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

THE PEOPLE OF THE STATE OF NEW YORK,	:
	:
Respondent,	:
	:
- against -	:
STEVEN BLOOME,	:
	:
Defendant-Appellant.	:

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 307/15.

2. The full names of the original parties were the People of the State of New York against Steven Bloome.

3. This action was commenced in Supreme Court, Richmond County.

4. This action was commenced by the filing of an indictment on December 1, 2015.

5. This appeal is from a judgment of the Supreme Court convicting appellant of two counts of robbery in the first degree, burglary in the first degree, criminal possession of a weapon in the third degree, and criminal mischief in the fourth degree.

6. This is an appeal from a judgment of the Supreme Court rendered February 8, 2017.

7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

PRELIMINARY STATEMENT

Steven Bloome appeals from a judgment of the Supreme Court convicting him of burglary in the first degree (P.L. § 140.30(1)), two counts of robbery in the first degree (P.L. § 160.15), criminal possession of a weapon in the third degree (P.L. § 265.02), and criminal mischief in the fourth degree (P.L. § 145.00), and imposing consecutive indeterminate prison sentences of 21 years to life on each of the first-degree robbery counts, to be served concurrently with prison sentence of 21 years to life on the first-degree burglary count, 1 year on the criminal possession count and 6 months on the criminal mischief count (Ozzi, J.).

Timely notice of appeal was filed and on November 3, 2017, this Court granted appellant leave to appeal as a poor person and assigned Paul Skip Laisure as appellate counsel.

Appellant had no co-defendants below. Appellant is currently incarcerated pursuant to the judgment and no stay has been sought.

QUESTIONS PRESENTED

1. Whether, because the complainants' testimony that appellant possessed a knife during the altercation was inconsistent and uncorroborated by other testimony and the police failed to secure the knife so that DNA or fingerprint evidence could be recovered, appellant's burglary, robbery, and weapon possession convictions were against the weight of the evidence.

2. Whether the indictment was jurisdictionally defective because it alleged that appellant was armed with a "dangerous weapon," a term undefined in the Penal Law, and thereby failed to make a meaningful accusation as to the armed with a deadly weapon possession element of first-degree burglary, an error that was not cured by incorporation of the "deadly weapon" subsection of first-degree burglary because the possession alleged did not meet the Penal Law definition of "deadly weapon."

3. Whether the amendment of the indictment after trial to substitute a different subsection of the first-degree burglary statute, and add language from the statute that did not appear in the indictment violated appellant's due process right to a fair trial because it materially altered the People's theory of the prosecution, and, therefore, his conviction under the amended count should be vacated and the count dismissed.

4. Whether the evidence was insufficient to convict appellant of robbery in the first degree under count five of the indictment, and the verdict was against the weight of the evidence as to that count, because the People failed to establish that appellant took or intended to take the cell phones over which complainant Diaz temporarily relinquished control

5. Whether, in a case in which appellant was charged with robbery, the court's Sandoval ruling permitting the people to cross-examine him about his prior robbery and assault convictions and their underlying facts involving use of a knife to cause injury, stealing money, jewelry, and cell phones on multiple occasions, deprived him of his due process right to a fair trial, his right to testify, and his right to present a defense.

6. Whether, because no one was hurt, the sentence appellant received, an aggregate of 42 years to life in prison, was excessive.

STATEMENT OF FACTS

Introduction

Appellant Steven Bloome was arrested at the home of his ex-brother-in-law Michael Rodriguez when the police were called by Mr. Rodriguez's then-girlfriend Carmen Diaz about a home invasion by a man with a "bat." Ms. Diaz made additional calls to 911 during which she said Mr. Bloome had a knife. The police arrived to find Mr. Bloome holding Mr. Rodriguez in a headlock with one arm and holding a watch box with his other hand; he did not have a knife, although a kitchen knife was found on a bed in a room nearby. Because Count 1 of the indictment charging burglary in the first degree under PL 140.30(1) alleged that Mr. Bloome had possessed a "dangerous weapon, to wit: a knife," during the course of effectuating entry" into the dwelling, defense counsel interposed a defense that Mr. Bloome was not armed at the time he entered. At the close of the case, over vigorous objection, the court permitted the prosecutor to amend the first count of the indictment charging first-degree burglary to permit conviction if Mr. Bloome was armed either at the time he entered, or while he was inside the home. The court also permitted relabeling of the first count from P.L. § 140.30-1 to P.L. § 140.30-3, and the substitution of "dangerous instrument" for "dangerous weapon,"—something nowhere defined in the Penal Law— and to add that appellant "used or threatened to the immediate use" of the newly-added dangerous instrument, an allegation also not contained in the original count.

At trial, Mr. Rodriguez and Ms. Diaz both described Mr. Bloome's demands for the phones Ms. Diaz used to call the police in terms consistent with Mr. Bloome wanting to prevent such calls to the police. Neither offered testimony that Mr. Bloome actually ever took possession of the phones, which were either handed to Mr. Rodriguez from the bedroom to which Ms. Diaz had gone, or were tossed out of that bedroom. Nor was there evidence as to what happened to the phones; neither phone was in Mr. Bloome's possession when he was arrested at the scene. Nevertheless, Mr. Bloome was convicted of first-degree robbery for forcibly stealing a cell phone from Ms. Diaz, and of burglary as that count was amended.

Mr. Bloome might have been able to offer important testimony concerning the allegations in general and the possession of a knife in particular. The court's Sandoval ruling, however, which permitted the prosecutor to question him about four sets of very prejudicial facts underlying two prior convictions that were very similar to the ones charged, three sets of which were from 12 years earlier, effectively prevented Mr. Bloome from taking the stand. He was ultimately convicted of three counts of first-degree burglary and robbery, and related crimes. Even though all the counts of which Mr. Bloome was convicted arose from one transaction during which neither Mr. Rodriguez or Ms. Diaz were harmed, the court imposed consecutive terms of imprisonment for an aggregate sentence of 42 years to life in prison.

The Indictment

Mr. Bloome was indicted on one count of burglary in the first degree, P.L. § 140.30(1), charging that he "knowingly entered and remained unlawfully in a dwelling, . . . with the intent to commit a crime therein, and in the course of effectuating entry into said dwelling, was armed with a dangerous weapon, to wit, a knife" (Indictment 307/2015; emphasis supplied).[1] He was also indicted on two counts of second degree burglary. The first, under P.L. § 140.25(1)(c), charged that he "knowingly entered and remained unlawfully in a dwelling, . . . with the intent to commit a crime therein, and in the course of effectuating entry into said dwelling, was armed with a dangerous instrument, to wit, a knife" (Indictment 307/2015, Count Two). The other second-degree burglary count charged him under P.L. § 140.25(2) with knowingly entering and remaining unlawfully in a dwelling with the intent to commit a crime therein (Indictment 307/2015, Count Three).

Mr. Bloome was also indicted on two counts of robbery in the first degree, two counts of robbery in the third degree, criminal mischief in the fourth degree and criminal possession of a weapon in the third degree (Indictment 307/2015, Counts Four through Nine, respectively).

The Sandoval Hearing

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[1] P.L. § 140.30 reads, in pertinent part, "knowingly unlawfully enters or remains in a dwelling with the intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom . . . [i]s armed with a deadly weapon [subsection 1]; or . . . uses or threatens the immediate use of a dangerous instrument" [subsection 3] (emphasis supplied).

The court ruled that the People could not impeach Mr. Bloome with his 2000 conviction of attempted second-degree robbery because it was too remote in time (SH. 14; SD. 7).[2] The court also found Mr. Bloome's 2009 misdemeanor convictions for marijuana and menacing to be too prejudicial to be used for impeachment purposes (SD. 9).

The court permitted the People to use Mr. Bloome's 2004 conviction by plea of guilty of second-degree assault, and the underlying facts of that count , which were that he stabbed someone in the chest (SH. 16). The court precluded inquiry concerning the related violation of probation or resentence, and that the offense was a violent felony (SD. 7, 8). The court also, however, permitted the prosecutor to confront Mr. Bloome with the underlying facts of the other two counts of that indictment, to which he did not plead guilty, with the proviso that if he denied those facts the prosecutor would have no conviction with which to impeach him (SD 8, 11). According to the prosecutor, the underlying facts of the other offenses were as follows: "acting together and in concert with others, displayed a firearm and forcibly stole money from the complaining witness" and "the defendant struck the complaining witness in the face, put a pillow case over his

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[2] Unprefixed numbers in parentheses refer to pages of the trial transcript beginning on November 21, 2016; numbers preceded by "SH.," "SD.," and "S." refer to pages of the November 10, 2016 Sandoval hearing, the court's November 14, 2016 Sandoval decision, and the February 8, 2017 sentencing transcripts, respectively.

head while the other defendants punched and kicked the victim, removed money, a phone and jewelry" (SH. 16).

The court also permitted the People to use his 2012 conviction of third-degree robbery and the underlying facts elicited in his plea allocution, without mentioning that Mr. Bloome was on parole when that crime was committed (SD. 9, 10, 11). The underlying facts of the plea allocution were that he "forcibly [stole] property consisting of items including, but not limited to U.S. currency purses and a cellular phone" (Richmond County Ind. No. 64/12, plea minutes of August 22, 2012, at 11).[3]

The court made **its** ruling over defense counsel's arguments that the 2004 conviction was too remote to be probative and that its prejudice outweighed any probative value and that such inquiry would deprive Mr. Bloome of his constitutional right to a fair trial (SH. 22, 23).[4] The court acknowledged the similarity of the 2012 conviction to the facts of this case, but determined that this was not a bar to the People's use of it to impeach Mr. Bloome's credibility (SD. 12-13). The court did not discuss balancing the probative value of the prior convictions and underlying facts against their prejudice to Mr. Bloome.

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[3] The Ind. No. 64/12 plea minutes are being submitted as an exhibit on appeal.

[4] With respect to the 2012 conviction, counsel argued that the extended alleged facts underlying that conviction, including terrorizing and beating a mother in front of her child and firing at law enforcement officers, were sufficiently rebutted before the plea court that it permitted a plea to 2 to 4 years in prison (SH. 20-21, 24).

The Trial

The People's Case

Michael Rodriguez, who had been married to Mr. Bloome's sister, had known him for 13 or 14 years (50, 54). At the time of trial, Mr. Rodriguez was married to Carmen Diaz, who was his girlfriend at the time of the incident (Diaz 197-98). Beginning on October 31, 2015, Mr. Bloome engaged Mr. Rodriguez in text message conversations that continued over the course of several days (55-59). During those conversations, Mr. Bloome indicated that he needed to speak with Mr. Rodriguez in person, saying, "[n]ot negative, just a brotherly talk, need your input on something" (58). After Mr. Bloome was initially critical of Mr. Rodriquez failing to make himself available, the two texted back and forth without incident (58-59). During those exchanges, which ended on November 6, 2015, it became clear that Mr. Bloome wanted Mr. Rodriguez's help getting a job (59).

About a week later, Mr. Rodriguez encountered Mr. Bloome on the street and told him he had not been able to find Mr. Bloome a job (61). At about 8:50 p.m. on November 19, 2015, Mr. Rodriguez was helping Mr. Bloome's father get his car started (62, 127, 230-31). When Mr. Rodriguez arrived home at 10:30 p.m. or so, his wife, Carmen, told him that Mr. Bloome had come to the house looking for him, but had not said what he wanted (Rodriguez 63. 127; Diaz 199, 231).

At about 4:00 a.m. on November 20, 2015, Mr. Rodriguez was awakened by his phone but, seeing that it was Mr. Bloome's number, he let it go to voicemail (63-64, 128). Then the doorbell started ringing; seeing on his security camera that Mr. Bloome was at the door, he went downstairs to answer the door (64, 130). Ms. Diaz came downstairs as well, and Mr. Rodriquez invited Mr. Bloome inside (65, 67, 130, 140). Ms. Diaz testified that they were not in the kitchen even though, in the grand jury, she had testified that "he lets him in the kitchen" (234).

According to Mr. Rodriguez, when Mr. Bloome told him that he needed a favor, Mr. Rodriguez told him that if it was about money he could not help because he needed to pay rent (66). Mr. Bloome then became upset and said "this can go one or two ways" (Rodriguez 66; Diaz 202). At that point, Ms. Diaz wanted to call the police but Mr. Rodriguez told her it wouldn't be necessary because Mr. Bloome would be leaving, and told Mr. Bloome to do so (Rodriguez 66).

Mr. Rodriguez claimed that as he was walking to the door to let him out, Mr. Bloome "inched down on the right leg and pulled out a kitchen steak knife (66, 68, 133). Ms. Diaz, however said that Mr. Rodriquez told Mr. Bloome "you don't push me and disrespect me in my home" and "was trying to push him against the exit doorway" telling him "you got to go" (201). It was then, according to Ms. Diaz, that Mr. Bloome pulled a knife from his sock (201-02). Mr. Diaz claimed she saw Mr. Bloome lift up his jeans

and pull the knife from his sock even though she told the grand jury that "he takes it out from his sock, I am guessing" (229, 238).

Mr. Rodriguez told Ms. Diaz to lock herself in her room upstairs(Rodriguez 67; Diaz 202), and told Mr. Bloome "come upstairs, I got my rent money, you can take that and just go" (67). Ms. Diaz went into her daughter's bedroom and called 911 (Diaz 203). Mr. Rodriguez, followed by Mr. Bloome still holding the knife, walked up the stairs to Mr. Rodriguez's bedroom (68-69, 136). Mr. Rodriguez retrieved about $1,500 from his wallet, gave it to Mr. Bloome, and told him to leave. (69-70, 136-37). Mr. Bloome, however, told him it was not enough and demanded more (70, 137). After telling him he had no more money, Mr. Rodriguez gave Mr. Bloome three gold chains (70, 138). Mr. Bloom told him that he was not leaving because he believed that Mr. Rodriguez had more money, so Mr. Rodriguez gave him some watches as well (71). Mr. Bloome put the knife on the bed and began counting the money (71).

According to Mr. Rodriguez, Mr. Bloome then told Mr. Rodriguez that he knew Ms. Diaz had a cell phone and went to the room, kicked the door, and demanded the phone, saying "I have people in the can do things to your wife and daughter you don't want to see" (72). The two men returned to Mr. Rodriguez's room, but Mr. Bloome went to their daughter's door, holding the knife, and began kicking it again demanding the phone (72). Ms. Diaz opened the door just enough to throw it out of the room (73). Mr.

Rodriguez did not testify that Ms. Diaz relinquished both her own and her daughter's phones.

Ms. Diaz, however, testified that Mr. Bloome came to the door, pounding on it and telling Mr. Rodriguez to tell his wife to give up her phone (205). Mr. Rodrguez "begged" her to give Mr. Bloome the phone (205). When she opened the door Mr. Rodriguez was in front of Mr. Bloome and she gave Mr. Rodriguez her phone (205). Ms. Diaz then used her daughter's phone to call 911 two more times to warn the police that there might be people in the car outside (207). [5] Ms. Diaz also claimed that when Mr. Bloome returned and demanded her daughter's phone, she threw it out the door to him (209). At that point, Ms. Diaz asked Mr. Bloome if her daughter could use the bathroom but Mr. Bloome "looked at [her] like she was crazy for even asking that question," and told her, "'Fuck you. No.' Just started screaming" (208). Mr. Rodriquez did not testify about any such request.

Mr. Rodriguez returned to his room and tried to close the door, but Mr. Bloome pushed against it, kicking it down (74). Just then, the doorbell started ringing and Police Officers Genaro Barriero and Gareth Exchavarria, accompanied by their sergeant [ ] at the front door and announced through the now-open door "police" (Rodriguez 74; Barriero 149; Eschavarria 177). According to Mr. Rodriguez, Mr. Bloome "froze,"

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[5] Nicole Gopel, who was in a car parked outside the Rodriguez home when the police arrived, told them she had dropped someone off and was waiting for that person to return (Police Officer Genaro Barreiro 149).

saying, "You called the fucking cops," and both Ms. Diaz and her daughter ran down the steps, telling the police "he's going to kill him, he is going to kill my husband" (Barreiro 150). Ms. Diaz testified that she went downstairs to meet the police but said nothing about her daughter doing so as well (210).

As Mr. Rodriguez tried to walk to his son's bedroom, Mr. Bloome grabbed him by the head (Rodriguez 74); he had one hand around Mr. Rodriquez's head and the other holding the watch box; he did not have a knife (Barreiro 166). According to Officer Barreiro, Mr. Bloome dropped the watch box he was holding and, keeping Mr. Rodriguez in a head-lock, pulled him into one of the bedrooms; one of the men shouted "he is going to kill me" (Barreiro 150; Eschavarria 177)). The officers followed the two men into the room, separated them, and handcuffed each of them (Barreiro 153; Eschavarria 182). Across the hall, in Mr. Rodriguez's bedroom, Officer Barreiro found a knife on the bed (Barreira 153, 154). Mr. Rodriguez, however, said that when the police arrived at the top of the steps, Mr. Bloome let go of him and he was able to run into his son's room. He tried to close the door as Mr. Bloome, holding the knife, tried to get in (74-75). Mr. Rodriguez claimed that Mr. Bloome then ran toward Mr. Rodriguez's bedroom and that the police scuffled with him in the hallway while Mr. Rodriguez remained in his son's bedroom with his hands behind his back (75).

With Mr. Bloome in police custody, Officer Barreiro patted Mr. Bloome down and recovered $1500 from his pants pocket (Barreiro 154-55). A more thorough search was

conducted at the precinct, during which jewelry was recovered from Mr. Bloome's jacket pocket (Eschavarria 178). Having recovered the knife, Officer Barreiro took no precautions to preserve it's integrity as evidence for fingerprints or DNA (170).

On November 21, 2015, Mr. Rodriguez received a phone call from a number he did not recognize (76, 143). It was Mr. Bloome, saying "you got to get me out of here (143-44). Mr. Rodriguez responded with disbelief and hung up the phone (76).

The People introduced into evidence, without objection, recordings of telephone conversations Mr. Bloome had while incarcerated (196-87; P. Exhibit 11). During those calls, Mr. Bloome said that he went to Mr. Rodriguez's home "to scare him" because he "needed a job" (P. Exh. 11, 36d9a . . .; see 326); and that he "went there to scare him," and "pressed him for money" but "did not put my hands on him"(P. Exh. 11, 36c81 . . .; see 326, 335).

The 911 Calls

The 911 calls placed by Ms. Diaz were introduced into evidence as People's Exhibit 15 (see Diaz 213). During the first call, Ms. Diaz gave her address and told the 911 operator that the guy's gonna kill us" and "he came in my house with a bat.". When the operator asked her to confirm that the weapon was a bat, Ms. Diaz said "yes." She also said that her "boyfriend's ex-brother-in-law is gonna kill us" and that he came there asking for money. Later, when the operator again mentioned the bat, Ms. Diaz said nothing to correct or change that. She said nothing about a knife. During the second

call, Ms. Diaz gave her address again. She can be heard saying "can you bring the knife downstairs and give me the phone." During the third call, she gave her address again and told the operator that there were "a whole bunch of guys," [i]t's like six or seven guys" hiding up the block in a gray car and that the guy was going to kill her boyfriend (see Diaz 240). She also said that if the "guy" sees police he will kill her boyfriend. She told the operator that she had given up her cell phone and was using her daughter's phone. Ms. Diaz said she had seen the guy "once or twice" but did not know his name. She did not say anything about a knife, and when the operator asked if an ambulance should be sent she said, "No, he's debating with him and I'm locked in the other room" (see Diaz 242).

During her testimony, Ms. Diaz claimed that she did not recall telling the 911 operator that the intruder had a bat and that she "was just nervous. Just words coming out of my mouth at this moment" (214), and that there was no bat (239). Although she told 911 that she did not know the intruder's name, she testified that Mr. Bloome had introduced himself to her that night and this is why she testified that the intruder was "Steven" (225, 243). She admitted that she made up the number "six or seven" guys when speaking with 911 (241).

The Amendment of the Indictment

After both sides rested, the court convened a charge conference during which the prosecutor, for the first time, contended that the indictment included a "typo" in that the the first count "says burglary in the first degree, 140.30 sub 1" when "it should read

140.30, sub 3" (253). Defense counsel immediately pointed out, "I've been defending the wrong charge all this time?" (253). The prosecutor argued that the change would not alter the theory of the prosecution because the body of the charge states "armed with a knife," and the correct subsection was voted by the grand jury (253). The prosecutor identified the difference in the subsections as the use of "explosives or a deadly weapon" (subdivision 1), and "dangerous instrument" (subdivision 3) (254). As defense counsel pointed out, however, the indictment contained neither phrase. It states "effecting entry into said dwelling, was armed with a dangerous weapon," a term not defined anywhere in the Penal Law (254; Indictment Count One; emphasis supplied). The court granted the motion to amend the indictment to read 140.30 subdivision 3 "uses or threatens the immediate use of a dangerous instrument" (255).

Defense counsel then objected to a further aspect of the prosecution's proposed amendment to Count One. As counsel explained, the indictment stated that the weapon-related aggravating factor occurred "in the course of effecting entry into said dwelling," whereas the language of the statute also allows it to take place "at some point while in the residence (256).[6] Thus, as originally charged, the count would have precluded conviction if Mr. Bloome was not armed when he entered even if he grabbed

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[6] In relevant part, burglary in both the first and second degrees permit conviction when "in in the course of effecting entry, or while in the dwelling or in immediate flight therefrom," the person is armed with a deadly weapon or "uses or threatens the immediate use of a dangerous instrument". P.L. §§140.30 (1) & (3), 140.25 (1) & (3).

a knife once inside, while the latter would permit conviction under those circumstances (256).

Purporting to rely on what was presented to the grand jury, the prosecutor argued that adding language allowing the weapon possession to have originated inside the home after entry would not constitute a change of theory (257). Defense counsel, pointing out that he was "not privy to what's been charged in the grand jury" argued that he had relied on the written indictment to present a defense that Mr. Bloome was not armed when he entered the Rodriguez home (257-58). Specifically counsel contended that "[a]ll my questioning and cross-examination pertained to whether or not he had the knife when he entered the dwelling" (258).[7] A second prosecutor then argued that Count 2, charging burglary in the second degree under § 140.25 provided the requisite notice as to first-degree burglary (258). However, both counts stated that the defendant entered or remained unlawfully in the dwelling "with the intent to commit a crime therein, and in the course of effecting entry into said dwelling" was armed with or used a weapon of some kind, omitting the [] language, "or while in the dwelling or in immediate flight

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[7] Indeed, having based his defense on the allegation that Mr. Bloome was not armed when he entered the home, during summation, defense counsel noted that the jury had to determine whether Mr. Bloome was armed with a knife in his sock when he went to the Rodriguez home (280), highlighted Mr. Rodriguez's denial that the knife came from his own kitchen (289), pointed out to the jury, "wait, what is in the kitchen? Knives" (289), argued that Mr. Bloome pulling a knife from his sock was implausible (290-92), noted that the police did not initially see the knife in plain sight on the bed and later failed to safeguard it to check it for fingerprints (292, 301-02), and argued that Ms. Diaz's first statement to 911 that the intruder had a bat proved that she lied about Mr. Bloome having a knife (311-12)

therefrom" (Indictment; emphasis supplied). Counsel summarized his argument as follows:

> My argument is that at the time the defendant entered the residence, he had to be armed with a knife. If the jury feels at the time he entered he was not armed, they cannot convict under this count (264).

The court also rejected this aspect of defense counsel's objection (cite).

The Court's Final Instructions to the Jury

The court correctly defined "burglary" as being "complete when a person knowingly remains in a dwelling unlawfully and does so with intent to commit a crime in the dwelling, and "dangerous instrument" as something "which under the circumstances in which it is used, attempted to be used or threatened to be used, it is readily capable of causing death or other serious physical injury" (363). Turning, then, to the elements of burglary in the first and second degrees, Counts 1 and 2 of the indictment, the court instructed the jury, in relevant part, as follows:

> So in order for you to find the defendant guilty of . . . burglary in the first degree, the People are required to prove from all the evidence in the case and beyond a reasonable doubt . . . That in effecting entry or while in the dwelling or in the immediate flight therefrom, the defendant possessed a dangerous instrument or used or threatened the immediate use of that dangerous instrument (364).

* * *

> So in order for you to find the defendant guilty of [burglary in the second degree] the People are required to prove from all the evidence in the case and beyond a reasonable doubt . . . That in effecting entry or while in the building, the defendant possess[ed] a dangerous instrument and used or threatened the immediate use of that dangerous instrument (366).

The court then instructed the jurors as Counts 4 and 5 of the indictment charging first-degree robbery (forcibly taking currency and jewelry from Mr. Rodruiguez forcibly taking a cell phone from Ms. Diaz, respectively) as follows:

> Under the law a person is guilty of robbery in the first degree when this person forcibly steals property when in the course of the commission of the crime that person uses or threatens the immediate use of a dangerous instrument . . . capable of causing death or other serious physical injury (370; 372-73)

With respect to Count Five of the indictment, charging first-degree robbery of Carmen Diaz by taking her cell phone, the Court instructed the jury that:

> A person steals property and commits larceny when with intent to provide property profit [sic] or appropriate the property to himself, such person wrongfully takes, obtains, withholds property from the owner of the property (369).

The Verdict

During deliberations, the jury asked to hear the 911 call "when [Ms. Diaz] tells Steven to put the knife down for the phone" (388), which were provided (390). It also requested an "explanation on the use or threatening the immediate use of a dangerous instrument" (392). The court instructed the jury as follows:

> The threatened immediate use of a dangerous instrument, it requires no connection between the content of any verbal threats and the instrument behind it. The use or threatened immediate use need not be accompanied by any statements. For example, the brandishing of a weapon or dangerous instrument might be enough. So in essence, it depends on all the circumstances of the case. You may or may not conclude from all the circumstances in the case that the defendant used or threatened immediate use of a dangerous instrument (394-95).

The jury's next note announced that it had reached a verdict: guilty as to Count 1 of burglary in the first degree, guilty as to Count 4 of robbery in the first degree, guilty as to Count 5 of robbery in the first degree, guilty as to Count 8 of criminal mischief in the fourth degree, and guilty as to Court 9 of criminal possession of a weapon in the fourth degree, which was elevated to criminal possession of a weapon in the third degree by operation of law due to Mr. Bloome's criminal history (262-63). See P.L. § 265.02(1).

The Sentence

Mr. Bloom, who was 36 years old at the time of sentencing, had a "good upbringing" free of mental illness, substance abuse, or criminal activity, attended school through the ninth grade and ultimately obtained a GED (PSR at 1,5). He worked as a carpenter before his arrest and completed training in electrical, masonry and computer repairs while incarcerated (PSR at 5). His criminal history included a Y.O. adjudication

for attempted robbery, and two other robbery convictions, menacing with a weapon, and assault (PSR at 5).

At sentencing, Mr. Bloome was arraigned as a persistent violent felony offender based on a January 3, 2001 conviction of attempted robbery in the second degree for which he served at least 2 ½ years, and a February 18, 2004 conviction of assault in the second degree, for which he served about 5 years (S. 3). When Mr. Bloom declined to challenge his prior convictions, the court adjudicated him a persistent violent felony offender (S. 5).

The prosecutor read into the record a statement prepared by the Rodriguez family asking that the maximum sentence by imposed (S. 6). The prosecutor then recounted the testimony at trial and Mr. Bloome's criminal history, including the facts underlying his convictions, in detail, including displaying a firearm during robberies, assaulting someone during a burglary, stabbing someone, striking someone during another burglary, and firing at law enforcement during a car chase (S. 8-11). The prosecutor sought the maximum sentence of 25 years to life in prison (S. 15-16).

Defense counsel noted that the victims of Mr. Bloome's past criminal conduct were drug dealers and that those crimes related to drug activity (17-18). Counsel also argued that, since the court had ruled during a pre-trial hearing that evidence that Mr. Bloome was the person who had fired at officers during the car chase, that allegation should have no bearing on sentence (S. 19). Counsel conceded the serious nature of the

prior crimes but argued that the present conduct did not warrant a sentence above the very long minimum persistent violent felony offender sentence of 20 years to life (19-21).

The court, noting the interests of punishment and the safety of the community, imposed consecutive sentences of 21 years to life on the first-degree robbery counts relating to Mr. Rodriguez and Ms. Diaz, to be served concurrently with a sentence of 21 years to life on the first-degree burglary count and 2 to 4 years on the weapon possession count, as well as six months on the criminal mischief count (S. 22-23, 24).

ARGUMENT

POINT I

BECAUSE THE COMPLAINANTS' TESTIMONY THAT APPELLANT POSSESSED A KNIFE DURING THE ALTERCATION WAS INCONSISTENT AND UNCORROBORATED BY OTHER TESTIMONY AND THE POLICE FAILED TO SECURE THE KNIFE SO THAT DNA OR FINGERPRINT EVIDENCE COULD BE RECOVERED, APPELLANT'S BURGLARY, ROBBERY, AND WEAPON POSSESSION CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE.

Mr. Rodriguez and Ms. Diaz claimed that Mr. Bloome pulled a knife from his sock after he was permitted to enter their home. This claim was severely undermined by several other facts that were elicited at trial. When Ms. Diaz called 911, she informed the operator that a man with "a bat" was threatening her husband. She did not mention that Mr. Bloome had a knife during any of the rest of her testimony about the incident. When

the police arrived they saw that Mr. Bloome was not in possession of a knife and only later discovered a knife, which they took no measures to secure for DNA/fingerprint evidence, in a bedroom where part of the struggle took place. Under these circumstances, the credible evidence at trial failed to establish beyond a reasonable doubt that appellant was armed with a knife during the altercation. Thus, Mr. Bloome's convictions of third-degree criminal possession of a weapon, as well as for first degree burglary and first-degree robbery, which required a finding that Mr. Bloome possessed a dangerous instrument, were against the weight of the credible evidence. See U.S. Const., Amend. XIV; N.Y. Const., Art. 1, § 6; People v. Bleakley, 69 N.Y.2d 490 (1987); See People v. Hall, 18 N.Y.3d 122 (2011); People v. Grant, 17 N.Y.3d 613 (2011).

Appellant was convicted of third-degree criminal possession of a weapon for possessing a knife when he had previously been convicted of a crime; first-degree burglary for remaining unlawfully in the Rodriguez home and "us[ing] or threatening the immediate use of a dangerous instrument," P.L. § 140.30(3) and first-degree robbery for "forcibly steal[ing] property" and in the course of doing so "us[ing] or threaten[ing] the immediate use of a dangerous instrument." P.L. § 160.15(3). A "dangerous instrument" is a device "readily capable of causing death or other serious physical injury." P.L. § 10.00(13). See Hall, 18 N.Y.3d at 128-29 (explaining that the definition of "dangerous instrument" for first-degree robbery is derived from this subsection of the Penal Law). Serious physical injury "creates a substantial risk of death, or [] causes death or serious

and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." P.L. §10.00(10).

The Court of Appeals has unequivocally established that, in order to satisfy the "dangerous instrument" element of first-degree robbery, the People must prove beyond a reasonable doubt that the defendant "actually possessed a dangerous instrument at the time of the crime." People v. Pena, 50 N.Y.2d 400, 407 (1980). See People v. Matthews, 159 A.D.3d 1111, 1115 (3d Dept. 2018) ("item's capacity to cause serious physical injury must be proven, not inferred"). The same is true of first-degree burglary. People v. White, 155 A.D.2d 934 (4th Dept. 1989); People v. Hilton, 147 A.D>2d 427 (1st Dept. 1989).

First, and most obviously, when Ms. Diaz first called 911 she repeatedly told the operator that Mr. Bloome was armed with a bat, not a knife. Her admission that she exaggerating the number of people that who were supposedly in the car outside during one of the 911 calls is consistent with her having made up the knife in order to induce a quicker police response. It is inconceivable that she would not tell the 911 operator that Mr. Bloome had a knife, or mispeak by saying "bat," when she meant "knife," and then agree with the operator's confirmation that Mr. Bloome had a bat, when it was really a knife. The only reasonable explanation is that Ms. Diaz had not seen Mr. Bloome with a knife when she called 911.

That both Ms. Diaz and Mr. Rodriguez claimed, implausibly, that Mr. Bloome pulled the knife from his sock after he entered their home is uncorroborated by any other evidence. When the police arrived, Mr. Bloome was holding Mr. Rodriguez in a headlock with one hand, and clutching a watch-box with the other. He did not have a knife. Nor did Ms. Diaz claim that Mr. Bloome had the knife when he was at the bedroom door demanding her cell phone. And while a knife was found in one of the other bedrooms where the men had been struggling, the police recovered it without safeguarding it for fingerprint or DNA evidence. Therefor, the knife itself does not corroborate that Mr. Bloome ever touched it. see People v. Mitchell, 64 A.D.2d 119 (1st Dept. 1978) (lack of DNA or fingerprints on knife failed to corroborate that the knife found in the defendant's possession was the one used to kill the victim); cf. People v. Victor, Jr., 139 A.D.3d 1102, 1106 (3d Dept. 2016) (witness's testimony alleging that defendant possessed gun was corroborated testimony of other witnesses and by DNA connecting him to the gun).

Indeed, during her second call to the police, she can be heard in the background saying "can you bring the knife downstairs and give me the phone?" It makes no sense that this request was directed at her assailant; rather, particularly since she never reported to 911 that Mr. Bloome was threatening them with a knife, it appears that the request was directed at her husband, who might well have been expected to retrieve a knife from his kitchen to protect himself from the threat of an assault by Mr. Bloome, rather than

brought upstairs by Mr. Bloome as Mr. Rodriguez claimed. The lack of fingerprint or DNA evidence is particularly telling given this 911 call evidence.

Neither Mr. Rodriguez nor Ms. Diaz claimed that Mr. Bloome had the "bat" Ms. Diaz alleged in her first 911 call and there was no evidence Mr. Bloome possessed any item other than a knife that could have been a dangerous instrument. Accordingly, given the internal inconsistencies in the accounts given by the witnesses and the lack of any evidence corroborating their claim that Mr. Bloom ever had a possessed a knife during the altercation, his convictions of burglary, robbery, and weapon possession are against the weight of the evidence and must be reversed.

POINT II

THE INDICTMENT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT ALLEGED THAT APPELLANT WAS ARMED WITH A "DANGEROUS WEAPON," A TERM UNDEFINED IN THE PENAL LAW, AND THEREBY FAILED TO MAKE A MEANINGFUL ACCUSATION AS TO THE ARMED WITH A DEADLY WEAPON POSSESSION ELEMENT OF FIRST-DEGREE BURGLARY, AND (B) WHICH WAS NOT CURED BY INCORPORATION OF THE "DEADLY WEAPON" SUBSECTION OF FIRST-DEGREE BURGLARY BECAUSE THE POSSESSION ALLEGED DID NOT MEET THE PENAL LAW DEFINITION OF "DEADLY WEAPON."

The first count of the indictment filed against Mr. Bloome charged him with first-degree burglary under P.L. § 140.30-1, as being " armed with a dangerous weapon, to wit,

a knife." Since "dangerous weapon" is not a term defined in the Penal Law, and the generic "knife" specified in Court One does not meet the definition of "deadly weapon**,**" the weapon-related element contained in § 140.30 (3). As a result, Mr. Bloome was deprived of due process, his burglary conviction should be reversed, and that count of the indictment dismissed. U.S. Const. amends. V, XIV; N.Y. Const. art. I, § 6; People v. Iannone, 45 N.Y.2d 589 (1978).

A defendant accused of a felony has a fundamental right to be tried only upon an "indictment by a Grand Jury." Iannone, 45 N.Y.2d at 593. The indictment is the "necessary method of providing the defendant with fair notice of the accusations made against him, so that he will be able to prepare a defense." Id. at 594. It is "required to both charge all the legally material elements of the crime of which [the] defendant is accused, and state that [the] defendant in fact committed the acts which comprise those elements." Id.

An indictment is jurisdictionally defective when it does not effectively charge the defendant with the commission of a particular crime—for instance, if it fails to allege that the defendant committed acts constituting every material element of the crime charged. People v. D'Angelo, 98 N.Y.2d 733, 734-35 (2002); see, e.g., People v. Hall, 48 N.Y.2d 927, 927-28 (1979) (indictment that failed to allege mens rea, an "essential element of the crime," was jurisdictionally defective); People v. Colloca, 57 A.D.2d 1039, 1039-40 (4th

Dept. 1977) (indictment that failed to allege "knowledge" element did not "charge the defendant with a crime" and was jurisdictionally defective).

In this case, the indictment accused Mr. Bloome, under P.L. § 140.30-1, of burglary in the first degree by having entered the Rodriguez home unlawfully, with the intent to commit a crime, while"armed with a dangerous weapon, to wit: a knife." Indictment, Count One. However, to violate P.L. § 140.30-1, a defendant has to have been armed with a "deadly weapon," not a "dangerous weapon, a term that is not defined in the Penal Law. It does not matter whether the so-called "dangerous weapon" alleged is a "knife." "Deadly weapon," which is defined in section 10.00-12 of the Penal Law, proscribes being "armed with" certain types of specialty knives, such as a switchblade knife, a pilum ballistic knife, a metal knuckle knife and a dagger. By contrast, P.L. § 140.30-3, another version of burglary in the first degree, includes "dangerous instrument," which as defined in section § 10.00-12 can include all kinds of knives. However, to satisfy § 140.30-3, the defendant had to have "used or threatened to" the dangerous instrument **"**in a way that was readily capable of causing death or serious injury," not merely possessed it.

Since the meaningless "dangerous weapon" does not specify the unlawfulness of possessing an un-described "knife," the indictment failed to allege a necessary element of first-degree burglary and, therefore, Count One ran afoul of the meaningful accusation requirement and was jurisdictionally defective. See People v. Tromp, 164 A.D.3d 1479,

1479-89 (2d Dept. 2018) (failure to allege that possession of gun was not in the home or place of business rendered weapon possession count defective); People v. Newell, 95 A.D.2d 815, 816 (2d Dept. 1983) (same).

The meaningful accusation requirement can be met, notwithstanding a failure to specify every element of the crime, if the indictment incorporates the statute by reference. D'Angelo, 98 N.Y.2d at 735; People v. Cohen, 52 N.Y.2d 584, 586 (1981). Here, the indictment incorporated Penal Law § 140.30-1, which makes it a crime to unlawfully enter or remain in a dwelling while armed with "explosives or a deadly weapon." As mentioned previously, however, the generic "knife" described in Count One was not any of the specific types of knives listed in that subsection such that it could be a "deadly weapon." As a result, the incorporation of Penal Law § 140.30-1 did nothing to cure the absence of a meaningful accusation in that count. Indeed, the use of "dangerous instrument" in Count Two of the indictment charging Mr. Bloome with second-degree burglary highlights the jurisdictional defect present in Count One.

As part of the court's erroneous attempt to salvage the jurisdictionally defective count, it re-labeled it as P.L. 140.30-3. But as just noted, that version of burglary in the first degree requires that defendant "used or threatened to use" the weapon involved, a dangerous instrument" in a way that could have caused death or serious physical injury. There was no mention whatsoever of having "used or threatened to use" in the original defective count. The court apparently recognizing that problem added that language,

something it categorically was not entitled to do. C.P.L. § 200.70(2)(a)(b); Iannone, 45 N.Y.2d 594 (1978)

Defense counsel preserved this claim. But in any case, a claim that an indictment contains a jurisdictionally defective count states a question of law regardless of preservation, People v. Pierce, 14 N.Y.3d 564, 570 n.2 (2010); People v. Chata, 8 A.D.3d 674, 675 (2d Dept. 2004). Accordingly, Mr. Bloome's conviction of first-degree burglary must be reversed and Count One of the indictment dismissed.

POINT III

THE AMENDMENT OF THE INDICTMENT AFTER TRIAL TO SUBSTITUTE A DIFFERENT SUBSECTION OF THE FIRST-DEGREE BURGLARY STATUTE, AND ADD LANGUAGE FROM THE STATUTE THAT DID NOT APPEAR IN THE INDICTMENT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BECAUSE IT MATERIALLY ALTERED THE PEOPLE'S THEORY OF THE PROSECUTION, AND, THEREFORE, HIS CONVICTION UNDER THE AMENDED COUNT SHOULD BE VACATED AND THE COUNT DISMISSED.

At the close of the trial, the prosecutor moved to amend Count One of the indictment charging first-degree burglary by substituting P.L. § 140.30-3, (uses or threatens the immediate use of a dangerous instrument) for P.L. § 140.30-1 (armed with a deadly weapon) and changing the language of the charge to the jury to permit conviction of Mr. Bloome if he was armed with a dangerous instrument while in the

dwelling even though the indictment required that he be armed "in the course of effecting entry into the dwelling." The prosecutor also moved to add the language "used or threatened the immediate use of" a weapon during the burglary even though Count One contained no allegation concerning "use" of a weapon at all. By allowing the prosecution to add that language as part of an amendment purportedly transforming Count One from § 140.30 (1) (armed with a deadly weapon) to 140 (3) (uses or threatens the immediate use of a dangerous instrument), the court violated both due process and CPL. § 200.70(2)(a)(b), which precludes the amendment of an indictment for the purpose of curing improperly drafted counts when the amendment changes the theory of the People's case or prejudices the defense on the merits. U.S. Const., Amend. XIV; N.Y. Const., Art 1 §6; People v. Perez, 83 N.Y.2d 269 (1994). See also People v. Iannone, 45 N.Y.2d 589, 600-601 (1978). For this reason, Mr. Bloome's conviction under the amended count was invalid, must be reversed, and that count of the indictment must be dismissed.

(A)

C.P.L. § 200.70(2), categorically prohibits the amendment of an indictment that changes the "theory" of the prosecution or otherwise prejudices the defendant on the merits. See Perez, 83 N.Y.2d 269 (1994). Here, Count One of the indictment alleged that Mr. Bloome committed first-degree burglary by "knowingly enter[ing] and remain[ing] ujnlawfully in a dwelling . . . with the intent to commit a crime therin, and in the course

of effectuating entry into said dwelling, was armed with a dangerous weapon, to wit: a knife." Count One did not include the additional statutory language permitting conviction if the defendant was armed with a dangerous instrument "in effectuating entry or while in the dwelling or in immediate flight therefrom.." P.L. § 140.30.

Defense counsel pointed out that the additional language would change the theory of the prosecution from Mr. Bloome being armed at the time he entered the dwelling to being armed any time once inside it (256). When the prosecutor argued that the change in language was consistent with the People's presentation to the grand jury, defense counsel explained that he had not been privy to the grand jury proceedings and tailored the defense to the language of the indictment (257-58). Counsel also explained that the defense would be prejudiced by the change because the theory of the defense against the burglary count throughout the trial as he cross-examined the People's witnesses was to establish reasonable doubt that Mr. Bloome was armed "in the course of effecting entry into said dwelling" as was charged in the indictment (258).

The language of the amendment in this case mirrors that of People v. Kaminski, 58 N.Y.2d 886, 887 (1983), in which the trial court amended a count to add language not included in the indictment. There, the indictment alleged in a rape count forcible compulsion "by means of physical force which overcame earnest resistence." The court amended the count to include that forcible compulsion could also have been accomplished by threatening the victim with physical injury or death. Id. The Court of

Appeals reversed and dismissed the count because the additional language changed the theory of the prosecution. Just as the court in Kaminski impermissibly allowed the jury to find forcible compulsion by the use of physical force or by threatening the use of force, the court in this case impermissibly permitted the jury to convict of burglary whether armed at entry or at any time within the dwelling. Since being armed at any time within the dwelling did not appear in the indictment and changed the theory of the prosecution, the amendment was unlawful. See People v. Brown, 221 A.D.2d 353 (2d Dept. 1995)("It was error for the trial court to grant the People's motion to amend the first count of the indictment, charging the defendant with robbery in the first degree, by deleting the words 'displayed what appeared to be [a knife]' and inserting the words 'used or threatened the immediate use of a dangerous instrument to wit [a knife]'"); see also, People v. McLean, 170 A.D.3d 1196, 1198 (2d Dept. 2019) (dismissing count because amendment to change date of crime altered the theory of the prosecution); People v. Covington, 86 A.D.2d 877, 877 (2d Dept. 1982).

The amendment in this case was far from harmless. Unlike in People v. Grega, 72 N.Y.2d 489, 497 (1988), where the amendment to include threat of force to count alleging use of force was harmless because there was no evidence of any threat, here, Ms. Diaz first told 911 that Mr. Bloome entered her home with a bat, not a knife, leaving open the possibility that Mr. Bloome acquired the kitchen knife inside the home after entering. If the jury found that to be true, it could not have convicted Mr. Bloome under

the original first-degree burglary count with required possession of the knife "in the course of effectuating entry." And since counsel specifically argued that the amendment would change the theory of the prosecution, to the detriment of Mr. Bloome's defense that he was not armed when effectuating entry into the Rodriguez home, the claim is fully preserved.

(B)

The addition of the "or while in the dwelling or in the immediate flight therefrom" language was not the only unlawful amendment the court permitted. Count One of the indictment unequivocally alleged that Mr. Bloome had violated subsection one of P.L § 140.30 by entering a dwelling while "armed with a dangerous weapon." That subsection was specifically cited in the count and its language tracked that of § 14030 (1) except for the substitution of "dangerous" for "deadly." See Point I, ante. The Court permitted the amendment of Count One to allege that Mr. Bloome violated a different subsection of the first-degree burglary statute, P.L. § 140 (3), and to add the language "uses or threatens the immediate use of a dangerous instrument."

Although the prosecutor argued that a change from P.L. § 140.30 (1) to § 140.30(3) would simply correct a "typo" (253), the change of subdivision, including the addition of "uses or threatens the immediate use of a dangerous instrument" clearly changed the theory of the prosecution and prejudiced the defense on the merits. The amendment is virtually identical to that which was found invalid in People v. Sollars, 91 A.D.2d 909 (1st

Dept. 1983), where the top two counts of the indictment charged robbery in the first degree under P.L. § 160.15(3), but failed to allege that the defendant "used or threatened the immediate use of" the dangerous instruments involved. The First Department held that an amendment that added crucial statutory language improperly changed the theory of the prosecution in violation of § 270(2)(b), prohibiting amendments to correct the "legal insufficiency of the factual allegations."

Analytically, the amendment found invalid in the Perez case is indistinguishable from the amendment the court permitted here. In Perez, the People asserted that the grand jury voted on one theory, but the indictment mistakenly reflected another. As the prosecution's written motion to amend the indictment explained,

> the People submitted the theory of Assault in the Second Degree under subdivision two before the Grand Jury but submitted paperwork with subdivision one. The evidence presented to the Grand Jury included the fact that the defendant attacked [Monique Revander] with a screwdriver, causing injuries to [her].

In other words, the People's grand jury presentation made out one crime, but they had the foreman sign off on another one mistakenly included in the physical indictment.

To facilitate this change, the trial court inscribed the new subdivision directly on the copy of indictment contained in the Supreme Court file and added the requisite language to the factual portion of the count. Perez made clear that the trial court was powerless to amend the indictment to ameliorate the prosecution's mistake. The same

result obtains here. Assuming that the People presented evidence consistent with P.L. § 140.30 (3) before the grand jury, the fact remains that the voted indictment listed a different crime, P.L. § 140.30 (1), in a count containing language consistent with that listed subdivision. Here, as in Perez the court was without authority to amend the Count to charge a different crime.

Since these claims were fully preserved by defense counsel's arguments in opposition to the amendment of the indictment, Mr. Bloome's conviction of burglary in the first degree must be reversed and Count One of his indictment dismissed.

POINT IV

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF ROBBERY IN THE FIRST DEGREE UNDER COUNT FIVE OF THE INDICTMENT, AND THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE AS TO THAT COUNT, BECAUSE THE PEOPLE FAILED TO ESTABLISH THAT APPELLANT TOOK OR INTENDED TO TAKE THE CELL PHONE**S** OVER WHICH COMPLAINANT DIAZ TEMPORARILY RELINQUISHED CONTROL.

The People failed to prove that Mr. Bloome forcibly stole Carmen Diaz's cell phone, which is a required element of robbery in the first degree. P.L. § 160.15. Although Mr.Bloome demanded that Ms. Diaz relinquish her cell phones, which she did, no evidence established that, rather than simply trying to prevent her from calling the police, Mr. Bloom ever actually took possession of them or intended to permanently

deprive Ms. Diaz of them. And since the cell phones were recovered inside the Rodriguez home near the room from which Ms. Diaz threw them, even if Mr. Bloome ended up with either of the phones momentarily, there was no proof that he intended to keep either of them. Accordingly, the People failed to prove that Mr. Bloome intended to permanently deprive Ms. Diaz of the cell phone allegedly stolen. Thus, the evidence was insufficient to establish that Mr. Bloome "forcibly stole" anything, and it was insufficient to sustain Mr. Bloome's conviction of first-degree robbery as to Ms. Diaz. See U.S. Const. Amends. V, XIV; N.Y. Const. art. 1, § 6; Jackson v. Virginia, 443 U.S. at 313–19. The verdict was also against the weight of the evidence. See C.P.L. § 470.15(5); People v. Cahill, 2 N.Y.3d 14, 57–58 (2003); People v. Bleakley, 69 N.Y.2d 490, 495 (1987).

A. The Evidence Failed to Establish that Mr. Bloome Took Possession of a Cell Phone

To establish the "taking" element of a larceny-related offense, such as robbery in the first degree, a defendant must have "exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights." People v. Jennings, 69 N.Y.2d 103, 118 (1986). Here, the People never established that, with respect to Count Five of the indictment, Mr. Bloome ever exercised dominion and control over either of the cell phones Ms. Diaz was using for any period of time.

According to Mr. Rodriguez, Mr. Bloome twice approached the bedroom to which Ms. Diaz and her daughter had gone, banged on the door, and demanded **her** phone (72). Ms. Diaz opened the door just enough to throw the phone out of the room (73). Mr. Rodriguez did not say Mr. Bloome caught or picked up the phone, and he said nothing about Ms. Diaz relinquishing a second phone. Ms. Diaz testified that when Mr. Bloome first came to the bedroom demanding her phone she gave it to Mr. Rodriguez, who was standing in front of Mr. Bloome (205). When Mr. Bloome returned to the bedroom demanding her daughter's phone, she "opened the door and threw him the phone" (209). She did not say whether Mr. Bloome caught it.

The police arrived after the events surrounding the phones to find Mr. Bloome in possession of a watch box, holding Mr. Rodriguez in a headlock with his other arm. There was no police testimony that Mr. Bloome possessed a cell phone and no such phone was recovered from him during either their pat-down of him at the scene or their more thorough search of him at the precinct. There was no testimony as to what became of either phone after Ms. Diaz relinquished them.

This evidence failed to establish, beyond a reasonable doubt, that Mr. Bloome ever even touched either cell phone, much less intended to steal them. Ms. Diaz's testimony that she "threw the phone to him" simply does not establish Mr. Bloome caught or possessed it, even momentarily. See Harrison v. People, 50 N.Y. 518, 523 (1872); People v. Smith, 176 A.D.2d 185, 186 (1st Dept. 1991) (defendant snatched items from

complainant and possessed them for a period of time before the complainant was able to regain possession); People v. Jones, 265 A.D.2d 159, 159-60 (1st Dept. 1999) (wallet was completely removed from complainant's pocket, but complainant immediately took it back). Neither the officers nor the complainants testified that they saw Mr. Bloome with one of her cell phone in his hand or his possession., refuting any inference that he even momentarily possessed the phone. Rather, the evidence collectively proved only that she relinquished the phones by handing one to her husband and throwing the other from the room, not that Mr. Bloome physically possessed either phone at all or otherwise exercised dominion and control over either of them.

B. The Evidence Failed to Establish that Mr. Bloome Intended to Steal a Cell Phone

Robbery in the first degree is a specific intent offense that requires that "[the] defendant's conscious objective was" to be to "compel [the] victim to deliver up property or to prevent or overcome resistance to the taking or retention thereof." This formulation embeds the elements of larceny, People v. Gordon, 23 N.Y.3d 643, 649-50 (2014). Moreover, "[t]he concepts of 'deprive' and 'appropriate' connote a purpose to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof." People v. Cantoni, 140 A.D.3d 782, 783 (2d Dept. 2016). The statute makes clear that the intent element applies to the property that the defendant steals. P.L. § 155.05(1)

(defining larceny as "with intent to deprive another of property … [a person] wrongfully takes, obtains or withholds such property from an owner thereof.").

The undisputed evidence established that Mr. Bloome was in possession of jewelry and money, not cell phones, when he was arrested. Everything about the testimony concerning the phones indicates that he demanded the phones so they could not be used to call the police. In fact, the first thing Mr. Bloome did when the police arrived was to express incredulity about the family having called the police. When he demanded the phone he threatened to harm the family, a threat **far** more consistent with preventing police intervention than with wanting to steal the phone. Mr. Bloome never asked for the phones in the context of wanting valuables; it was only when he realized that Ms. Diaz and her daughter were in another room in a position to use those phones to call the police that he demanded them.

Likewise, the evidence failed to demonstrate that Mr. Bloome intended to exert permanent or virtually permanent control over either phone, the way he did with the money and jewelry. This Court's decision in Cantoni is instructive here. In that case, the People presented proof that the defendant was trying to steal a car to evade the police 140 A.D.3d at 783. Here, the People similarly contended that Mr. Bloome wanted to steal the cell phones Mr. Bloome demanded from Ms. Diaz. As this Court explained in Cantoni, however, if the People only proved that the defendant wanted to steal the complainant's remote key fob as a means to gain control of his car, the intent to

permanently deprive element would not have been proven. Likewise, here, even if Mr. Bloome intended to gain control over the phones, it did not follow that he meant to permanently deprive Ms. Diaz of them, as opposed to demanding them so they could not be used to call the police. Cantoni, 40 A.D.3d at 783-84 (internal citations and quotations omitted); see also People v. Terranova, 147 A.D.3d 1086, 1087 (2d Dept. 2017) (overturning robbery conviction where the People presented proof that defendant, who was covered in blood, tried to take a vehicle in order to seek medical treatment). Since Mr. Bloome pocketed the things he wanted to take, the absence of either phone in his possession at the time of his arrest demonstrates the lack of evidence the People presented concerning his intent to take them to permanently deprive Ms. Diaz of them.

* * *

In sum, for the reasons stated above, the evidence was insufficient to establish that Mr. Bloome forcibly stole either cell phone such that they met their burden of proving that required element of robbery in the first degree beyond a reasonable doubt. Alternatively, his conviction was against the weight of the evidence. Accordingly, this Court should reverse Mr. Bloome's conviction of first-degree robbery under Count Five of the indictment and dismiss that count.

Although defense counsel failed to preserve the claim that the evidence was insufficient to prove that Mr. Bloome had actually stolen the cell phones by moving to dismiss at the end of the People's case, this Court should reach the claim in the interest

of justice because Mr. Bloome has been convicted of a crime he did not commit. C.P.L. § 470.15(3)(c). Alternatively, trial counsel should be deemed ineffective for failing to raise the issue. See Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

POINT V

IN A CASE IN WHICH APPELLANT WAS CHARGED WITH ROBBERY, THE COURT'S SANDOVAL RULING PERMITTING THE PEOPLE TO CROSS-EXAMINE HIM ABOUT HIS PRIOR ROBBERY AND ASSAULT CONVICTIONS AND THEIR UNDERLYING FACTS INVOLVING USE OF A KNIFE TO CAUSE INJURY, STEALING MONEY, JEWELRY, AND CELL PHONES ON MULTIPLE OCCASIONS, DEPRIVED HIM OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL, HIS RIGHT TO TESTIFY, AND HIS RIGHT TO PRESENT A DEFENSE.

Under the court's Sandoval ruling, if Mr. Bloome testified at trial, the prosecutor could inquire about a twelve-year-old second-degree assault conviction, including the underlying facts of three incidents in which he was alleged to have (1) displayed a firearm and forcibly stole money from the complainant, (2) together with others punched and kicked the complainant and stole money, jewelry, and a cell phone, and (3) stabbed someone in the chest with a knife. The court also permitted the prosecutor to inquire about a more recent third-degree robbery conviction including the underlying facts that he forcibly stole money, purses, and a cell phone from the complainant. Given that Mr. Bloome was on trial for first-degree robbery and related charges, apprising the jury of

both these prior convictions and four sets of similar underlying facts would inevitably have suggested that Mr. Bloome had a propensity to commit violent robberies. There were substantial inconsistencies in the complaining witnesses' testimony trial and testimony calling into question whether Mr. Bloome was armed when he arrived at their home. **It** was therefore imperative that Mr. Bloome testify. But the court's Sandoval ruling essentially barred Mr. Bloome from doing so, depriving him of his due process right to a fair trial, the right to testify, and the right to present a defense. See U.S. Const. amends. V, VI, XIV; N.Y. Const. art. I, § 6.

A defendant who chooses to testify may be cross-examined regarding prior crimes that bear on his credibility. People v. Hayes, 97 N.Y.2d 203, 207 (2002); People v. Sandoval, 34 N.Y.2d 371, 376 (1974). As the courts have long recognized, however, the introduction of such evidence poses the substantial risk that the defendant's presumption of innocence will be ignored "solely because of a jury's natural tendency to conclude, despite limiting instructions, that a defendant who has committed previous crimes is either the kind of person likely to have committed the crime charged, or is deserving of the punishment in any event." People v. Davis, 44 N.Y.2d 269, 274 (1978); see also People v. Walker, 83 N.Y.2d 455, 463 (1994); People v. Mayrant, 43 N.Y.2d 236, 239 (1977).

Thus, before allowing cross-examination about a defendant's criminal record, the trial court must balance the probative worth of such evidence on the issue of credibility

against the risk of prejudice to the defendant. Sandoval, 34 N.Y.2d at 375-76. The factors the court must consider in determining whether the probative value of the conviction outweighs the prejudice to Mr. Bloome include "the degree to which it bears on a defendant's veracity and credibility, and the extent to which any similarity between the prior conviction and the crime charged" may lead the jury to infer that the defendant has a propensity to commit the charged crime. People v. Williams, 56 N.Y.2d 236, 239 (1982).

The first problem with the court's ruling was that it permitted inquiry with respect to Mr. Bloome's 2004 assault conviction into facts of counts as to which there was no allocution or admission of guilt. He pled guilty to second-degree assault for having stabbed someone in the chest, in satisfaction of an indictment with additional counts alleging that in a separate incident he displayed a firearm and forcibly stole money from the complainant, and that in a third incident he punched and kicked the complainant and stole money, jewelry, and a cell phone. He did not admit the allegations regarding the second and third incidents. The court acknowledged as much when it informed the prosecutor that if Mr. Bloome was asked about those allegations and denied them, there would be no conviction with which to impeach him. Because there was no proof that Mr. Bloome even committed the acts underlying the counts involving the second and third incidents, those underlying "facts" could not have been at all probative of either his credibility or his willingness to place his interests above those of society. See People v.

Young, 249 A.D.2d 576, 581 (3d Dept. 1998) (Because a crime involving compulsive violence had no probative value concerning credibility or a deliberate indifference to the interests of society, Sandoval ruling permitting inquiry about that prior crime was error); see also Williams, 56 N.Y.2d at 239 (probative value with respect to the defendant's credibility and veracity must outweigh prejudice).

The second problem with the court's ruling is that even with respect to the underlying facts for which there was proof, the similarity, violence, and remoteness of those facts far outweighed any probative value they may have had. Mr. Bloome was charged with first-degree robbery for allegedly robbing the complainants of money, jewelry, and a cell phone, while armed with a knife. Without any explanation, however, the court allowed the prosecutor to question him about his 2012 third-degree robbery conviction and three sets of underlying facts. In two of them, it was alleged that he forcibly stolen money, purses or jewelry, and cell phones, once displaying a gun. In the third**,** he admitted he stabbed someone in the chest. The court also permitted inquiry into a 2004 second-degree assault conviction, and the underlying facts that he displayed a gun and stole the complainant's money. The four sets of underlying facts in those two convictions were therefore remarkably similar to the charges Mr. Bloome faced.

It is true that cross-examination is not automatically precluded because of the similarity of the crime. People v. Smith, 18 N.Y.3d 588, 593 (2012); Hayes, 97 N.Y.2d at 206. At the same time, however, the court is not free to simply permit such inquiry as

the court in this case believed. Rather, the court was required to balance whether the particular circumstances of Mr. Bloome's case would have impermissibly led the jury to convict because of an assumption of criminal propensity. Williams, 56 N.Y.2d at 239; see Sandoval, 34 N.Y.2d at 377 (noting that "cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial").

Here, the trial court's ruling did not reflect this careful balancing, and did not consider the immense prejudice that would naturally result from the jury learning that Mr. Bloome had been previously convicted multiple **of** similar crimes, involving the use of a gun or a knife, and the theft of virtually the same kinds of property as was charged in this case: money, jewelry, and cell phones.. The court acknowledged the similarity of the prior crimes but said nothing at all about balancing probative value versus prejudice to Mr. Bloome. Nor did it take account of the jury's natural tendency to consider evidence of prior similar conduct as proof of the commission of the charged offense "despite the most clear and forceful limiting instructions to the contrary." Sandoval, 34 N.Y.2d at 377; accord Davis, 44 N.Y.2d at 247. Instead, the court's ruling went far beyond what was necessary for fair impeachment, and would have had a "disproportionate and improper impact on the triers of fact" had Mr. Bloome taken the stand. Young, 249 A.D.2d at 581; see Sandoval, 34 N.Y.2d at 376.

Courts have routinely recognized the prejudice inherent in a ruling that permits inquiry into similar convictions, often finding such rulings to be error. See People v. Dickman, 42 N.Y.2d 294, 297-98 (1977) (reversible error to allow cross-examination on similar prior conviction); People v. Wright, 121 A.D.3d 924, 928 (2d Dept. 2014) (in burglary case, court's Sandoval ruling was "more damaging to the defendant than was appropriate or necessary for the jury's evaluation of his credibility," when it allowed inquiry into underlying facts of prior theft convictions that were similar in nature to charged crime); People v. Church-Ford, 242 A.D.2d 579, 597 (2d Dept..1997) (permitting cross-examination with respect to defendant's prior driving record was "clearly improper" in case arising out of vehicular accident); People v. Fuller, 197 A.D.2d 881, 882 (4th Dept. 1993) (in burglary prosecution, evidence of prior burglary had "minimal probative value" in comparison to prejudice, and permitting cross-examination referring to prior burglary was, therefore, error).

The court should have, at the least, arrived at a so-called "Sandoval compromise," permitting inquiry only into the prior convictions themselves, not the nature of the crimes or their underlying facts. Courts have repeatedly endorsed such a compromise as the proper way to ameliorate undue prejudice. See, e.g., People v. Lindsey, 121 A.D.3d 715, 715-16 (2d Dept. 2014) ("Court's Sandoval compromise precluding the prosecution from eliciting the underlying facts of the defendant's seven conviction, or even the nature of the crimes of which the defendant was convicted, avoided any undue prejudice that

could have resulted from the similarity between the prior conviction and the instant charge of robbery"); People v. Wolfe, 103 A.D.3d 1031, 1036 (3d Dept. 2013) (court properly barred questioning about underlying facts and name of defendant's prior conviction which was similar to charged crime under so-called Sandoval compromise); People v. Jamison, 303 A.D.2d 603, 603 (2d Dept. 2003) (same); People v. Cestalano, 40 A.D.3d 238, 238 (1st Dept. 2007) (same); see also Smith, 18 N.Y.3d at 597 (Pigott, J., concurring) (endorsing use of compromise "in general" (emphasis omitted)).

Moreover, courts have also recognized that an appropriately-crafted Sandoval ruling should prohibit or at least limit inquiry that emphasizes the violent nature of a defendant's prior conviction. See People v. Chochenda, 17 A.D.3d 248, 249 (1st Dept. 2005) (proper exercise of discretion when court "minimized inquiry into the violent aspects" of criminal history); People v. Alvarez, 304 A.D.2d 313, 314 (1st Dept. 2003) (same, when court allowed inquiry into defendant's only conviction for weapon possession but "disallow[ed] inquiry into the underlying facts" and "any mention of the term 'violent' to describe the prior felony conviction"). Indeed, limiting reference to the violent nature of a defendant's criminal history is "an eminently reasonable compromise between suppression of unfairly inflammatory evidence and evidence probative of defendant's credibility. People v. Lipinski, 159 A.D.2d 860, 862 (3d Dept. 1990) (proper to refer to out-of-state conviction of "resisting arrest 'with violence'" only as "conviction of resisting arrest" and to aggravated battery as "a felony conviction").

Here, however, the court made no effort to limit inquiry into the violent nature of the prior convictions. Rather, its ruling allowed the prosecutor to inquire about underlying facts that involved the use of a knife and a gun and resulted in injury to a complainant. Since violence is not specifically probative of credibility, permitting such inquiry could only serve to portray Mr. Bloome as a generally violent person and invite the jury to punish him for this reason alone. See People v. Jones, 108 A.D.2d 824, 826 (2d Dept. 1985) (prejudicial impact of cross-examination on prior assault, "which portrayed defendant as an individual with a violent character, outweighed any legitimate probative value it had for impeaching defendant's credibility."). Under the circumstances, it is no wonder that Mr. Bloome did not testify.

In addition, the prior assault conviction, with its two companion sets of underlying facts, was from almost 12 years before the charged offense. This significantly reduced its probative value with respect to credibility at trial, and the court should have more seriously considered this factor. See People v. Brothers, 95 A.D.3d 1227, 1228-29 (2d Dept. 2012) (trial court should have excluded under Sandoval defendant's ten-year-old robbery conviction because, inter alia, "probative value of impeaching the defendant's credibility by questioning him about th[at conviction] was outweighed by the danger of undue prejudice");People v. Davis, 44 N.Y.2d 269, 276 (1978) (court abused its discretion when it failed to consider "effect of a factor such as the age of each of the older convictions" which "might be found to have diminished in probative value with the

passage of time"); see generally Sandoval, 34 N.Y.2d at 376-77 ("Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity, or honest at the time of trial").

Finally, and perhaps most critically, the court abused its discretion by failing to adequately take into account "whether the validity of the fact finding process would be affected if the court's ruling had the effect of discouraging defendant from taking the stand.." People v. Briggs, 166 A.D.2d 210, 210-11 (1st Dept. 1990); People v. Yost, 50 A.D.2d 577, 578 (2d Dept. 1975) ("an important consideration may be the effect on the validity of the fact-finding process if the defendant does not testify out of fear of the impact of the impeachment testimony for reasons other than its direct effect on his credibility"). Mr. Rodriguez and Ms. Diaz both testified that Mr. Bloome was armed with a knife when he arrived at their home but when Ms. Diaz called 911 she told them repeatedly that he had a "bat." This inexplicable statement, together with Ms. Diaz's flip-flop between grand jury and trial as to whether Mr. Bloome and Mr. Rodriguez had been in the kitchen, where a steak knife might be found, cried out for Mr. Bloome's testimony. The court's to preclude inquiry into such similar prior offenses, or at least arrive at a Sandoval compromise, which kept Mr. Bloome off the stand and thus prevented assertion of the defense case, thereby undermined the validity of the truth-seeking function of trial.

This error was not harmless. The court's ruling prevented Mr. Bloome from testifying, and, consequently, the jury did not have an opportunity to hear the defense version of events. See People v. Grant, 7 N.Y.3d 421, 425 (2006) (harmlessness of erroneous Sandoval ruling turns on whether defendant's decision not to testify deprived jury of "any critical information"); People v. Hall, 155 A.D.2d 344, 346 (1st Dept. 1989) (erroneous Sandoval ruling was not harmless since "defendant contends that the pretrial ruling resulted in his decision not to testify"); People v. Smith, 60 A.D.2d 963, 964 (4th Dept. 1978) (same). And there was a defense version: that Mr. Bloome came, unarmed, to the Rodriguez residence to inquire about getting a job and ask for money, that Mr. Bloome and Mr. Rodriguez went into the kitchen to talk where things got heated and one of them, possibly Mr. Rodriguez, went for a steak knife, which ended up in a bedroom upstairs. This would account for Ms. Diaz's failure to mention a knife in her call to 911.

Thus, and particularly because Mr. Bloome did not contest identity, it was vital that Mr. Bloome be permitted to offer his version of events. See Williams, 56 N.Y.2d at 241 (in one-eyewitness case where crucial issue was whether defendant robbed the complainant or merely "conned her," Sandoval ruling that prevented defendant from providing "critical information" was not harmless); Davis, 44 N.Y.2d at 432 (when defense was "frame-up," "its chance of success as a practical matter was reduced to naught by [the defendants] failure to testify"). Therefore, the court's ruling, which

infringed upon Mr. Bloome's constitutional right to present a defense, was not harmless beyond a reasonable doubt. People v. Crimmins, 36 N.Y.2d 230, 237 (1979).

This issue, at least with respect to the bulk of the error — the ruling as to the 2004 conviction and the three sets of extremely similar underlying facts,—was amply preserved by counsel's argument at the Sandoval hearing that the conviction was too remote to be probative and that its prejudice outweighed any probative value it would have, in violation of Mr. Bloome's constitutional right to a fair trial (SH. 22, 23-24). To the extent that counsel did not specifically extend that argument to the 2012 conviction, this Court should reach the claim as to that conviction in the interest of justice.

Accordingly, this Court should reverse Mr. Bloome's conviction and order a new trial.

POINT VI

BECAUSE NO ONE WAS HURT, THE SENTENCE APPELLANT RECEIVED, AN AGGREGATE OF 42 YEARS TO LIFE IN PRISON, WAS EXCESSIVE.

The lowest sentence Mr. Bloome could have received as a persistent violent felony offender upon his conviction of robbery in the first degree and burglary in the first degree was 20 years to life in prison. P.L. §§ 160.15; 70.08. Given that no one was injured and that Mr. Bloome had a GED and a history of gainful employment, the sentence he received, 42 years to life in prison, was excessive.

This Court has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range. C.P.L. § 470.15(6)(b); People v. Delgado, 80 N.Y.2d 780 (1992); People v. Thompson, 60 N.Y.2d 513, 519 (1983). This power may be exercised "without deference to the sentencing court," id., and does not require a finding that the lower court abused its discretion. People v. Suitte, 90 A.D.2d 80, 85-86 (2d Dept. 1982). In reviewing the sentence, the appellate court should take a "second look at the sentence in light of the societal aims which such sanctions should achieve." People v. Notey, 72 A.D.2d 279, 284 (2d Dept. 1980) (citation and internal quotation marks omitted). This Court should exercise its power in this case and impose the minimum punishment in keeping with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. See People v. Mauceri, 118 A.D.2d 735 (2d Dept. 1986); Notey, 72 A.D.2d at 282-83.

While the crime of which Mr. Bloome was convicted, which involved allegations that he brandished a knife while in the Rodriguez home demanding money ,was serious, his conduct constituted only the minimum elements of first-degree robbery. Although Ms. Diaz said she was afraid Mr. Bloome would kill her husband, he never threatened to do so and he admitted in recorded telephone conversations that he meant to scare Mr. Rodriguez into giving him money. He never actually came close to using the knife; when the police arrived he had Mr. Rodriguez in a headlock, no knife in sight. The sentence

he received as a 36-year-old man, was essentially life in prison without the possibility of parole, for which he would not be eligible until he is 78 years old.

Not content with a sentence of life in prison as a persistent felony offender, the court imposed consecutive sentences on the robbery counts, doubling a 21 years to life sentence to 42 years to life even though the two counts were essentially part of a single episode. Since different complainants were involved, consecutive sentencing was not illegal, but it was extreme and unnecessary under the circumstances.

While Mr. Bloome's status as a persistent felony offender made him ineligible for a sentence befitting that crime; the minimum sentence as a persistent felony offender is far longer than would otherwise be appropriate as punishment commensurate with his conduct. As a result, his sentence should have conformed to the statutory minimum of 20 years to life in prison, with all counts to be served concurrently. See People v. Morin, 192 A.D.2d 791, 794 (3d Dep't 1993) (recognizing that charging a defendant with the maximum sentence for every count of conviction was "an abuse of discretion" partly because "the circumstances of the crime, which although deplorable, were not egregiously heinous").

In light of the nature of Mr. Bloome's actual conduct in this case — he did not hurt anyone --- his sentence should be reduced to the minimum possible term of 20 years to life in prison, which will prevent his being released to parole until he is approximately 60 years old.

CONCLUSION

FOR THE REASONS STATED IN POINT I, APPELLANT'S CONVICTIONS OF FIRST-DEGREE BURGLARY, FIRST-DEGREE ROBBERY, AND WEAPON POSSESSION MUST BE REVERSED AND THOSE COUNTS DISMISSED; FOR THE REASONS STATED IN POINTS II AND III, APPELLANT'S CONVICTION OF FIRST-DEGREE BURGLARY MUST BE REVERSED AND THAT COUNT DISMISSED; FOR THE REASONS STATED IN POINT IV, APPELLANT'S CONVICTION OF FIRST-DEGREE ROBBERY AS TO CARMEN DIAZ SHOULD BE REVERSED AND THAT COUNT DISMISSED; FOR THE REASONS STATED IN POINT V, APPELLANT'S CONVICTION ON ALL COUNTS SHOULD BE REVERSED AND A NEW TRIAL ORDERED; AND FOR THE REASONS STATED IN POINT VI, APPELLANT'S SENTENCE SHOULD BE REDUCED IN THE INTEREST OF JUSTICE.

Respectfully submitted,

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