LEGAL WRITING TIPS

by Geoffrey Kaeuper

(*Probably none of these tips are originally mine. But I have accumulated them from too many sources over too long a time for attribution to be feasible*.)

FORMATTING:

- Do not use bold, italics, or underlining for emphasis. Your writing should convey what is most important without them. Using that kind of emphasis can be off-putting inasmuch as it suggests that the reader is incapable of recognizing what is important.

- Footnotes are a last resort — they should be used only when absolutely necessary. They disrupt the flow of your writing by forcing the reader to attend to something that is not important enough to be in the body of the text.

- Eliminate "widows and orphans." That is, do not have headings or first lines at the bottom of a page or single lines dangling at the top of a new page.

WORD CHOICE:

- Never use a fancy word when a simple word works as well. Overwrought phrasing distracts the reader by calling attention to style rather than substance.

- Avoid words that introduce ambiguity, such as "essentially," "generally," etc. If "A is essentially X," that means that A is not X. So if you use a word like this, it should be clear why you are doing so. If you say that "A is essentially X," it should be clear how A is different from X and why that difference is not important to your argument.

- Only use words like “clearly,” “certainly,” or “obviously” when you are saying something completely incontrovertible — something that should go without saying, but that, for some reason, you have to say anyway. Saying something is “clearly” the case when it is actually a point in dispute provokes distrust and costs you credibility with the reader.

- Avoid “elegant variation,” which is using synonyms to refer to a single thing. This is usually done out of a fear of clunky repetition of the same word. But the cure is worse than the disease. It can create ambiguity or at least lack of clarity, and it often sounds pretentious.

- Do not use legalese, such as “said” to mean “that,” the “instant” case, etc.

- Do not use words like “heretofore,” “thereto,” “hereinafter,” etc.

- Avoid Latinisms except for those that “have become part of standard English or [that are] legal terms of art” (New York Law Reports Style Manual, 12.3 [b], at 105).

- “That” vs. “which”: “That” is used for clauses defining or restricting the thing to which they refer, whereas “which” is used for parenthetical clauses adding expendable information.

- ~~Don’t~~ Do not use contractions.

- A thesaurus can be a useful tool to jog your mind when you are having trouble finding the right word, but it should never be used in an attempt to elevate your writing. As a source for words you would not ordinarily use, a thesaurus can be disastrous inasmuch as it can lead you to pick a word with a nuance or connotation that is wrong for your context.

SENTENCE STRUCTURE:

- The most important point in a sentence should always be in the main clause rather than a subordinate clause.

- Less important clauses or phrases should be placed first, and more important ones should be placed last for emphasis.

- Vary your sentences to avoid reader fatigue: use a mix of simple, complex, and compound sentences; use sentences of different lengths; and vary whether sentences begin with subject/verb, prepositional phrase, etc.

- Use strong verbs. Avoid forms of "to be" to the extent possible, as they make your writing static.

- A related point: avoid nominalizations, which are verbs converted into nouns. For example, instead of "the Court made a determination that," say "the Court determined that."

- Do not use the passive voice. This is worst when it conceals the subject entirely (sometimes called the "double passive"). Even when the subject is included, however, the passive voice sounds weak and evasive.

- Do not begin a sentence with "however," as it is "postpositive." Beginning a sentence with "and" or "but" is fine but should be done sparingly.

- Check for agreement whenever subject and verb are separated. For example: "Each of the plaintiffs is," not "Each of the plaintiffs are."

- Also check for agreement of verb tense and mood in conditional sentences. For example: Not "If that case is overruled, it would be better for us to withdraw our appeal," but either "If that case were overruled, it would be better for us to withdraw our appeal," or "If that case is overruled, it will be better for us to withdraw our appeal."

PARAGRAPH STRUCTURE:

- Except in rare cases where there is a particular reason for an abnormal length, paragraphs should not be shorter than three sentences and should not be longer than six or seven.

- Use block quotations only when really necessary (for example, where the full text of a statute is essential, or where an extended passage from the transcript cannot be effectively summarized or broken down into smaller segments for quotation). Do not end a paragraph with a block quotation.

STATEMENT OF FACTS:

- Be honest. Although you will want to present the facts in the light that best supports your argument, you should never cross the line into misrepresentation (including by omission). If you do, both the Court and your opponent are sure to notice. A lawyer who misrepresents the facts will lose credibility with the Court.

- Do not engage in argument in a statement of facts, and do not cite cases. When you do this, it appears heavy-handed and defensive. If you cannot give a statement of facts without outright argument, the reader may assume that the facts are not on your side.

- Provide citations to the record for all critical or disputed factual assertions.

ARGUMENT:

- Get to the point. A legal argument should not read like a mystery novel. The core of your argument should be clear from the first paragraph.

- Reject boilerplate language. Nothing is more tiresome than reading a canned discussion of a general point of law. Everything in your argument should be tailored to the particular case.

- Avoid harsh characterizations of your opponent's position. Labeling something as, say, "ridiculous" rarely convinces the reader that it is so. An effective argument reveals the flaws in a position dispassionately and leaves the reader to draw for him- or herself the harsh characterization.

- Do not ask rhetorical questions. In legal writing they are at best gimmicky and at worst annoying.

USE OF AUTHORITY:

- Except in instances of the most familiar principles, each point of law in your argument should be supported by citation to appropriate authority.

- Always cite honestly and never misrepresent authority. If a case does not quite match the proposition for which you are citing it, you should explain your reliance on that case either in the main text or at least parenthetically within the citation.

- You have a duty to cite any adverse controlling authority. You also cannot conceal that any case you have cited has been reversed or overruled, even if on other grounds.

- Do not use string citations unless there is a specific need to do so. For instance, a string citation may occasionally be useful if it supports a critical point in the argument and multiple examples illuminate that point. If so, the string citation should include brief parenthetical explanations for each case in the string.

- In New York courts, citations should conform to the “tan book” published by the Law Reporting Bureau. It is freely available at: www.courts.state.ny.us/reporter/New_Styman.htm.

- In federal courts, use the Blue Book for citation style.

- Be sure to cite cases using the proper name, as set out in the official reporter. This can also be checked using this website: www.nycourts.gov/reporter/citations/first_gen_citator/Default2.aspx

FINALLY:

- Proofread! Whenever possible, have someone else proofread your writing. It is very difficult to proofread your own work because you know what you are trying to say and so may breeze past errors and typos without seeing them. If you cannot get someone else to proofread for you, try to put the writing aside for a day before your final proofreading.

People v Omar Alvarez

No. 13

RIVERA, J. (dissenting):

Our State Constitution guarantees every defendant effective assistance of counsel, which we have defined as "meaningful representation" (People v Benevento, 91 NY2d 708, 712 [1998]; People v Baldi, 54 NY2d 137, 147 [1981]; see also People v Stultz, 2

NY3d 277, 284 [2004] [extending the "meaningful representation" standard to appellate counsel]). In the appellate context, "[a]ppellate 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 NY3d at 285). Defendant Omar Alvarez claims his appellate counsel's work failed to satisfy these criteria and seeks the opportunity to appeal his conviction and sentence with the benefit of a lawyer who will timely perfect the appeal, discuss the issues with him in preparing the appellate arguments, and submit a brief that advocates for him based on the facts and law rather than leaving it to the judiciary to conjure the strongest arguments on his behalf. Based on the record of appellate counsel's substandard brief and failure to comply with his basic professional obligations to his client, a de novo appeal should be granted.[1]

The majority's acceptance in this case of appellate counsel's failures erodes our constitutional standard for effective assistance, imports a prejudice standard we have long rejected, and sends a message to the profession that there is seemingly little to no value attached to a lawyer's skill in advocacy. This could not be further from the truth. I dissent.

I.

As a threshold matter, the People's argument that defendant failed to act with due diligence in asserting his claim of ineffective assistance is unpreserved. As the People

[1] The brief that defendant's counsel filed on his behalf in his original appeal is available here: http://www.nycourts.gov/ctapps/reference/Alvarez%20Brief.pdf. The brief is also permanently available for viewing at the New York State Library. The Library is the repository for all court filings: http://www.nysl.nysed.gov/recbrief.htm.

concede, they argued in the Appellate Division that defendant's request for coram nobis relief should be denied on laches grounds because his failure to file his coram nobis petition earlier prejudiced the People. They did not argue, as they do now, that defendant failed to exercise due diligence in pursuing relief. In fact, the People argued that the reasons for the timing of defendant's coram nobis petition were wholly irrelevant to the court's analysis because the petition must be dismissed on the sole basis of the alleged prejudice to the People's ability to oppose defendant's request.

The People attempt to avoid our preservation rules by arguing that laches and a statutory due diligence requirement are functionally equivalent grounds for disposition of defendant's petition. The People fail to address the significant, and ultimately dispositive, differences between the two. Laches originated as a doctrine in the courts of Chancery as a ground to refuse a claim in equity by a plaintiff who delayed bringing an action beyond the limitations period, even if opposing party suffered no prejudice (see e.g. Petrella v Metro-Goldwyn-Mayer, Inc., 572 US 663, 678 [2014]; Black's Law Dictionary 1006 [10th ed 2014]). Laches remains an equitable doctrine but requires a showing of prejudice caused by a party's unreasonable delay in pursuing a right or claim. "The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches" (Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 816 [2003], cert denied 540 US 1017 [2003]). Specifically, laches is an affirmative defense, deployed to estop a party from asserting a claim (id.). As its sine qua non is prejudice to the party against whom a claim is asserted, laches may be invoked regardless of whether the action is timely or not (id.).

However, the doctrine is narrow in application and the United States Supreme Court "has cautioned against invoking laches to bar legal relief" (Petrella, 572 US at 678). In contrast, the People rely on CPL 460.30 (1), a statutory provision which extends the time to file a criminal leave application and expressly imposes a due diligence requirement on a defendant, tethered to a limitations period (CPL 460.30 [1]; People v Syville, 15 NY3d 391, 399 [2010]). In other words, by statute, the burden falls on the defendant to establish due diligence in bringing the claim within the time allotted (see People v Rosario, 26 NY3d 597, 603 [2015]; People v Arjune, 30 NY3d 347, 357–358 [2017], cert denied ___ US ___, 139 S Ct 67 [2018]). A defense based on laches and a due diligence requirement are founded on disparate analytic foundations, each imposes different burdens of production and persuasion (see, e.g., Pecorino v Vutec Corp., 6 F Supp 3d 217, 221 [EDNY 2013] ["Because laches is an affirmative defense, a defendant asserting laches bears the ultimate burden of persuasion, even where a presumption of laches may apply"]). As such, and notably, the Appellate Division would not have applied due diligence principles to the People's claim that the doctrine of laches was an insurmountable bar to his request for coram nobis relief (Lichtman v Grossbard, 73 NY2d 792, 794 [1988] [Court cannot grant relief on theory not argued below]); Karger, Powers of the New York Court of Appeals, § 17:1 at 589-591 [3d ed rev 2005]). Since the People's due diligence argument was not presented below, we may not consider it on this appeal (see Bingham v New York City Tr. Auth., 99 NY2d 355, 359 [2003]).

Even if preserved, the People's argument is without merit.[2] The People would have us extend the analysis of cases resolved under CPL 460.30 (1) and impose a statutory due diligence requirement to the writ of coram nobis. The Court has previously rejected the same claim, holding that a demand for coram nobis relief is to be considered on the merits as we do "not allow the lengthy passage of time, in itself, to bar review of a defendant's claims" (People v D'Alessandro, 13 NY3d 216, 221 [2009]). With good reason, as the writ of coram nobis is not a creature of statute, subject to the limits set by the legislature, but rather "[a] common-law writ . . . [that] continues to be available to alleviate a constitutional wrong when a defendant has no other procedural recourse" (Syville, 15 NY3d at 400, citing People v Bachert, 69 NY2d 593 [1987]). That is the case here, as defendant has no other mechanism by which to present his claim that appellate counsel was ineffective.

II.

Turning to the merits, it is well established that a defendant has a right to effective assistance of counsel under both the federal and state constitutions (see Evitts v Lucey, 469 US 387 [1985] [defendant has federal right to appellate counsel on first appeal as of right]). We have also long recognized that our state standard affords greater protection to defendants than the federal test for ineffectiveness (People v Caban, 5 NY3d 143, 156 [2005]). Effective assistance under our state constitution requires counsel provide the client with "meaningful representation" (see Benevento, 91 NY2d at 712; Baldi, 54 NY2d at

[2] The Appellate Division denied defendant's petition, suggesting that it rejected the People's argument that the petition should be dismissed based on laches.

147). "[T]he claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (Benevento, 91 NY2d at 714). This Court has stressed that "our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence" (id., quoting People v Donovan, 13 NY2d 148, 153–154 [1963]). "Thus, under our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial" (Caban, 5 NY3d at 156).

"In Stultz, we held that the 'meaningful representation' standard, announced in People v Baldi in the context of evaluating the constitutional adequacy of trial representation, applies as well to claims of ineffective assistance of appellate counsel and that appellate counsel provides meaningful representation when [counsel] displays a competent grasp of the facts, the law and appellate procedure, supported by appropriate authority and argument" (People v Borrell, 12 NY3d 365, 368 [2009] [internal citations and quotation omitted]). The Court recognized that "[i]n delineating what is meaningful, however, it would be unwise and possibly misleading to create a grid or carve in stone a standard by which to measure effectiveness" (Stultz, 2 NY3d at 285). In other words, our "meaningful representation" standard is not static, and takes into account differences between trial and appellate advocacy. Just as trial counsel must be judged holistically by the work attendant to preparing and conducting a defense at trial (Baldi, 54 NY2d at 147), appellate counsel must be judged according to the obligations and tasks of appellate

practice, without consideration of whether the arguments presented would have resulted in a beneficial outcome for defendant (Stultz, 2 NY3d at 283). "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 reasonably competent appellate attorney" (Borrell, 12 NY3d at 368, citing People v Satterfield, 66 NY2d 796, 799 [1985]).

More to the point, an appellate lawyer is measured by the ability to advocate persuasively, and forcefully, if not successfully, for the client. Advocacy is "the act of pleading for or actively supporting a cause or proposal" (Black's Law Dictionary 66 [10th ed 2014]). A synonym of to advocate is to "champion" (Merriam-Webster Online Dictionary, advocate [https://www.merriam-webster.com/dictionary/advocate]). The right to counsel "means more than just having a person with a law degree nominally" representing defendant (People v Bennett, 29 NY2d 462, 466 [1972]), and requires the effective assistance of counsel in "research of the law, and marshalling of arguments on [defendant's] behalf" (Douglas v California, 372 US 353, 358 [1963]). The culmination of that work for appellate counsel is the presentation of a cogent and organized appellate argument, presented in writing, grounded on legal analysis and the facts of the case, and, when available, reaffirmed and further expounded orally before the court.

We have considered effectiveness of appellate counsel's overall performance in a small number of cases (see People v Townsley, 20 NY3d 294 [2012]; Borrell, 12 NY3d 365; People v Ramchair, 8 NY3d 313 [2007]; People v Turner, 5 NY3d 476 [2005]; Stultz,

2 NY3d 277; People v Vasquez, 70 NY2d 1 [1987]; People v Gonzalez, 47 NY2d 606 [1979]). Most of those cases focused on appellate counsel's choices, and specifically, the failure to raise a specific claim. In Gonzalez and Vasquez, the focus was on the manner in which counsel undermined their client by disparaging the client's claims; defendant's case is of a different kind. It goes to the essence of appellate advocacy – the ability to present a coherent argument intended to persuade through its rhetorical and analytical power. Here, we must consider whether merely presenting points of law without any reasoned advocacy effort is sufficient as a matter of law.

III.

Defendant filed this petition for coram nobis relief on the ground that his appellate counsel's performance, considered in its totality, deprived him of the effective assistance of counsel in his appeal. Defendant's claims are several and supported by the record.

First, defendant maintains that counsel was ineffective because he initially failed to perfect the appeal, causing the Appellate Division to place the matter on the court's Dismissal Calendar, thus risking the loss of defendant's only appeal as of right (CPL 450.10; First Department Local Rule § 1250.10). The majority does not even address this failure.

Second, counsel failed to communicate at all with his client in the three years following his appointment to represent defendant, and only as a late-day response to the Dismissal Calendar notification. Even then, the correspondence was cursory – a mere two sentence letter stating, "Enclosed please find a copy of your transcript which has been

separated from the transcript of your co-defendants'. I am presently preparing your appeal brief and it will be submitted as soon as it has been completed." The majority concludes that defendant's allegations are unsupported and thus fail to establish this lack of client contact (majority op at 5-6). I disagree and conclude that appellate counsel's on-the-record conduct supports defendant's claim.[3]

Appellate counsel waited over three years to take any action on defendant's appeal, and only after prompted by the Appellate Division's notice of potential dismissal. Even still, counsel's letter to defendant was nothing more than an announcement of belated work. Its perfunctory content is telling in what it lacks. The letter does not reference prior correspondence or communication with defendant, so it cannot be viewed as a follow-up to prior contact. It nowhere explains why counsel is sending defendant transcripts three years into his representation. The letter does not discuss the Appellate Division dismissal calendar notification, even though the court copied defendant on the letter and any reasonable attorney would expect the client to be curious or even concerned about a

[3] The majority claims that I have engaged in speculation about appellate counsel's years-long failure to communicate with his client (majority op at 6, n 3). The majority ignores the totality of my analysis, which focuses on several key factors: counsel's dilatory conduct was established by the Appellate Division's warning letter that defendant's appeal was at risk of dismissal for counsel's failure to perfect; counsel's hurried reaction which consisted of a cursory letter to defendant, one that lacked even a semblance of an attorney-client relationship as it failed to acknowledge any prior communication and did not explain why the appeal was noticed for the dismissal calendar; and the eventual submission of a slapdash writing that counsel had the temerity to represent as an appellate brief. If what the majority means by speculation is an unjustified assumption, then it is the majority that has faltered in its analysis by assuming that appellate counsel conducted himself in a professional manner when all evidence is to the contrary.

potential dismissal. Perhaps most revealing, counsel announces that he is working on the brief and will submit it when completed, without any suggestion of prior attorney-client discussions or the opportunity to discuss the contents of the brief, pre-filing. Of course, there is the additional matter of counsel's failure to file a request for leave to appeal to this Court when the Appellate Division affirmed his conviction.[4]

This track record is sufficient to support defendant's claims that counsel failed to communicate with defendant about the status of his appeal or otherwise engage with defendant about the issues counsel chose to raise in his brief. Counsel's failure to communicate with defendant is a basic violation of counsel's professional obligation to discuss the representation with his client, thus depriving defendant a voice in his appeal (see New York Rules of Professional Conduct – Rule 1.4 "Communication" [a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "(a) lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"]).

Third, defendant complains of the poor quality of appellate counsel's advocacy. As the record establishes, counsel took an inexplicably long time to file the brief, over four

[4] I adhere to the view that when, as here, appellate counsel fails to timely file a criminal leave application to this Court, the defendant has been denied effective assistance (see People v Grimes, 32 NY3d 302, 320–336 [2018] [Wilson, J., dissenting]; People v Andrews, 23 NY3d 605, 617–619 [2014] [Rivera, J., concurring in part and dissenting in part]). Defendant does not seek review in this Court, which would be the relief for that failure, but rather an opportunity for a fair consideration of his appeal in the Appellate Division. Therefore, I address the question whether appellate counsel was ineffective in his representation of defendant before the Appellate Division, the one appellate review as of right provided under New York law (CPL 450.10; People v West, 100 NY2d 23 [2003]).

years, delaying defendant's appeal. Once filed, the brief was, according to defendant, a "pathetic mockery of competent advocacy." There was no possibility any of the points raised could have persuaded the Appellate Division to reverse the conviction, and counsel's failure to raise an excessive sentence claim was inexplicable and inexcusable. Defendant submitted the brief in support of this claim.

The failings of the brief are substantial. Indeed, it is beyond understatement to declare, as the majority does here, that this "is not a model to be emulated" (majority op at 7). The brief fails to meet the basic criteria we have identified as fundamental to meaningful appellate advocacy. It does not "reflect[] a competent grasp of the facts, the law and appellate procedure" (Stultz, 2 NY3d at 285). The brief is barely 20 double-spaced pages, including separate pages for the cover, tables of contents and cases, CPLR 5531 statement, and issues presented.[5] Inexplicably, at the end of the facts section, appellate counsel inserted a photocopy of a six-page letter from trial counsel to the judge requesting an adjournment. The factual recitation consists of two pages and six lines of text. There is not a single citation in this section to the record on appeal, as required by the First Department's Local Rule § 120.8 (b)(4) which requires an appellant's brief to include a statement of facts "with appropriate citations to the . . . record." This hardly seems adequate given defendant appealed from a judgment following a three-month joint trial with two co-defendants,

[5] Previously, at least one member of this Court has indicated concern by a brief in a complicated case that was "only 37 pages long" (Borrell, 12 NY3d at 371, [Pigott, J., dissenting] [noting that counsel's performance in its totality was less than meaningful where "counsel's brief, which as noted by the majority was for two separate felony indictments and convictions, was only 37 pages long"]).

resulting in a trial transcript spanning over 4,000 pages, and involving multiple serious counts, including murder. In contrast, the People submitted a brief over 175 pages long, with 60 pages solely devoted to the facts.

Appellate counsel's brief contained four argument points. Point one is titled: "Once the defendant is under police control was the search of the immediate area controlled by the defendant, illegal." The argument is just barely over three pages, with several single sentence paragraphs, and a vague reference to a "recent" case (but rather than cite or even name the case, appellate counsel appears to cite a three-year-old law journal article without a title). In contrast, the People responded with 15 pages of legal analysis, focused on both defendant's standing and the merits of his claim. Point two, titled "Did the Court's denial of an adjournment violate the defendant's 14th Amendment right of due proces [*sic*]" is a page and a half long. The People's brief on this point was 11 pages in length, with a full discussion of the constitutional standard. Counsel's point three, titled "Did the Court's sealing of the witness list deny the defendant effect [*sic*] assistance of counsel" is one paragraph long, a mere six sentences, and does not contain even a single citation to any legal authority.[6] The People responded with five pages of argument with over 11 legal

[6] The entire paragraph, exactly as it appears in the brief, errors and all, reads:

> "The defendant was placed at a handicap because he was not aware who was going to testify against him for the records were sealed and the witnesses were not known until they testified. This interfered with the ability to cross exam a witness that you were not aware of until he took the stand. There was not an opportunity to discuss the witnesses with your client before cross examination . An investigator would have been able to provide the defense attorney with background information before the witness took the stand to make his cross examination more effective . The court indicated that the witness records were sealed because there were threats, however

citations. All of the People's points in response contain thorough and repeated citations to the record. Point four, "The verdict is against the weight of the evidence" is a page and a half and, likewise, fails to contain a single citation to any legal authority. Not even to the standard of review. This is especially notable because, despite the point heading being labelled "weight of the evidence," counsel then argues there was not enough "legally sufficient" evidence. Legal sufficiency has a different, much more limited standard of review than weight of the evidence (see People v Acosta, 80 NY2d 665, 672 [1993] [comparing People v Steinberg, 79 NY2d 673, 681–682 [1992] [legal sufficiency] and People v Bleakley, 69 NY2d 490, 495 [1987] [weight of the evidence]).

The brief in no way illustrates appellate counsel's mastery of the factual record and the significant legal rules that supported these arguments (Stultz, 2 NY3d at 285). None of the points raised contain a citation to the facts or trial transcript; nowhere in the brief is the record ever cited. It appears counsel was not even certain of the standard as, for example, in support of his purported "weight of the evidence" argument, counsel invokes his personal opinion: "so I feel that the possibility of YTC setting Omar up to take the fall is very probable since they are the only ones to testify against him in the conspiracy."

The brief violates every rule about effective appellate advocacy taught to law students across the country. These rules are well-known and found in numerous academic

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there should have been some proof that the threats came from Omar for he should not be denied his rights if the treats came from a co-defendant however there were no indication that treats came from any of the defendants. There should be a hearing before the witness list are sealed to determine whether there is justification for such a drastic action."

and practice-oriented texts used in classrooms to assist future generations of lawyers in developing the skills recognized by the profession as essential to effective appellate lawyering: (see, e.g., Mary Beth Beazley, A Practical Guide to Appellate Advocacy [4th ed 2014]; Daniel P. Selmi, Principles of Appellate Advocacy, [1st ed 2013]; Ursula Bentele, Eve Cary & Mary R. Falk, Appellate Advocacy: Principles and Practice [5th ed 2012]). One commentator summarized the skills necessary for appellate counsel as follows:

> "First, counsel must be familiar with and follow the court's rules for protecting the defendant's right to appeal, such as the rules of procedure for filing the notice of appeal and any related statements and for ordering the transcript. Second, counsel must review the record for possible appellate issues. Third, counsel must determine what issues to raise in light of the facts, the law, the standard of review, and the scope of review. Fourth, counsel must decide how to formulate those issues. Fifth, counsel must find and use the most persuasive authority available. And sixth, counsel must write persuasively – including marshalling the facts, analyzing the law, and applying it to the facts" (Griffin, Lisa. The Right to Effective Assistance of Appellate Counsel, 97 W Va L Rev 1, 37 [1994]).

Although not of the same significance, in addition to its substantive shortcomings, the brief is also riddled with grammatical and typographical errors. For example, counsel starts the brief by incorrectly identifying the parties on the cover – referring to the People as "Plaintiff-appellee," (which makes little sense in a criminal case) and referring to the defendant as both the "defendant-Appellant" and "Defendant Appellee." Point two refers in its heading to "Due Proces." The first sentence uses the contraction "it's" for the possessive. The same type of error is repeated later when the brief incorrectly refers to "defendants" in the plural rather than the singular possessive "defendant's," and uses the singular possessive "court's" when the sentence clearly intends to refer to the plural "courts." The second sentence is barely coherent: "The court in this matter appeared in the

denial of an adjournment to Omar to view the tapes and discuss them [*sic*] with his counsel prior to starting trial as if starting trial on that day was more important than the defendant being properly prepared for trial." There is also this sentence: "The defendant had to proceed to trial without adequately preparing himself with the tapes that were an obstacle he had to traverse in his defense." Ironically, the point ends with appellate counsel's assertion that a defendant has a fundamental right to an adequately prepared counsel, and it is an abuse of discretion for the court to deny defendant the opportunity to consult with counsel. If only appellate counsel had been so self-aware.

There is more. The heading for point three posits the question "did the Court's sealing of the witness list deny the defendant effect [*sic*] assistance of counsel." The argument is one paragraph long and the penultimate sentence refers to "treats" instead of "threats"—not once but twice in the same sentence. The final sentence argues about the need for a hearing "before the witness list are sealed." The point four heading refers to the weight of the evidence but in the very first sentence states that "there is not enough legally sufficient evidence to sustain a conviction on the conspiracy count."

As this summary reveals, appellate counsel's brief fails to cite cases in support of the argument, lacks appropriate discussion of the facts, fails to comply with the filing rules of the Appellate Division, and violates basic rules of syntax and grammar. To the further detriment of defendant, this was the only advocacy on his behalf presented to the Appellate Division, as appellate counsel chose to submit the appeal and did not argue in person before that court.

The majority attempts to trivialize the deficiencies in this brief and suggests that I have focused on style rather than substance (majority op at 9). The majority's fixation on the grammatical and structural errors I describe elides critique of the fundamental problems with the writing. As is obvious from my analysis, my primary concern is with appellate counsel's failure to file a brief that "reflect[ed] a competent grasp of the facts, the law and appellate procedure supported by appropriate authority and argument" (Stultz, 2 NY3d at 285). That counsel could not even proofread his brief is further evidence that he failed to meet the minimum threshold for satisfactory appellate work. For all the majority's efforts to normalize these numerous deficiencies, the majority cannot make a silk purse out of this sow's ear.

Faced with an obviously inadequate writing, the majority clings to the view that the brief satisfies our standard of meaningful representation, as long as the brief "raised four reviewable issues that "triggered plenary review by the Appellate Division" (majority op at 7). However, it is not enough for appellate counsel to raise an issue; counsel must advocate in support of the issue and serve as defendant's champion. According to the majority all appellate counsel need do to provide meaningful representation is prepare a document populated with a list of issues, unsupported by facts and law, and then leave it to the judiciary to work through the record and the law to determine whether there is a meritorious claim hidden somewhere in this substandard brief. This is not advocacy but abdication of the professional obligation to prepare a quality work product on behalf of the client.

Of course, the brief speaks for itself, and so for the reader's convenience, the brief is immediately available to view here: http://www.nycourts.gov/ctapps/reference/Alvavrez%20Brief.pdf.[7] Practitioners, educators, and law students may assess whether this brief comports with our standard of effective legal assistance. To the organized bar, I ask: Is this an acceptable work product? Would any one of your members submit this on behalf of a client?

As for defendant's claim that appellate counsel was ineffective because he failed to challenge the sentence as harsh and excessive, I agree that on the facts of this case, there appears to be no strategic reason to fail to assert this claim. While "[e]ffective appellate representation by no means requires counsel to brief or argue every issue that may have merit [and] appellate lawyers have latitude in deciding which points to advance and how to order them," there is no hard and fast rule and counsel's representation must be measured in light of the circumstances (Stultz, 2 NY3d at 285). I would not adopt a per se rule that every appellate counsel who fails to challenge the sentence as excessive is ineffective as a matter of law. However, here, defendant's sentence was 66 2/3 years to life. This effectively turns the minimum term of incarceration into a life sentence without the possibility of parole. Under these circumstances, there was no strategic advantage to be gained by failing to request the Appellate Division exercise its interest of justice power to consider whether defendant—who at the time of the crime was 19 years old—was

[7] This link is the equivalent of an appendix. It provides quick and easy perpetual access to appellate counsel's brief, which should be read as part of this dissent.

potentially redeemable and should have the opportunity to persuade the Parole Board of such in the future. After all, if paroled, defendant would still serve a lengthy sentence and would walk out of prison an old man. Still, the possibility of parole would provide him hope of spending his last days free. As Judge Wilson persuasively argues in his dissent (J. Wilson, dissenting op at 9-10), defendant's conduct during his incarceration should remind us why we cannot simply write off young people who violate the law, even those who commit heinous crimes.

The majority's conclusion that appellate counsel was effective because there is no claim upon which defendant would have prevailed ignores that, under our state standard, prejudice to defendant is "not [an] indispensable element in assessing 'meaningful representation'" (Stultz, 2 NY3d at 284; Benevento, 91 NY2d at 712; Baldi, 54 NY2d at 147). The reason is because our standard does not solely protect against errors that may have adversely affected a defendant. If that were the case, we would have adopted the federal test which requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (Strickland v Washington, 466 US 668, 694 [1984]). Instead, we have repeatedly eschewed the federal prejudice requirement because our constitution provides greater protection and is concerned with the integrity of the process overall (see, e.g., Borrell, 12 NY3d at 368; Turner, 5 NY3d at 479-480; Stultz, 2 NY3d at 283). Even if the outcome would not have changed, if counsel for the defendant fails to provide constitutionally adequate representation, our justice system

is weakened. Thus, we regard counsel as ineffective because "[o]ur focus is on the fairness of the proceedings as a whole" (Stultz, 2 NY3d at 284).

IV.

For the reasons I have discussed, the majority has reduced our constitutional guarantee of meaningful representation for defendants to nothing more than a platitude, empty of any real substance. Previously, we lauded our state standard for legal representation as affording greater protection than the federal test (Caban, 5 NY3d at 156). Now, the majority has adopted a substandard threshold for professionalism. While public defenders, legal aid attorneys, other institutional providers of indigent defense services, the American Bar Association, and our State Bar Association promote guidelines and best practices for trial and appellate counsel, the majority has chosen to accept shoddy work product as the benchmark for meaningful representation. Defendants have a constitutional right to something better and our judiciary has the obligation to maintain the high quality of legal practice in New York by rejecting inferior work.

What other profession accepts a product riddled with errors? What client would put their liberty at risk with a brief that fails to present a cogent argument grounded in the facts and the law? The answer seems plain to me that no profession and no individual would be satisfied with the work at the center of this appeal.

Defendant has established that his appellate counsel failed to provide meaningful representation as required by our State Constitution. Defendant's coram nobis petition

should be granted so that he may pursue a de novo appeal before the Appellate Division (see, e.g., Vasquez, 70 NY2d at 4).

1-00-1712

1712

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION ; FIRST DEPARTMENT

Indictment No
5501-94

THE PEOPLE OF THE STATE OF NEW YORK
Plaintiff – appellee,

- against –

OMAR ALVAREZ
Defendant – Appellant .

APPEAL FROM A JUDGMENT OF CONVICTION RENDERED IN THE COUNTY OF NEW YORK , STATE OF NEW YORK

APPELLANT'S BRIEF

SEP 0 8 2000

NARDELLI J.P.
MAZZARELLI
LERNER
ANDRIAS
BUCKLEY JJ.

R, FRANKLIN BROWN
Attorney for Defendant Appellee
401 Broadway Suite 300
New York , New York 10013
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TABLE OF CONTENTS

TABLE OF CASES

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEWYORK
Plaintiff- Appellee,

V.

OMAR ALVAREZ
Defendant – Appellant .

1. The index number of the case in the County Court is 5501-94
2. The full names of the original parties are People of the State of New York and Omar Alvarez . there have been no change in the parties .
3. The action was commenced in the Criminal Court, New York County
4. The action was commenced on June 16, 1994 by the arrest and arraignment of the defendant .
5. The defendant was indicted on June 20, 1994 under number 5814-94 and then consolidated with the conspiracy case 5501 – 94 .
6. The defendant was arraigned on the indictment around June 18, 1994 in Part 88 before the Hon. Leslie Crocker Snyder.

7. The nature and object of the action are as follows ;

Count 1. Conspiracy	Count 16 Assault 1%	Count 24 Crim. Sale of a Contrl. Sub. 3%
Count 1 2. Murder 2%	Count 17 Assault 2%	Count 25 Crim. Sale of a Contrl. Sub. 2%
Counts 14 & 15 Att. Murder 2%	Count 18 Crim .Poss. Weapon 2%	Count 26 Crim poss. Weapon 3%

8. This appeal is from a judgment of conviction entered on January 3 0, 1996 against Omar Alvarez The defendant was sentenced by Hon. Leslie Crocker Snyder to the following terms:.

Ct. 1.	25 to Life	Ct. 16	5 to 15 years
Ct. 2.	25 to Life	Ct. 17	2 1/3 to 7 years
Cts. 14&15	8 1/3 to 25 years	Ct. 18	5 to 15 years

Ct. 24	8 1/3 to 25 years
Ct. 25	8 1/3 to Life
Ct 26	2 1/3 to 7

Counts 1, 12, 14 and 15 are to run consecutively to each other all other counts are To run concurrently to each other.

The appeal on the original record : leave to prosecute the appeal on the original record was granted by the court. The appendix method is not being used.

ISSUES PRESENTED

1. **WHETHER ONCE THE DEFENDANT IS UNDER POLICE CONTROL IS THE SEARCH OF THE IMMEDIATE AREA CONTROLLED BY THE DEFENDANT , ILLEGAL .**

2. **WHETHER THE COURT'S DENIAL OF AN ADJOURNMENT VIOLATES THE DEFENDANT'S 14TH ADMENDMENT RIGHT OF DUE PROCESS.**

3. **WHETHER THE COURT'S SEALING OF THE WITNESS LIST DENY THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL**

4. **WHETHER THEVERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE**

STATEMENT OF FACTS

On June 20, 1994, a Grand Jury returned a 20-count indictment against members of an alleged drug operation headed by Martin Mejias, known as Chango and Jose Rosa known as Tito this group was known as YTC that stood for young talented children or yellow top crew Their operations was started in 1992 and was primarily based on 107th street between Amsterdam Avenue and Central Park West..

Omar Alvarez was seen in the area frequently in the company of various drug dealers but was not involved with YTC until August of 1993 as testified to by one witness .Some time before November 1993 Omar and some of his friends had words with a group on 112 th street after they left the place where they had purchased marijuana. Another time they drove through 112th street and were shot at one bullet striking the automobile in which they were riding. On November 17, 1993 a witness testified that he saw Omar leaving the scene of the shooting . Where Lamont Williams was killed and two of his friends shot .

In December of 1993 the New York City Police Department Homicide Investigation Unit directed their attention to violent drug activity in Manhattan Valley This prompted them to set up an observation post across the street from a drug active building on 107 Th street for over a year. During this time they photographed all the regulars in the area and obtained their names . In May of 1994 they began to videotape the activity. Three undercover police person were assigned to make purchases on the street . The undercover would view photographs of the people in the

area and attempt to make purchases form them and after the purchases they would return to their location and confirm the identification by viewing the photograph of the seller ..

On May 12 , 17 & 19 th of 1994 three under cover police persons said that they made purchases from Omar and identified him from the photograph taken earlier by their investigation unit .

Omar's trial attorney objected to the admissibility of this testimony and a wade hearing was held to suppress the identification. The suppression was denied and The court held that it was a valid tool used in investigation..

On June 16. 1994 Omar and a number of his friends were on the street speaking with a young man known as Ramirez when Ramirez pulled out a shot gun and shot several of the group. Omar and a friend retreated to an apartment in the building on Columbus Avenue known by the police to be used by YTC They both had been shot and the occupants of the house called 911 for an ambulance . The police appeared and were allowed in the apartment and were lead to the room where Omar was lying on a couch in his underwear wounded .The police asked were there any guns in the house and he did not receive an answer he asked the woman to turn up the sofa cushion and she turned up the ends of the sofa . Then he demanded that Omar get up and come toward him then he requested that the mattress be taken off and he saw and recovered a gun. Omar was arrested and when he asked for his clothes the police found $500.00 and 39 crack vials in his pants . Omar was indicted for possession of a gun and drugs and the indictment was consolidated with the conspiracy indictment which was filed against other members of the YTC .

A Mapp hearing was conducted to suppress the gun and drugs without the Assistant District Attorney questioning Omar's standing as to expectation of privacy . The court held that the search was proper and denied the suppression of the evidence. The case was marked for trial on September 7, 1994, however, Omar's trial attorney indicated by the following letter that he wanted an adjournment to allow Omar to listen to the tapes that were going to be placed in evidence by the Assistant District Attorney.

970-0551
F

HALLINAN & CAMCHE
ATTORNEYS AT LAW
[redacted]
[redacted]

[redacted]
[redacted]

September 1, 1995

980-0650
[redacted]
[redacted]
[redacted]

FAX
593-7157

Hon. Leslie Crocker Snyder
Justice of the Supreme Court
New York County
100 Centre Street
Part 88, 13th Floor, Room 1313
New York, New York 10013

Re: People v. Omar Alvarez
Ind. Nos. 5501, 5814-1994

Dear Judge Snyder:

This is to inform you that Omar Alvarez will not be ready for trial on September 7, 1995 because he has been denied his constitutional rights, Federal and State, to adequately prepare for trial.

I tried to reach your chambers on Tuesday, August 29, 1995 to inform you of this but I was informed that everyone was on vacation until September 6, 1995.

I was first assigned to this case on February 22, 1995. I realized from the very beginning that tapes, video and audio, would be a large part of the case.

I began paring down my case load so that I would be able to devote all my time and efforts to this case. By the middle of May I was in a position to devote much of my time to this matter, although since the date of my assignment I had spent time on it as time permitted.

On May 11, 1995 I delivered to ADA Andrea Sacco 11 blank video tapes and 20 audio tapes for copying. I was notified toward the third week in May that the tapes were ready. On May 24, 1995 I picked up the tapes. I began my review of the tapes on May 26, 1995. I had two extra copies made, one for Omar and one for Omar's mother and father.

On June 1, 1995 I met with Omar's mother and father in my office and gave them their copies of the tapes with very detailed instructions on what I wanted them to do and how I wished them to proceed. Among other instructions, I told them I wanted them to look for certain things. To do what I wanted them to do involved, among other things, frequent pauses, reversals, replays, etc.

On July 12, 1995 I wrote to the General Counsel of the Department of Correction, Ernesto Morrero, seeking his guidance on how I could get the tapes, video and audio, to Omar so that could begin to view, analyse and study the tapes. He had a lot of time on his hands to do this.

On July 18, 1995 I received a phone call from Linda Lida, Esq., one of Mr. Morrero's assistants. She explained to me how I could get tapes into Rikers. She said I would have to bring over the tapes and a Walkman personally and contact a Captain Castillo. She further explained that the facility would make availabel a screen for Omar to view the video tapes. She alsosaid that as soon as the tapes were there they would be made available to Omar to review, listen to and study.

On August 1, 1995 I personally went to Rikers with the tapes and the Walkman. When I arrived they accepted the tapes but they wouldn't accept the Walkman because, besides playing, it could also record. This was the first time that I was informed of this fact. I was assured that the videos would be made available immediately for his review and study and that as soon as I delivered theplayer Walkman Omar would be given access to them for review and study.

On August 9, 1995 I went to Rikers Island to deliver a Walkman with only a player capability. I was once again assured that Omar would have access immediately to the audio tapes.

On August 22, 1996 I received a phone call from Omar's mother requesting an office conference on the evening of August 23, 1995. When they (mother and father) arrived they told me that Omar had not been allowed to view and study the videos or listen to and study the audios. I had instructed

VENDOR: C.R.S., INC.
5301 TACONY STREET 210-3
PHILADELPHIA, PA. 19137
(215) 535-7790 OR FAX (215) 535-7808

Omar to study the tapes carefully and make notes on a pad of certain points. This required much, much more than simply "seeing" the tapes or "listening" to the audios.

On August 23, 1995 I received a phone call informing me that Correction was going to produce all seven defendants in the ADA's office for a group viewing of the video tapes. They planned on doing this on August 30 and 31, 1995. She further informed me that they would be produced very early and watch for approximately ten hours on August 30, 1995 and until they finished on August 31, 1995. I objected strenuously to this procedure. I explained to Ms. Sacco that I had made arrangements weeks ago for Omar to view and study the videos and listen to and study the audios. She responded that there was a Court order for their production on August 30 and 31. I asked her to send me a copy of the order. She replied that she didn't have a copy of the order. I asked who prepared the order and she replied, "Hillel Bodak".

I again objected strenuously to this procedure which essentially denied him adequate access to both types of tapes and was highly coercive. The setting for the viewing is in a group with all other defendants and under the watchful eye of an ADA or a Police Officer. I further explained to the ADA that I had tried many "tape" cases and that it was not sufficient to see a tape. In a tape case, the tape must be studied. This calls for playing, stopping, reversing, fast forwarding, not once, not twice but several times. It requires copious note taking. All this may not be accomplished in marathon sessions over two days. I explained that to bring them over from Rikers to get them there at 8 AM would require getting them up at 2 or 3 AM. After the viewing on August 30, 1995 the defendants would probably be returned very late in the evening only to be awakened in the early hours of August 31, 1995 for another marathon session. I once again objected strenuously to the whole procedure.

Omar, having been requested to do so, called my office while his parents were there. I spoke with him first. He informed me that he had not yet, as of August 23, 1995 been given access to the videos or the audios. He told me that he asked the Captain at C-95 on a daily basis for access and was told on a daily basis that he would be given access.

In practical terms, this meant that all the time between August 9, 1995 and August 23, 1995 was wasted because Corrections refused to abide by its agreement with me. All of that time could have been spent viewing, studying and analysing the videos and listening to and studying the audios. When Omar told me he had been denied access I flipped my lid.

On August 24, 1995 I called Linda Lidz, the attorney for Corrections, with whom I had made the arrangements for Omar to view and study the tapes and listen and study the audios. I explained to her that as of August 23, 1995 Omar had been denied access to both tapes. She said she would check it out immediately.

On August 25, 1996 I had called the Legal Department of Corrections to request Omar's production on Monday, August 28, 1995 for an attorney interview. As of the end of August 25, 1995 I had not heard from Linda Lidz.

On August 28, 1995, as soon as I arrived in the office, I called the 12th floor bridge at 100 Centre Street to see if Omar had been produced. The officer in charge informed me that Omar was on the list of inmates to be produced but that he had not yet been produced. I then called Linda Lidz who found out that Omar was being given access at that very moment to the material to review and study for as long as he liked. I explained to her that I had, on August 25, 1995, requested Omar's production on August 28,1995 and could she kindly confirm that Omar was given access so that I wou dn't make a needless trip down to the 12th floor bridge. She called me right back and told me she had spoken with security at Rikers and it was indeed true what she had told me. She further informed me that Omar had been diverted from the attorney visit so that he could begin the tapes.

It should be recalled here that pursuant to my agreement with Corrections that by this time (August 28, 1995) Corrections had everything necessary for Omar to study the tapes but had been denied access to them.

On August 28, 1995 I sent a hand written Fax to Hillel Bodek objecting strenuously to his action in obtaining a Court order for the production of my client without any notice to me and I also objected to the whole procedure. I told him to cease and desist from taking any further action with respect to my client without notifying me first. I also requested a copy of the Court order. To this date he has not sent me a copy of the order. Had I been served with a copy of the proposed order I would have strongly objected for all of the reasons stated above. I would have stated that to produce Omar in the ADA's office for a marathon viewing of the tapes was not what I had agreed upon and was totally inadequate. I would have told him and the judge who was asked to sign the order all of the above. In my opinion, a defense lawyer would have to be out of his or her mind and derelict in his or her duty to request a one time viewing in the office of the prosecutor.

On September 1, 1995 I spoke with the ADA to cofirm how long Omar was in her office on August 31, 1995 and she confirmed that Omar was in theoffice from 8 AM to 9:30 PM. I asked her again for a copy of the order and she again stated she did not have a copy of the order. I asked her how she found out about it and she said in a conversation with Hillel Bodek. She said that I had requested this procedure which statement was a total misstatement of the facts as can clearly be seen from the above.

The denial of adequate access to the tapes pursuant to my agreement with Corrections and Hillel Bodek's ex parte obtention of a Court order for the production of Omar, are clear violations of Omar's constitutional rights and render impossible my being ready for trial on September 6, 1995. See Allen v. Biden, et al, 2d Cir. Court of Appeals, NY, as reported in NYLJ, Vol. 214, No. 42, August 30, 1995, at p. 21, 23 and 24.

I can be ready for hearings on September 7, 1995. I can be ready for trial as soon as Omar has had adequate time to view and study the videos and listen to and study the audio.

On August 16, 1995 I called the ADA to make arrangements for Omar and myself to look at photos in the office of the ADA. She said she didn't have time that week to bring Omar over but to call her next week.

On August 25, 1995 I called the ADA again to request that Omar and I be given the opportunity to view the photos. She said she couldn't bring Omar over, but that I could view them in her office on Monday, August 28, 1995.

On August 28, 1995, with the ADA present, I reviewed the photos. There was, of course, no opportunity to study the photos. This would have been possible only if Omar had been supplied copies of the photos so that Omar and I together and seperately could "study" the photos. This denial also constitutes a violation of Omar's constitutional rights. I shall not be ready for trial until Omar and I have received copies of the photos and have had adequate time to "study" them.

Respectfully submitted,

J. Joseph Hallinan, Esq.

Joseph Hallinan, Jr., Esq.

CJH:mpg

cc: Ernesto Morrero
ADA Linda Sacco

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 88

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

OMAR ALVAREZ, et. al. : IND. NO: 5501/94

To: Mr. Joseph Hallinan, Jr. Esq.
The court has reviewed your letter dated September 1, 1995. Your request for an adjournment is denied.

YOU ARE HEREBY ORDERED to appear and be prepared to proceed to trial in the above-entitled case on September 6, 1995 at 9:30 a.m. in Part 88.

The jury clerk has arranged a special call of 600 jurors for this case.

You are not to accept any engagements which could conflict with this trial under penalty of contempt.

Both the Prosecution and the Defense are ON NOTICE that this court will take appropriate extraordinary measures if counsel is not present and ready to begin trial on that date.

SO ORDERED.
September 5, 1995

LS

Hon. Leslie Crocker Snyder

ARGUMENT
POINT 1

ONCE THE DEFENDANT IS UNDER POLICE CONTROL WAS THE SEARCH OF THE IMMEDIATE AREA CONTROLLED BY THE DEFENDANT, ILLEGAL

There was an illegal search of Omar in the apartment where he was arrested, the search was not a search of the residence but a search of his person and the area in which he had control.

Omar was a wounded person in a prone position in his underwear lying on a couch waiting for an ambulance to transport him to a hospital when he was asked by the policeman if there were any guns in the apartment . He did not respond to this question so he was ordered to walk toward the policeman and a woman in the apartment was ordered to lift the cushion off the couch where a gun was discovered . Omar was searched personally and he had constructive possession of the gun under the cushion on the couch on which he was lying for the area is an extension of his person .

Where a criminal charge is predicated on ordinary constructive possession principles the defendant must demonstrate a personal legitimate expectation of privacy in the premises that was searched. People v. Tejeda , 81N.Y.2d.861 (1993).

In this case the people did not object to Omar's right to have a hearing so they had waived the standing objection . however, the defendant maintains that this is a personal search and not a search of the residence .

In a case recently decided a defendant who had been placed in handcuffs (therefor eliminating any safety concerns) the court held that the police could not search his bag without obtaining a search warrant.NYLJ 10/2/97 Col. 1, (1st Dept.).

The police entered the premises in response to a call to 911 for an ambulance therefor the police had permission to be on the premises . Once the officer is there on a mercy mission his function should normally be waiting with the injured for the arrival of the ambulance . Since the injury was the result of a gun shot the interest of the officer would be different , the concern for his safety is paramount therefor he is concerned that there are not any weapons that are accessible to the people in the area. The right to search the individuals on the premises depends upon his right to protect himself . The search is not a search of the residence but of the individual and should be governed by the right to search the individual an the area in which the individual has constructive control. The defendant was requested by the officer to get off the couch and come toward him so he controlled the defendant and had no reason to have the couch cushion removed. This case is different from the Rodriguez case where the defendant was in the apartment to purchase drugs and fell asleep. When the police arrived they saw him on the bed and a bulge next to him they found the bulge to be drugs and arrested the defendant and he was not able to complain about the search for it was held that he had no expectation of privacy . People v. Rodriguez , 69 N.Y.2d 159 (1987) . In this case when the defendant is asked do you have a gun he has a right not to respond and the police had no right to frisk or search him or the area in his immediate control . People v. Cornelius , 113 AD2d. 666 (1986); People v. Howard 50 N.Y.2d. 583 .

A warrantless search is valid if it is conducted with the voluntary consent of the person searched. The voluntariness is not measured by the consenter's state of mind but by an objective evaluation of the following factors ;

1. Whether there was overbearing police pressure and coercion .
2. Whether the individual consenting is in the custody or under arrest .

voluntariness is incompatible with official coercion actual or implied in this case Omar was coerced to get off the couch and walk forward by the police but he did not consent to the search of the couch .

A protective pat down search must be strictly limited to that which is necessary for discovery of weapons which might be used to harm an officer or others nearby. If the search goes beyond what is necessary to determine if the suspect is armed the search is no longer valid and its fruits will be suppressed .

An officer with an arrest warrant may search the area within the possession or control of defendant New York v. Belton, 453U.S.454 (1981) . meaning the area from which the defendant might gain control is construed to mean the area from which the defendant might gain possession of a weapon. People v. Saglimbeni, 62N.Y.2d 798 . Without a warrant the same area is in the control of the defendant and he is protected in this area from unreasonable searches and this was

an unreasonable search.the officer was lawfully on the premises so the search of the defendant was like a street encounter, a consent to enter is not a consent to search People v. O'NEIL 11 N.Y.2d 148 (1962).

ARGUMENT
POINT 2

DID THE COURT'S DENIAL OF AN ADJOURNMENT VIOLATE THE DEFENDANT'S 14TH AMENDMENT RIGHT OF DUE PROCES

There is something inherently wrong with a system that is more concerned with the train running on time than it is about the safety of it's passengers. The court in this matter appeared in the denial of an adjournment to Omar to view the tapes and discuss them with his counsel prior to starting trial as if starting trial on that day was more important than the defendant being properly prepared for trial .The attorney in his letter ,which I included in my statement of the facts had done every thing he could have done to have this interview with his client while the court was on vacation and he needed guidance in how to proceed to get this interview with his client on the reasonable terms that he had requested. The defendant had to proceed to trial without adequately preparing himself with the tapes that were an obstacle he had to traverse in his defense . His attorney now was faced with the problem of preparing his trial at the same time he is trying the case without an opportunity to spend uninterrupted time going over the tapes. The defendant never had the opportunity to listen to the tapes before the trial started alone as his attorney had requested and when he was given an opportunity to look at the tapes he had to spend two ten hour days with the two other defendants one of the days was a day he was scheduled to see his lawyer shortly before the trial was to start . During the time Omar's attorney was having a problem with the

correction department which could have been solved probably with the court's intervention which would have allowed the defendant to prepare properly for trial .

A defendant's request for an adjournment is entirely up to the discretion of the court but the abuse or improvident exercise of discretion may occur where the refusal to grant an adjournment results in a deprivation of defendants fundamental right to confer with counsel People v. Norris , 593 N.Y.S.2d. 866 (1993). McKinney's Constitution Art. 1 sec. 6 .

The court's have held where the protection of fundamental rights are involved in a request for an adjournment the discretionary power has been more narrowly construed. People v. Spears, 64 N.Y.2d. 698.

The right to have an adequately prepared counsel for the defendant is such a fundamental right and that there is no reason for haste if the people's case is not prejudiced there is an abuse of discretion for the court not to allow the defendant to consult with counsel. People v. Snyder. 297N.Y.81 (1947)

ARGUMENT
POINT 3

DID THE COURT'S SEALING OF THE WITNESS LIST DENY THE DEFENDANT EFFECT ASSISTANCE OF COUNSEL

The defendant was placed at a handicap because he was not aware who was going to testify against him for the records were sealed and the witnesses were not known until they testified . This interfered with the ability to cross exam a witness that you were not aware of until he took the stand . There was not an opportunity to discuss the witnesses with your client before cross examination .An investigator would have been able to provide the defense attorney with background information before the witness took the stand to make his cross examination more effective . The court indicated that the witness records were sealed because there were threats, however there should have been some proof that the threats came from Omar for he should not be denied his rights if the treats came from a co-defendant however there were no indication that treats came from any of the defendants. There should be a hearing before the witness list are sealed to determine whether there is justification for such a drastic action .

ARGUMENT
POINT 4

THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE

There is not enough legally sufficient evidence to sustain a conviction on the conspiracy count . There has not been any independent evidence of Omar being involved with the YTC organization except the testimony given by members of the YTC especially those members who were at the top . Chango who testified that he corresponded with members of the YTC during the time he was in jail never contacted Omar but contacted a number of the members who testified against Omar they are the only ones that testified that he had worked as a manager and a seller for YTC and later when he was not seen in the area by the police they said he was cooking crack when there is not any independent evidence that he was in the area. There is no independent evidence that Omar was ever around the area selling drugs for the YTC the investigators in that area had been there for over a year and had seen Omar only a few times , so to account for his absence he was to be in the house cooking crack . The only sales he was connected with are the sales that he made to the undercover police persons . If Omar was part of the YTC he would have been on Chango's correspondence list as the other members were and he would have been indicted at the same time as the other members were indicted The members of the YTC. were indicted for conspiracy prior to Omar's arrest and he was not a part of that indictment when Omar was arrested on June 16, 1994 he was indicted separately

and his indictment was consolidated with the YTC . It appears, had he not been arrested especially in that area , he would have not been indicted on the conspiracy charge . His arrest provided Chango an opportunity to make a deal for he and the other menbers of the YTC to testify against him and reduce their exposure .

Chango testified that Omar was not on the scene until around August of 1993 and it was testified that when he was around he spent time hanging out with other drug dealers so I feel that the possibility of YTC setting Omar up to take the fall is very probable since they are the only ones to testify against him in the conspiracy. The verdict is against the weight of the evidence.

CONCLUSION

This case was an inquest because a very capable attorney was not allowed to prepare a defense for his client. First the consolidation of the case set the stage for inflaming the jury who listened to horrible crimes that were committed in furtherance of the conspiracy by YTC members . These crimes were committed before the defendant was alleged to have been a part of this conspiracy and they were performed to build a drug business for the person who testified against him .and the jury assumed that he was involved .in these other crimes .

Then the defendant was denied an opportunity to listen to the tapes alone, to prepare him to discuss the strategy and defense with his attorney in the manner that he should have been prior to trial .This kind of preparation is necessary to develop the defendant's defense . Since this was not done prior to trial the trial attorney spent time during trial with questions about the tapes, and witnesses that could have been resolved prior to trial.

There were also questions of Rosario material that the defense did not receive prior to trial that was an issue of contention during the beginning of the trial .

Then the court sealed the witness list based on the possible threats to the witnesses, however, these threats were not revealed to the

defendant and most of the witnesses were incarcerated so they could have been protected .and the list would have been available to enable the defendant to prepare his defense . ithout that list the defendant's attorney did not have an opportunity to have an investigator , investigate the witnesses so he would have information for cross e amination to enable him to test their credibility . Since the witness list was not available the defendant's attorney was without the material to properly perform a cross e amination based on knowledge that will enable him to test the credibility of all the witnesses.

This is a case where the defendant had an opportunity to prepare if he was given the information which was absolutely necessary for his defense at a time prior to the trial. .

The defendant , however, was not given this opportunity, he was prevented from preparing a defense because of the lack of cooperation of the Correction epartment and the decision of the court to seal the witnesses' identification so there was nothing to prepare before trial. uring trial the preparation interfered with concentration thus making it almost impossible to present a defense. The defendant did not have a fair trial and feel the case should be reversed because of the reasons previous given.

ated 13