23-6657

ORIGINAL

In The

Supreme Court of the United States

Erick Cruz,

Petitioner, Pro se.

-against-

The People of the State of New York,

Respondents.

On Petition for a Writ of Certiorari

to

The New York State Court of Appeals

Petition for a Writ of Certiorari

Submitted by

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QUESTIONS PRESENTED

Q1: During opening statements, the trial court, over defense counsel's objections, allowed the prosecution to use a Powerpoint presentation. This Powerpoint presentation contained slides of hundreds of pages of transcribed telephone conversations (which were never properly authenticated), and annotated pictures which, amongst other things, contained telephone numbers of cell phones that were assigned to this writer, but the cell phone was never entered into evidence. The Powerpoint presentation also contained mug-shot like photographs which, by pictorial placement, established the Petitioner as the leader of the conspiratorial scheme that was the subject of this indictment, a fact that was never established by legally sufficient evidence during the course of the trial.

1a: Did this violate the Petitioner's right to a fair trial, and/or the presumption of evidence?

1b: Did this impermissible shift the burden of proof from the State to the Defense?

1c: Is there any constitutional significance between using a PowerPoint presentation during opening statements, as opposed in using the same during closing arguments?

Q2: Did the trial court violate the petitioner's constitutional rights when, over defense counsel's objections, it delivered a coercive *Allen* charge for the deadlocked jury urging jurors to resume deliberation, and warning them that the trial would have to be repeated without instructing that any verdict reached must be the verdict of each individual juror and not mere acquiescence in the conclusion of others?

Q3: Can a conviction for criminal possession of a controlled substance in the first and third degrees be considered constitutionally valid if there was no legally sufficient evidence submitted at trial to corroborative possession and/or sale of the specified quantity of the controlled substance charged in the indictment?

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are The People of the State of New York, and Erick Cruz, defendant, pro se.

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The opinion of the New York State Court of Appeals denying reconsideration is reported at **People v. Erick Cruz**, 40 NY3d 1012, and is dated 10/31/23. The opinion of the New York State Court of Appeals denying leave to appeal is reported at **People v. Cruz**, 40 NY3d 927, and is dated 06/16/23. The opinion denying this writer's direct appeal is reported at **People v. Cruz**, 213 AD3d 465, and is dated 02/09/23.

JURISDICTION

Because the order denying leave to appeal to the New York State Court of Appeals (**People v. Cruz**, 40 NY3d 927) was entered on June 16, 2023, and the application for reconsideration was denied on October 31, 2023 (**People v. Erick Cruz**, 40 NY3d 1012), this Court's jurisdiction rests on 28 U.S.C. § 1257(a), making January 28th, 2024 the date upon which review to this Court expires.

CONSTITUTIONAL PROVISIONS INVOLVED

14th Amendment (Due Process/Equal Protection)

> **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws**

6th Amendment (Fair Trial/Presumption of Innocence)

> **In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . [and] to be confronted with the witnesses against him . . .**

STATEMENT OF THE CASE

Overview of Trial and Appellate Proceedings

During opening statements, the State, over defense counsel's objections, was allowed to use a PowerPoint presentation that included (a) prejudicial photographs resembling mug-shots, (b) a chart depicting this writer as a leader of a drug organization, (c) mug-shot like photos that contained annotations assigning a cell phone to this writer which was meant to establish that this writer's voice was found on drug-related telephone calls during the course of the State's investigation, and (c) slides containing hundreds of pages of transcribed cell phone conversations (which were never properly authenticated at trial) but nevertheless contained this writer's name as a participant in the conversations (see Appendix **J** and Appendix **K)**.

During trial, however, the phone described in the annotated mug-shot like photograph (see Appendix **J**, page 9), was never introduced into evidence (see T.T. _____). The recorded phone calls which were said to include my voice were never properly authenticated by someone who was actually familiar with my voice (see Argument 3, infra), and more importantly, there was no evidence ever presented, besides the opinions of the investigating officers (who themselves had severe credibility issues), which indicated that I was involved in the distribution and sale of cocaine and/or heroin.

On direct appeal, my appellate attorney argued, amongst other things, that because of the scarcity of evidence actually produced at trial connecting me to the alleged conspiratorial network, the use of the Powerpoint presentation improperly shifted the burden of proof. He also argued that the Powerpoint presentation was otherwise prejudicial to the extent that it deprived me of a fair trial and other constitutional protections (see Appendix **E**, pages 25-29; also see Appendix **G**, pages 10-11). And, citing **Lowenfield v. Phelpes**, 484 US 231, 241 (1988), he also raised that the truncated ***Allen*** Charge delivered by the trial court was coercive (Appendix **E**, pages 20-24).

The appellate court rejected my appellate counsel's argument that the Powerpoint argument was improper (see **People v. Cruz**, 213 AD3d 465, 466 [1st Dept. 2023]; also see Appendix **C**, page 2). It did this by citing to its holding on the same issue in my codefendant's direct appeal, where it held that:

> The [trial] court providently exercised its discretion in permitting the people to use the Powerpoint presentation during their opening statement. The content of the Powerpoint was within the bounds of what is proper for an opening statement, giving an overview of the evidence to be presented without including any commentary or otherwise prejudicial material . . .
>
> A Powerpoint presentation may be used as a visual aid in connection with closing arguments, provided that what is displayed would likewise be proper to present in the form of an oral statement . . .
>
> The fact that the Powerpoint was used in connection with the people's opening statement, when facts were not yet in evidence, rather than their summation, when all the evidence would have already been admitted, does not warrant a different result, especially where the court advised the jurors that anything the prosecutor said during opening statement was "not evidence", The principles that permits visual aids during closing arguments is applicable to opening statements, where the people state what they intent to prove.

(see **People v. Santana**, 209 AD3d 566, 567 [1st Dept. 2022][citations and inner quotation marks omitted]; also see Appendix **D**).

With regards to the coercive ***Allen*** charge, the appellate court ruled that:

> Contrary to defendant's characterization, the jury did not represent that it was deadlocked, but only that it was at a "standstill" on a "couple of charges" (where numerous counts had been submitted) and asked for "help with how to proceed." This was the first note from the jurors that indicated they might be having difficulty harmonizing their respective opinions. The deliberations had not been particularly lengthy, given the duration of the trial and complexity of the charges. The court's request to the jury asking it

> to continue deliberations in an effort to reach a unanimous verdict was reasonable at that stage of the proceedings, when it otherwise appeared that the deliberations had been fruitful.

People v. Cruz, 213 AD3d 465, 466 (1st Dept. 2023)

The court made no ruling concerning the legal sufficiency of the evidence.

The Court, however, was in error. The Powerpoint presentation was not within the bonds of what is proper for an opening statement, as it gave a pictorial inference that this writer was the head of a conspiracy. Moreover, the trial court's curative instruction could never undue the taint of having the Powerpoint presentation displayed before the jury for well over an hour while the prosecutor delivered its opening statements. To think that such taint could be cured is akin to asking a jury to ignore the stench of a skunk who has sprayed the jury box for over an hour.

Add to this the fact that the trial court refused to give a balanced ***Allen*** charge (see Argument 2, infra) and the fact that the evidence introduced at trial was devoid of any of the necessary legally sufficient elements for this writer's conviction for criminal possession of a controlled substance in the first and third degrees (see Argument 3, infra), and you have a perfect medley of novel constitutional issues which warrant this Court's intervention.

All of these issues were properly raised in the Court of Appeals utilizing the State's leave protocols (see Appendix **H**, and Appendix **I**, and Exhibits attached thereto)

REASONS FOR GRANTING THE WRIT

ARGUMENT 1

THE TRIAL COURT'S ALLOWANCE OF THE STATE TO USE A POWERPOINT PRESENTATION DURING OPENING STATEMENT WHICH CONTAINED MUG-SHOT LIKE PHOTOGRAPHS OF THIS WRITER, REFERENCES TO PHYSICAL EVIDENCE NEVER SUBMITTED AT TRIAL, AND REFERENCES TO RECORDED CONVERSATIONS THAT WERE NEVER PROPERLY AUTHENTICATED, VIOLATED THIS WRITER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, THE PRESUMPTION OF INNOCENCE, AND OTHERWISE UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE DEFENSE

Probably the most scholarly discussion concerning the dangers and perils associated with Powerpoint presentation in the criminal trial context comes from the Honorable Justice J. Rivera of the New York Court of Appeals (see **People v. Anderson**, 29 NY3d 69, 74-83 [2017][Rivera, J. Dissenting]). Although Judge Rivera's discussion dealt with using Powerpoint presentations during summation, its rationale, when combined with the findings of other Courts who have rejected the use of Powerpoint presentations during opening statements, has significant persuasive value in this Court's determination as to whether to take up the question. What is the constitutional impact of allowing a prosecutor to use a Powerpoint presentation during it opening statement as opposed to using one during its closing statement?

Because of the complexity of this argument, I freely utilize the scientific and legal arguments that Judge Rivera used in her dissent. I also do my best at cases from across the country which demonstrates that this County is divided camps when it comes to the novel issue of whether Powerpoint presentations can be used during opening statements.

Those who say that Powerpoint presentations during opening statements should not be allowed, or should be subject to some sort of pre-trial proceedings to ferret out the constitutional objectionable material that have the tendency to violate a defendant's constitutional rights.

And those who state Powerpoint presentations during opening statements should be subjected to the same rules for allowing Powerpoint presentations during closing statements.

And those that hold a middle ground (see subsection B, infra)

A. The Science Bears Out The Prejudicial Impact that Stems From the Prosecutor's Use of Powerpoint Presentations During Opening Statements

Every person who relies on visual aids to communicate a message is likely cognizant of what the science bears out; visual rhetoric in the form of inferential pictures have the potential to powerfully influence the way the message is heard and retained (see Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 293 [2010]). Research shows that pictures are typically remembered better than words (see Mary Susan Weldon & Henry L. Roediger, III, *Altering Retrieval Demands Reverses the Picture Superiority Effect*, 15 Memory & Cognition 269, 269 [1987]), and in the skilled hands of the Manhattan district attorney's office, a seemingly innocent DMV photograph, was transformed into a mug-shot like photograph with this writer as a smirking defendant screaming out, "I am the king of this operation", rather than simply being that bad DMV photograph that most individuals take after waiting in line at the DMV for hours for that picture.

Indeed, with visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the "alacrity" by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system -- that reasoned deliberation is necessary for a fair and just system (Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy* l, supra, at 293)

This can make the use of images at trial particularly problematic when combined with language, as "annotating images with text . . . exacerbates the interpretive distortion of images" (Elizabeth G. Porter, *Taking images seriously*, 114 Colum. L. Rev. 1687, 1755 [2014]). And whether the annotation occurs by oral accompaniment or by the written word is of no moment.

The wrong picture can say what a thousand words cannot. Guilty!. Even though the picture is merely a DMV photograph.

Here, the images delivered by the prosecutor during their opening statement used a DMV photograph of this writer that not only looked like a mug-shot, but had me with a smirk on my face that no doubt had the decided message that I was at the top of the conspiratorial food chain. While the prejudice to the defense from the admission of an arrest photo is most often related to its implication that the defendant has a criminal record (e.g. **United States v. Harrington**, 490 F.2d 487, 490 [2nd Cir. 1973]), there is an additional source of potential prejudice, as when the photo is unrelated to identification testimony and serves only to show defendant in a negative light (see Paul Lashmar, *How to Humiliate and Shame: A Reporter's Guide to the Power of a Mugshot*, 24 Soc. Semiotics 56, 56-87 [2014][examining the history and cultural significance of mug shots]). Therefore, it did not matter that the photo was not a mug-shot, it looked like one (see Exhibit **J**, pages 2, 3 and 9), and thus, had the same prejudicial impact.

Particularly troubling in the legal context are recent studies showing that photos that relate to, but do not provide any evidence for a claim can nudge people towards believing that the related claims are true, whether they are true or not (Eryn Newman & Neal Feigenson, *The Truthiness of Visual Evidence*, 25 The Jury Expert 1, 1 [Nov. 2013]; see also Eryn Newman et al., *Nonprobative Photographs [or Words] Inflate Truthiness*, 19 Psychonomic Bulletin & R. 969, 973 [2012][studies have suggested that "the mere presence of Nonprobative information such as photos might rapidly inflate the perceived truth of many types of true and false claims" and that this effect can last up to two days][1])

Furthermore, images are much more immediately and tightly linked with emotion than is text, so "while images offer a wealth of creative and effective communication tools for lawyers,

[1] For a summary of much of this research and the case law, see Matthew S. Robertson, Note, *Guilty As Photoshopped: An Examination of Recent Case Law and Scholarship Regarding the Use of Non-Probative Images in the Courtroom*, 55 Washburn L.J. 731, 732 (2016)

the very elements that make them persuasive pose dangers to the integrity of the decision making process" (Porter, supra, at 1755-1756")[2]

Here, on page 9 of the Powerpoint presentation, this writer's smirking mug-shot like photo is shown above a telephone number. This number was linked to several phone calls that the prosecutor claimed established that on March 4, 2017, the defendant possessed eight ounces or more of cocaine (see Argument 3, infra). The problem with this?

- The phone that they assigned to me during their power point presentation was never introduced into evidence.
- There was no cell-cite data, GPS coordinates, or anything else that connected my apartment to the telephone they assigned to me in this case.
- None of the officers had any prior involvement with me, and thus, the voice on the telephone they assigned to me was never properly authenticated as being mines.
- The alleged ruse call they claimed established that the phone belonged to me was in fact hotly debated, impossible of belief, and was otherwise legally insufficient to establish my identity as the caller "D-Bo" on the calls that formed the basis of my conviction for criminal possession of a controlled substance in the first and third degrees.

These studies establish that the Powerpoint presentation was a powerful tool in the prosecutor's arsenal against this writer. While a phrase mentioned once in passing during an opening statement that is not accompanied by a Powerpoint presentation may not leave an indelible mark or be sufficiently egregious on its own to sway the jury, the odds that an improper reference or inflammatory remark will be noted, remembered, and revisited during the deliberative process increases when that remark is presented visually during a Powerpoint presentation (see e.g. Miriam Z. Mintzer & Joan Gay Snodgrass, *The Picture Superiority Effect: Support for the Distinctiveness Model*, 112 Am. J. Psychol. 113, 113 (1999)[explaining that pictures are easier to remember than roughly equivalent denotational words]). Here, there were hundreds of pages of annotated transcripts published during the prosecutor's Powerpoint presentation which had this writer's name as a participant, even though not a single officer ever

[2] Visual presentation may send subconscious messages to jurors, creating a significant risk that jurors reach verdicts based on emotionalism and leaps in logic rather than on the facts in evidence (Janet L. Hoffman, *Visual Advocacy: The Effective Use of Demonstrative Evidence at Trial*, 30 Litg. J. 9 [2011])

had a personal conversation with me (undercover of otherwise) to authenticate the voice on the phone was actually mine. Add to this the fact that the phone that they assigned to me was never submitted into evidence during trial, something that my trial attorney vehemently advanced during his trial order of dismissal.

To not regulate this field, would give the prosecutor an unfair advantage during opening statements, allowing them to play Pictionary with a slide show presentation that essentially says that the defendant is guilty, before the first witness is even called. In essence saying with a picture, what the prosecutor could never say by his or her words. After all, the old adage that a picture is worth a thousand words says a great deal when the picture contains a smirking defendant in a mug-shot like photograph (that was impermissibly allowed by the trial court to be displayed to the jury for well over an hour), while the prosecutor delivered his opening statement (see e.g. Paul Lashmar, *How to Humiliate and Shame: A Reporter's Guide to the Power of a Mugshot*, 24 Soc. Semiotics 56, 56-87 [2014][examining the history and cultural significance of mug shots]). This novel issue provides this Court with the perfect opportunity to weigh in on an issue that is fast becoming a mix bag of unconstitutional tricks employed by prosecutor's all over this Country.

It will no doubt be argued that the trial court's instructions, as claimed in **People v. Santana**, supra, was sufficient to overcome any prejudice that the defendant may have encountered. However, because of the duration of the Powerpoint presentation, the fact that this writer's picture was placed at the head of the pictorial scheme, and there was hundreds of pages of transcripts of telephone conversations shown to the jury before the first witnesses was even called, brings to life the sage like words Justice Thurgood Marshall, who remarked that "[I]t is quite unrealistic to believe that instruction to disregard evidence that a jury might treat in a manner highly prejudicial to a defendant will often be followed" (**Chaffin v. Stynchocombe**, 412 U.S. 17, 41 [1973][Marshall, J., dissenting]). It is like asking the jury who has been sprayed by a skunk for over an hour, to ignore the smell. The science bears out that it is impossible to cure the unconstitutional taint that occurs in cases where Powerpoint presentations containing prejudicial photographs and annotations (whether verbal or written) are used during the opening

statement. This impermissible shifts the burden of proof and otherwise removes the presumption of innocence.

B. State Courts Across The County Are Divided As To The Use Of Powerpoint Presentations During Opening Statements

The general rule, embodied in CPL § 260.30, and similar statutes across the Country, is that the prosecutor's opening statement should adequately describe what the people intended to prove, and properly prepare the jury to resolve the factual issues at trial. But that did not occur here. Playing the prosecutorial equivalent of Pictionary, the State displayed a highly prejudicial Powerpoint presentation to convey to the jury that this writer was guilty of being the head of a conspiratorial network, and by doing so, said with pictures what it could not say by words.

Although this question appeared to be an issue of first impression in New York State[3], other state appellate courts' rulings offer ready guidance. These courts, for example, have found that trial courts err where they allow the prosecutor to show the jury a presentation during opening statements that included mugs-shots and other prejudicial photographs because those images undermine the defendant's constitutional right to be presumed innocence (see e.g. **Wesner v. Commonwealth** 2012 WL 3636928, at *7 [Ky. 2012]; see also **Watters v. State**, 313 P.3d 243 [Nev. 2013]).

In **Wesner v Commonwealth**, for example, the Kentucky Supreme Court held that the trial court erred in permitting a prosecutor to use a "mug shot" of the defendant during an opening statement Powerpoint presentation because "there was no demonstrable need for the commonwealth" to do so (**id.** 2012 WL 3636928, at *7; see also **Watters**, 313 P.3d at 247-48 (holding that Powerpoint presentation used in opening statement including booking photograph

[3] The New York Court of Appeals has weighed in on the propriety of a Powerpoint presentation used during closing argument. Holding that the determination should turn on whether a Powerpoint presentation constitutes a fair comment on the evidence or was instead totally irrelevant to any legitimate issue presented at the trial (see e.g. **People v. Anderson**, 29 NY3d 69 [2017]; **People v. Williams**, 29 NY3d 84 [2017]; **People v. Santiago**, 22 NY3d 740 [2014]). But those cases are inapposite in the opening statement context where evidence has not yet been admitted and tested by cross-examination. In these circumstances, the jury is uniquely susceptible to the risk of prejudging the ultimate question in the case.

with label that defendant was "guilty" unconstitutionally undermined the defendant's presumption of innocence).

For similar reasons, State appellate courts have held that Powerpoint presentations are prejudicial and improper where prosecutors include versions of exhibits that include the prosecution's written commentary on the evidence. For example, in **Bell v. State**, 172 P.3d 622, 627 (Okla. Crim. App. 2007), the Court found that the prosecution's inclusion of photos that "affixed captions to the pictures" was improper. Although the prosecution was "free to present" his theory of the case, "because the prosecution's commentary itself was not evidence, and the marked version were never admitted, it was unduly prejudicial to allow those be shown to the jury before trial" (**id**).

Here, there was no demonstrable need for the prosecution to present the Powerpoint that it did. To the contrary, it unconstitutionally undermined this writer's presumption of innocence. The Powerpoint contained numerous slides that conclusively identified this writer as the head of a drug organization and a participant in alleged drug-related telephone conversations (see e.g. Appendix **K** at slides 11-15, 17-19, 21, 23-30, 32, 35-38, 43-58 [depicting telephone conversation transcripts and, at top and alongside of slide, listing "Erick Cruz" as a "Participant"]). These facts were disputed at trial (see e.g. T. 2015-2027 [summarizing disputes and testimony]).

As noted above, the telephone conversations themselves involved an individual named "D-Bo." The only evidence linking this writer to the voice on the telephone calls was testimony of a single "ruse" identification conducted by the police from over a half-city block away (T. 1390-1392). That testimony was subject to significant cross-examination (T. 1396-1404). Indeed, the officer who conducted the "ruse" call acknowledged that she mis-remembered the location from where she allegedly observed this writer (T.1412-1414).

Moreover, the Powerpoint presentation improperly included the prosecution's commentary, never admitted into evidence in the form of the Powerpoint slides that showed this writer at the top of a purported organization chart of a drug distribution network. No formal

organization was shown by the evidence presented at trial. At best, the prosecution only presented evidence of purported roles played by the various persons charged.

The prejudice of this was compounded by the presentation's use of mug-shot like photographs of the defendants. There was no need for this either. This writer and his co-defendants were present in the courtroom during the prosecution's opening statement and were identified by the prosecution verbally. Indeed, the prosecutor specifically noted that the defendants were present at trial, identified each defendant by name, noted where they were seated, and also noted the color of their clothing for the record (T.33-34).

Against this backdrop, and considering the scientific findings found in the previous section, the prosecution's opening Powerpoint presentation severely undermined this writer's presumption of innocence on disputed facts. It was error to permit its use during an opening statement. And as the Courts of this country are divided as to the permissibility of using Powerpoint presentations during opening statements, this presents the type of novel question that the rules of this Court would allow (Supreme Court Rules 10[c]).

ARGUMENT 2

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DELIVERED AN UNBALANCED ALLEN CHARGE THAT FAILED TO WARN JURORS NOT TO RELINQUISH THEIR CONSCIENTIOUSLY HELD BELIEFS DURING DELIBERATIONS

Under well-established law, an *Allen* charge is proper only if it "assists the jury in its deliberations by stressing the importance of reaching a verdict without forcing any juror to yield a conscientious belief." (see **People v. Ali**, 65 AD2d 513, 514 [1st Dept. 1978]). Where, on the other hand, a supplemental charge "fail[s] to balance" a direction to a jury to continue deliberating "with language that would indicate 'the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows,'" the ***Allen*** charge is coercive as a matter of law requiring reversal (see **People v. Rodriguez**, 141 AD2d 383, 386 [1st Dept. 1988]; also see **Fong v. Poole**, 522 F.Supp.2d 642, 660 [S.D.N.Y. 2007][holding that a trial court must remind jurors not to relinquish their own conscientiously held beliefs]).

The issue here is not whether the trial court was required to give an ***Allen*** charge in response to the jury's deadlock note. But rather, once the court determined to give the charge, it was required to give a balanced, non-coercive one.

In his appellate brief, my appellate counsel established that the partial ***Allen*** charge delivered by the trial court in this case was not only unbalanced, but coercive (Appendix **E**, pages 20-25). None of the dispositive facts are in dispute: The trial court read only the first two substantive paragraphs of the CJI's model ***Allen*** charge to the jury (T.2383). This warned jurors that if they did not reach a unanimous verdict, the complex, multi-week trial they just heard would have to be repeated before a new jury and that juries almost always reach unanimous verdicts. The charge otherwise contained no balancing language whatsoever to offset those instructions. Had the trial court merely read on in the model charge, the jury would have heard, for example, that jurors should not "violate his or her conscience" or "abandon his or her best judgement" in reaching a verdict[4].

This is precisely the sort of coercive instruction that has time and again required reversal as a matter of law (see e.g. **People v. Ali**, 65 AD2d 513, 514 [1st Dept. 1978][reversing conviction because one-sided instruction contained no reminder that the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of others]).

In **People v. Aleman**, 12 NY3d 806, 807 (2009), the New York Court of Appeals reversed and remanded for a new trial because a supplemental instruction did not contain balancing language that the jury should not surrender conscientiously held beliefs. The New York Court of Appeals recognized that each supplemental instruction must be tailored to the circumstances of the case and the nature of the deadlock (id.). But, critically, it emphasized that when a trial court determines a supplemental instruction is necessary, "[the Court of appeals] cannot condone [the trial court's] failure to issue an appropriate and balanced deadlock

[4] see Deadlock Charge, Criminal Jury Instructions & Model Colloquies, NYCourts.GOV. https://nycourts.gov/judges/cji/1-General/CJI2d.Deadlocked_jury.pdf.

instruction *that, in tenor and substance, convey[s] the principles reflected in the pattern charge*." (**id**)(emphasis added).

The trial court's initial charge to the jury -- delivered over four days before the jury eventually deadlocked -- is entirely irrelevant. The proper ***Allen*** charge inquiry is not whether all instructions, taken together, were unbalanced and coercive, but whether the "*supplemental instruction as a whole*" is unbalanced and coercive (**People v. Aponte**, 2 NY3d 304, 308 [2004][emphasis added]). Here, the supplemental instruction plainly was.

This conclusion follows directly from the language of the charge itself. The charge emphasized just two points: (1) if the jury failed to reach a unanimous verdict, the complex, multi-week trial would have to be repeated from scratch, (2) jurors almost always reach unanimous verdicts. Taken as a whole, the lack of cautionary language pressurized these exhortations and "created a significant risk" that the minority jurors would be left with a belief that they had no choice other than to convince other jurors of their position or surrender to the will of the majority (see **People v. Aleman**, 12 NY3d at 807). Indeed, this lack of balancing language may have had a coercive effect (see **People v. Rodriguez**, 141 AD2d at 386 [reversing because lack of balancing language may have had a coercive effect upon the jury]).

This conclusion is further compelled by the record. Indeed, at the time of the ***Allen*** charge, the jury had already been deliberating for four days (Appendix **E**, at 24), had sent out 20 notes, most of which related to charges against this writer (Appendix **E**, at 13), and had requested read back of testimony. These facts serve to bolster the conclusion that a minority of jurors were struggling with evidence as it related to this writer and were attempting to persuade other jurors of their views. Nor can there be any doubt that the unbalanced charge -- which resulted in a verdict a mere three hours after it was given -- cut off that debate (see Appendix **E** at 23 & note 12, citing T.2388; T.2396-2400).

This Court is being called on to clarify, in the context of an ***Allen*** charge, can the aforementioned omissions be deemed coercive, and/or whether a trial court's refusal to provide the requested charge deprive a defendant of the right to a fair trial.

ARGUMENT 3

THE QUESTION OF WHETHER A CONVICTION FOR CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE COULD BE PREDICATED SOLELY ON A QUESTIONABLE IDENTIFICATION OF A POLICE OFFICER, INTERCEPTED TELEPHONE CALLS THAT WERE NEVER PROPERLY AUTHENTICATED, AND OTHER IMPROPERLY ADMITTED EVIDENCE NEEDS TO BE ADDRESSED BY THIS COURT

In November of 2022, the district attorney filed their Opposition to my Appellate Counsel's brief. But it had a strange twist. In addition to countering my appellate attorney's three arguments (i.e. the defective Allen charge, the handling of the jury notes, and the Powerpoint presentation [see Appendix **F**, pages 30-73]), the district attorney, sua sponte, added an argument. That the evidence was legally sufficient to establish this writer's guilt for, amongst other things, Criminal Possession of a Controlled substance in the first and third degrees (see Appendix **F**, pages 21-30).

As argued in my pro se applications for reconsideration (see Appendix **H** and Appendix **I**), the interesting thing about this sua sponte argument was that when it came to the incidents that occurred on March 4, 2017 which (supposedly) supported my convictions for criminal possession of a controlled substance in the first and third degrees, ***their own rendition of the facts show that the evidence was in fact, not legally sufficient***.

Nowhere in the district attorney's brief does it show that on March 4, 2017, the police recovered eight ounces or more of cocaine from my home, my person, or the car they said they observed me enter.[5] Moreover, on March 4, 2017, there was no money, drugs, or drug paraphernalia recovered from anyone in the charged conspiracy. In fact, all of the sales that were made to the undercover officer only involved Frankie Santana, and occurred either three months

[5] It is interesting to note that when they did search my home on 06/07/17, they only found marijuana and marijuana packaging materials. Not a single trace of cocaine or cocaine paraphernalia. And, while there was over $45,000 found in my home, this was from a settlement AND this money was returned to me in 2019. Yet, without objection from my appellate counsel, the prosecutor, even on appeal, was allowed to misrepresent that this $45,000 was from the sales of cocaine, when in fact they knew such not to be true.

before March 4, 2017 (i.e. 12/1/16), or two months after March 4, 2017 (i.e. 05/09/17) (Appendix **J**, pages 11-12)

Another strong fact to consider is that while it is true that the police did find cocaine and cocaine paraphernalia during their searches of the apartments of the other defendants charged in this indictment, none was found in mine, even though the police claimed that I had possessed and processed cocaine in my home. But, not a trace of cocaine was found.

Moreover, there was absolutely no evidence that I had dominion or control over any of my codefendant's apartments that would even remotely be sufficient to hold me liable for any substantive crimes related to cocaine, cocaine distribution, cocaine paraphernalia and/or the sales charged in this indictment.

Indeed, it can be said that my conviction for CPCS in the first and third degrees rested entirely on the (erroneous) opinions of officers who (knowingly) mistranslated what was conversations related to the possession, sale and/or distribution of marijuana, into sales and possession of cocaine. The problem with this?

- On March 4, 2017, there was no drugs recovered from me or anyone else charged in these conspiracies.
- There was no money recovered on that day to corroborate the sale of sales of cocaine of eight or more ounces of cocaine.
- All of the photographs and video footage that was allegedly taken of me during this months long investigation were lost, resulting in the trial court given an adverse inference charge that in and or itself had questionable language which my trial counsel did object to.
- There was no cocaine packaging material found in my home on that day, or any subsequent day.
- The scales confiscated from my home were tested by the police lab, and not even a trace of cocaine was found on them (demonstrating that no cocaine or cocaine residue was ever in my home).
- The phone that they assigned to me during their power point presentation was never introduced into evidence.
- There was no cell-cite data, GPS coordinates, or anything else that connected my apartment to the telephone they assigned to me in this case.

- None of the officers conducting the investigation into this case, even the "expert" who translated the telephone calls, ever had any prior involvement with me. According to well established law, the voice on the telephone they assigned to me was never properly authenticated, and so can be said was legally insufficient to establish me as the talker.
- In 2019, the district attorney returned the $45,000 they relied on during my trial to establish my membership in the drug conspiracy because, as they implicitly conceded, the $45,000 was the remains of a insurance settlement that I told my trial attorney about, but which he never advanced to the jury, even though bank records were subpoenaed during trial.

Brief Discussion: **A Conviction For a Possession Crime Must Be Based On More Than Officers' Uncorroborated Testimonial Opinions**

While officers may explain the coded language of intercepted telephone calls (**People v. Lasso**, 268 AD2d 313 [1st Dept. 2000]), they cannot provide their opinions as to what a defendant was doing in the activities described in the coded language. There has to be more.

For instance, in **People v. Calderon**, 55 AD3d 321 (1st Dept. 2008), New York's Appellate Division, First Department, held that the evidence was legally sufficient based on intercepted telephone conversations, even though no drugs were recovered. However, this was because the officers' interpretations of the coded language in the intercepted telephone calls ***were corroborated*** by the recovery from that defendant of monies that correlated to the amount of drugs he said he had on the phone calls.

In this case, there was no corroboration. No money or drugs were ever recovered from my person, my home or any other person who appeared on the wire taps on March 4, 2017. This, notwithstanding the fact that a uniformed officer searched my person on March 4, 2017. A fact that was left out of any of the narratives provided by the district attorney concerning the events of that day.

In **People v. Wheeler**, 159 AD3d 1138 (3rd Dept. 2018), that defendant's conviction was valid because 549 grams of cocaine was found in a backpack located in a vehicle in which the defendant was a passenger. This correlated to the observation by the testifying officer that prior

to a traffic stop, the defendant was observed carrying that same backpack from his residence into the vehicle where the cocaine was ultimately found a short time later.

Here, according to the testimony of the investigating officers, some of the intercepted phone calls on March 4, 2017, indicated that there was going to be a hand to hand delivery of well over 8 ounces of cocaine from this defendant's apartment, to another alleged co-conspirator. This officer claimed to have waited for me to come downstairs to make this alleged delivery. This officer next testified that he saw me emerge from my apartment building, and allegedly witnessed me get into a car with an alleged coconspirator with what they insinuated to the jury was 8 ounces of cocaine[6]. Yet, the uniformed police officers who was sent to search me (I voluntarily allowed him to search me) found no drugs. In fact, what I was doing was picking up a pair of sneakers that Elcires Cruz had gifted my son.[7]

In **People v. Stumbo**, 155 AD3d 1604 (4th Dept. 2017), the recorded phone calls were corroborated by the stash of cocaine in the vehicle that matched the conversations in the phone calls. In this case, at least with regards to the events that occurred on March 4, 2017, there was none. No cash. No drugs. No paraphernalia. No anything. In fact, the scales confiscated from my home on June 7th, 2017 were tested, ***and not even a grain or speck of cocaine or heroin residue*** was found on them. So, how could it be said that the evidence was legally sufficient to support this writer's conviction for criminal possession of a controlled substance in the first degree?

On a set of facts similar to my case, the issue of legal insufficiency was appropriately addressed in **People v. Fleary**, 85 AD2d 742 (2nd Dept. 1981). There, the Second Department explained that the proof offered by the people consisted mainly of lawfully intercepted telephone conversations between the defendant and his alleged supplier of cocaine. These conversations, as interpreted by police witnesses, indicated clearly that the defendant was negotiating purchases

[6] What is interesting to note is that even though they had all of this information, and thus probable cause to search the entire vehicle, they never did.

[7] What is truly interesting about this is the fact that if the officer believed that I had over eight ounces of cocaine on me when I emerged from the building, why didn't they stop and search me? They had probable cause. It is submitted that they did not stop and search me because they knew that I did not have cocaine on me.

of two ounces of an unidentified drug from his supplier. However, when that defendant's apartment was searched, no cocaine was found. Instead, the police found four test tubes, three of which contained residue amounts of cocaine and a delicate scale of the kind used for narcotic drugs.

The defendant in **Fleary**, supra, was charged specifically with possession of two ounces of cocaine on each of the three separate occasions charged in his indictment. However, the Second Department reversed his conviction, finding that the evidence was legally insufficient because no drugs were recovered, nor was there any corroborative evidence to support the officers' opinion testimony that the defendant had in his possession eight or more ounces on the dates indicated in the indictment.

In **People v. Martin**, 81 AD3d 1178 (3rd Dept., 2011), the Third Department held that that defendant's conviction for criminal possession of a controlled substance in the third degree was not supported by legally sufficient evidence (although defendant was heard on tape recording discussing with other co-conspirators the distribution of cocaine). This was because the only cocaine recovered during the investigation was seized from two co-conspirators prior to that defendant's arrest, and no evidence was presented placing defendant in actual possession of cocaine on the dates specified in the indictment.

Here, nowhere in the district attorney's brief does it show that on March 4, 2017, the police recovered eight ounces or more of cocaine from my home, my person, or the car they said they observed me enter.[8] Moreover, on March 4, 2017, there was no money, drugs, or drug paraphernalia recovered from anyone in the charged conspiracy on or around March 4, 2017. In fact, all of the sales that were made to the UC only involved Frankie Santana (see Exhibit **J**), and occurred either three months before March 4, 2017 (i.e. 12/1/16), or two months after March 4,

[8] It is interesting to note that when they did search my home on 06/07/17, they only found marijuana and marijuana packaging materials. Not a single trace of cocaine or cocaine paraphernalia. And, while there was over $45,000 found in my home, this was from a settlement AND this money was returned to me in 2019 (see Appendix **I**). Yet, without objection from my appellate counsel, the prosecutor, even on appeal, was allowed to misrepresent that this $45,000 was from the sales of cocaine, when in fact they knew such not to be true, as they have implicitly conceded this fact in a recent FOIL appeal contemplating the release the documents authorizing the release of $45,000 they returned in 2019.

2017 (i.e. 05/09/17). According to the holdings in **People v. Martin**, supra, and **People v. Fleary**, supra, this was not sufficient to show that I was in possession of cocaine on March 4, 2017. And I am asking this Court to weigh in on the propriety of my conviction for criminal possession of a controlled substance in the first and third degrees with concern to March 4, 2017.

CONCLUSION

Based on the above, I respectfully request that this application be granted, and for any other and further relief as to this Court may deem just and proper.

Respectfully submitted

Erick Cruz
Petitioner, Pro se

Sworn to before me this
5th Day of January, 2024

NOTARY PUBLIC

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My Commission Expires: 11/13/2026