on appeal as an error that was clear from the record. Had appellate counsel done so, Judgment on two counts of burglary in the first degree would have been reversed, reducing a 36 year prison sentence to a 12 year prison sentence. For the foregoing reasons, judgment on two of defendant-appellant's burglary in the first degree convictions should be reversed since they violate his State and Federal constitutionally guaranteed rights against double jeopardy.

I have enclosed for your review petition for a common-law writ of error coram nobis, affirmation of appellate counsel in

response to coram nobis petition, affirmation in response to motion for writ of error coram nobis, reply to affirmation in response to a petition for a writ of error coram nobis decision and order on motion, appellant's brief, respondent's brief, and decision and order.

Respectfully submitted,

Benjamin Ayala

Sworn to before me this
4 day of June 2019

NOTARY PUBLIC

KEITH J. SPOSATO
NOTARY PUBLIC-STATE OF NEW YORK
No. 01SP6248188
Qualified In Putnam County
Commission Expires September 19, 2019

APPENDIX K

COURT OF APPEAL DECISION

State of New York
Court of Appeals

BEFORE: LESLIE E. STEIN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

BENJAMIN AYALA,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: September 24, 2019
at Albany, New York

Associate Judge

*Description of Order: Order of the Appellate Division, Second Department, dated May 15, 2019, denying defendant's application for a writ of error coram nobis.