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PRELIMINARY STATEMENT

Willie G. Roots, charged by Monroe County Indictment 2015-1346, appeals from a judgment of conviction, entered upon his conviction after a guilty plea, of one count burglary in the first degree in satisfaction of the indictment (P.L. § 140.30[2[]). The court imposed a sentence of 14 years in prison with 5 years of post-release supervision (Argento, J.).

As of the date of this filing, the Department of Corrections and Community Supervision website shows that Mr. Roots is in custody on this conviction.[1] Mr. Roots's codefendant, Tony Roots, pleaded guilty to one count of robbery in the second degree in satisfaction of the indictment and was sentenced to 7 years in prison with 5 years of post release supervision. This appeal is by Willie G. Roots, only.

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[1] http://nysdoccslookup.doccs.ny.gov/GCA00P00/WIQ1/WINQ000 (last visited May 11, 2022)

QUESTIONS PRESENTED

1. Did appellant validly waive his right to appeal?

Court below: The court did not explain the appellate rights appellant was being asked to waive, did not adequately differentiate the waiver of those rights from the rights forfeited by guilty plea, and both the court and the written waiver gave an overbroad description of the scope of the waiver.

2. Was appellant's guilty plea coerced by the court when it demanded an immediate plea decision even though defense counsel had not provided him with information about the case that he had requested?

Court below: Without inquiring about appellant's complaint, the court forced an immediate plea decision and appellant pleaded guilty.

3. Did defense counsel fail to provide meaningful representation when he did not request a *Dunaway* hearing challenging his seizure and the evidence obtained as a result, and did not

challenge two unnecessary and suggestive showup identifications at the *Wade* hearing?

Court below: The court denied the defense suppression motion in its entirety.

STATEMENT OF FACTS

The *Wade/Huntley* Hearing

Defense counsel served a draft omnibus motion on the Monroe County District Attorney long after the statutory 45-day deadline for the filing of such motion had passed but, upon information and belief, that motion was never filed with the court (*see* H2 at 5)[2]. The prosecutor consented to a *Wade/Huntley* hearing, despite the lateness of the omnibus motion, because no factual allegations need be made by the defense. However, although counsel requested a probable cause hearing in the draft omnibus motion, the prosecutor opposed a probable cause hearing because of the lateness of the motion (H1 5-6). Defense counsel did not argue that such a hearing should nevertheless be held (H1 7-8).

At the hearing, Police Officer LIZA DANN testified that, at 6:50 a.m. on December 18, 2015, she responded to 50 Saratoga Avenue where a burglary had occurred (H2 17). One of the victims of the burglary

[2] Numbers in parentheses preceded by "H1" and "H2," refer to pages of the *Wade* portion of the suppression hearing transcript beginning on April 22, 2016, and the *Huntley* portion of that hearing, which was continued on July 6, 2018. Numbers preceded by "P.," and "S.," refer to pages of the plea and sentence transcripts.

described the men who broke in as being Black men in their early twenties one of whom wore a hoodie with an emblem on it (H2 18). Officer Dann could remember no other details such as height, weight or facial hair (H2 22-23). The officer also responded to a report by an unnamed retired police officer that there were two "suspicious" men in a store at 255 Jay Street (H2 8). According to the retired officer's report, one was a Black male, early twenties, wearing a teddy bear sweatshirt, and the other was a Black male, early twenties. He added that the one wearing a teddy bear sweatshirt might have a gun (H2 9, 22, 28).

At between 7:30 and 7:45 a.m., Officer Dann, an Officer Yazback, and Police Officer MARK McDONALD went into a corner store located at 255 Jay Street. Seeing Mr. Roots and Tony Roots inside, the officers demanded that they put their hands up; eventually they did so (McDonald: H1 13, 38; Dann: H2 10). Willie Roots was wearing a gray sweatshirt with a yellow teddy bear on it (McDonald: H1 39-40; Dann: H2 24). Officer McDonald turned his attention to handcuffing Tony Roots (H1 39), while Officer Dann grabbed Mr. Roots's hands in an attempt to handcuff him (H2 25). Officer Dann had Mr. Roots's left hand but was

struggling with Officer Yazback to secure his right hand; while they were doing this the officers noticed a handgun in Mr. Roots's waistband (Dann: H2 10, 26). After the officers had succeeded in handcuffing Mr. Roots, Officer Dann searched him for identification (H2 13). When she recovered an ATM card, Mr. Roots said "you can call my bank, I have $22 to my name in my checking account and that's it" (H2 13-14). The officer also asked Mr. Roots why there was blood on his sweatshirt and he replied that he did not know and that the sweatshirt was not his (H2 11).

Once the two men were handcuffed and in custody, police officers took them, in separate cars, to 50 Saratoga Avenue (McDonald: H1 15; Dann: H2 13). On the way, in Officer Dann's patrol car, Mr. Roots wondered what would happen to his aunt's car, which he had left running on the street (Dann: H2 13-14). Officer Dann asked what kind of car it was and whether Mr. Roots wanted her to call someone to pick it up (H2 14). Mr. Roots said, "I'm gonna lose my family, I might as well lose my car too" (H2 14).

Two apartments at 50 Saratoga Avenue had been burglarized that morning (McDonald: H1 21). Adam Mogan and Christopher Lamere lived

in Apartment 2 and Raphael Velazquez and Dominic Candena lived in Apartment 3 (H1 21). At about 8:10 a.m., Officer McDonald participated in showups viewed by Mr. Mogan and Mr. Velasquez at 50 Saratoga Avenue (H1 15). Willie Roots and Tony Roots were each, separately, presented to Mr. Mogan and Mr. Velazquez, who could not see or communicate with each other during the viewing. It was a sunny day and each handcuffed suspect stood next to a single officer about 50 feet from the viewer. Mr. Mogan immediately identified Mr.Roots as the man who had kicked his apartment in, but did not identify Tony Roots (H1 18-20, 57). Mr. Velazquez immediately identified Mr. Roots, saying that Mr. Roots was the man who had held a gun to his head and robbed him; he did not identify Tony Roots (H1 21-22, 58, 60). Mr. Velazquez heard Mr. Roots yelling during the showup and said that he recognized his voice as well (H1 22).

At 8:52 a.m., two hours after the burglary, Officer McDonald participated in two more showups, this time at Rochester General Hospital, where Mr. Candena and Mr. Lamere were being treated for injuries they sustained during the burglary (H1 25). As before, each

suspect was separately shown to Mr. Candena and Mr. Lamere, who could not see or communicate with one another during the procedure. Each handcuffed suspect stood next to an officer and was shown to the two hospital patients as they stood 30 feet away looking out from the vestibule of the hospital (H1 26-28; 31, 72 ,78). Mr. Lamere and Mr. Candena both immediately identified Mr. Roots (H1 28, 31, 69). The two men also identified Tony Roots (H1 30, 35).[3]

At the close of the hearing, Mr. Roots's counsel asked to file a "written closing" and the court set a briefing schedule (H2 29). However, the court's written decision does not reference such materials and, upon information and belief, no such materials were ever filed.

In its October 21, 2016 written decision, the court ruled that two of Mr. Roots's statements were not the product of custodial interrogation, and that the officer's inquiry concerning blood on his sweatshirt was justified under the emergency doctrine; the court therefore denied the

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[3] As Mr. Roots raises no issue with respect to his photo array identification by Thomas Nocula relating to a robbery that took place the same day, and is the subject of Counts 21 through 25 of the Indictment, testimony relating to that identification procedure is not recounted here.

defense motion to suppress them (Decision and Order at 5). The court ruled that the showup identifications by Mr. Mogan and Mr. Velazquez were conducted at the crime scene approximately 1 hour and 20 minutes after the crime, close in time an place, under circumstances that were not unduly suggestive (Decision and Order at 5-6). Without mentioning that the showups involving Mr. Lamere and Mr. Candena were not conducted near the crime scene, the court ruled that the two-hours that had elapsed since the crime did not render the procedure defective since the circumstances of the viewing were not suggestive (Decision and Order at 6). Accordingly, it denied suppression of the four showup identifications (Decision and Order at 6).

The Guilty Plea and Sentencing

On December 5, 2016, Mr. Roots was offered a sentence of 14 years in prison with 5 years of post-release supervision in exchange for pleading guilty to one B felony charge in satisfaction of the indictment (P. 3). The offer was contingent on both codefendants pleading guilty (P. 4). The court noted that the codefendants had been given the entire morning leading up to 12:45 p.m. to discuss the plea and to view videotape footage

(P. 2). The court told Mr. Roots that if he wanted to plead guilty "I'm going to take it now" and "I'll have your decision now, sir" (P. 6). When confronted with this ultimatum, Mr. Roots said that he had "missed the opportunity to go over any of the evidence besides what was said to me at the hearings" (P. 7). Rather than address that issue, the court told Mr. Roots that he knew what he "did or didn't do" and demanded that Mr. Roots give the court his decision immediately (P. 7). When Mr. Roots hesitated, the court said "All right, I am now going to adjourn the matter of Willie Roots. We are starting picking a jury at 2:00 this afternoon. You may take Mr. Roots at this time, deputy" (P. 7). Mr. Roots then said, "I'm taking the plea, Your Honor" (P. 8). The court responded as follows:

> If you're sure you're going to take the plea at this time, then we're going to proceed with the plea. We're not going to have any hemming and hawing, because I'm toing to take a plea and you need to be clear to me that you're taking a plea because you're guilty of something. . . . But I'm not going to have you reluctant here. Either you're taking it a hundred percent or you're not (P. 8).

The court then explained to Mr. Roots that he would be pleading guilty to burglary in the first degree under count ten of the Indictment. The court then told him:

> You will receive a sentence promise from this Court of fourteen years in the custody of the Department of Corrections and five yours post-release supervision. You will be waiving your right to appeal at the time of sentencing (P. 10).

In response to court questions, Mr. Roots disclosed that he was 30 years old, had attended "some college," was a United States citizen, understood the proceedings, and was satisfied with counsel's performance, having been given sufficient time to discuss the case with him (P. 11-12). He was not under the influence of drugs or alcohol, had not been threatened by anyone to plead guilty, and was pleading guilty of his own free will (P. 13).

At the start of the plea colloquy, the court stated,

> you will be pleading guilty to burglary in the first degree which is count ten of this indictment. You will receive a sentence promise from this court of fourteen years in the custody of the Department of Corrections and five years of post-release supervision. You will be waiving your right to appeal. . . . (P. 10).

The court began its explanation of the effect of a guilty plea by explaining that "by pleading guilty you are giving up your right to allege the police unlawfully collected evidence or did anything else illegal"

(P. 13). The court further explained that by pleading guilty, Mr. Roots would be giving up his rights to a jury trial, to confront, cross-examine and call witnesses, to remain silent, to present a defense, to rely on the presumption of innocence, and to be convicted only upon proof beyond a reasonable doubt (P. 13-14). The court also warned Mr. Roots about the consequences of having a prior felony conviction were he convicted again in the future (P. 15).

The court then told Mr. Roots that, as part of the plea agreement, he would have to waive his right to appeal "this conviction and sentence" (P. 7). Mr. Roots affirmed that he had discussed the written Waiver of Appeal form with counsel and understood the rights he was giving up (P. 16).[4] In addition to giving up the right to appeal from the conviction

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[4] The waiver form stated, in relevant part, that

> I, the above-named defendant, in consideration for, and as part of, the plea agreement in this matter, hereby waive any and all rights to appeal from the judgment of conviction herein. . . . I further waive any rights I may have to bring any other post-conviction challenges to the conviction and/or sentence, such as motions to vacate judgement or set aside sentence and writs of habeas corpus, in state or federal courts. . . . It is my understanding and intention that the plea agreement in this

and sentence, the court told Mr. Roots that he was also waiving the right to appeal pre-trial rulings, and to make post-conviction challenges, motions to vacate the judgment, and habeas corpus petitions in state and federal court (P. 16). Mr. Roots then signed the Waiver of Appeal form (P. 17).

Mr. Roots said he understood the terms of the plea bargain the court had explained and that he wanted to plead guilty (17-18). He then admitted that on December 18, 2015, without permission, he entered Apartment 3 of 50 Saratoga Avenue, someone's residence, in concert with another to take property from the residents, and that he or his accomplice caused physical injury to Dominic Candena (P. 18-19). He then formally pleaded guilty to one count of burglary in the first degree (P. 20). The court accepted the plea (P. 20).

On January 10, 2017, the court adjudicated Mr. Roots a second violent felony offender (P. 7). After Mr. Roots made a statement expressing remorse and an intent to improve his life, the court imposed

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> matter will be a complete and final disposition of the matter.

the agreed-upon sentence of 14 years in prison with 5 years of post-release supervision (S. 9).

ARGUMENT

Point I: Appellant's Waiver of His Right to Appeal Was Not Knowing, Intelligent, and Voluntary

Mr. Roots's waiver of his right to appeal was not knowing, intelligent, and voluntary. It could only have been valid if the record demonstrated that he understood the nature of the right he is waiving and the full consequences of the waiver. *People v. Bradshaw*, 18 N.Y.3d 257 (2011); *People v. Seaberg*, 74 N.Y.2d 1 (1989). Here, the waiver colloquy conducted by the court did not include any explanation of the nature of the appellate rights Mr. Roots was being asked to waive. Nor did it adequately separate the waiver from the plea, thereby suggesting that the guilty plea automatically waived his right to appeal. The colloquy did, however, include an explanation of the scope of the waiver that was impermissibly overbroad, as was the written waiver form. Accordingly, Mr. Roots's purported waiver was invalid and he is not barred from

claiming on appeal that his plea was coerced and that he did not receive meaningful representation.

The Court of Appeals has warned that:

> Because only a few reviewable issues survive a valid appeal waiver, it is all the more important for trial courts to ensure that defendants understand what they are surrendering when they waive the right to appeal. Giving up the right to appeal is not a perfunctory step.

People v. Lopez, 6 N.Y.3d 248, 256 (2006). A waiver of the right to appeal "is effective only so long as the record demonstrates that it was made knowingly, intelligently and voluntarily." *Id.*

To ensure that the Mr. Roots's waiver was knowingly, intelligently and voluntarily made, the court was required to conduct an on-the-record inquiry with him to ensure that the waiver would be constitutionally valid. *Bradshaw*, 18 N.Y.3d at 262; *People v. DeSimone*, 80 N.Y.2d 273, 283 (1992); *People v. Gladden*, 267 A.D.2d 400 (2d Dept. 1999). Thus, a waiver is ineffective if the court "fail[s] to explain to the defendant the extent of the appellate rights he would be required to waive." *People v. Dongo*, 244 A.D.2d 353 (2d Dept. 1997). In a an opinion thoroughly

examining the validity of waivers of appeal, the court in *People v. Brown*, 122 A.D.3d 133, 144 (2d Dept. 2014), explained that:

> Ideally, a defendant should . . . receive an explanation of the nature of the right to appeal, which essentially advises that this right entails the opportunity to argue, before a higher court, any issues pertaining to the defendant's conviction and sentence and to have that higher court decide whether the conviction or sentence should be set aside based upon any of those issues. The defendant should also be told that appellate counsel will be appointed in the event that he or she were indigent. The trial courts should then explain the consequences of waiving the right to appeal, i.e., that the conviction and sentence will not receive any further review, and shall be final. The trial courts must be sure to obtain, on the record, an affirmative response from the defendant that he or she understands the rights as explained, that the defendant is giving up those rights, and that the defendant is doing so voluntarily after discussing same with counsel.

Here, the court made no effort to explain the nature of the appellate rights Mr. Roots was being asked to waive. Instead, the court "explained" only that he would be waiving his right to appeal the conviction and sentence. The court said nothing about a different, higher, court handling the appeal and that the higher court could decide whether the conviction

or sentence should be set aside. Nor did it inform him that counsel would be assigned if he could not afford an attorney.

Second, the court completely failed to explain that a waiver of the right to appeal can be a condition of a plea but that the right to appeal is separate and distinct from the rights a defendant forfeits by pleading guilty. *People v. Hernandez*, 63 A.D.3d 1615, 1615 (4th Dept. 2009) ("defendant's waiver of the right to appeal was not knowing and voluntary inasmuch as Supreme Court failed to explain that the waiver of the right to appeal is separate and distinct from the other rights that are forfeited by the plea"); *see Lopez*, 6 N.Y.3d at 256 ("The record must establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty"). In fact, the court told Mr. Roots that he "will be pleading guilty to burglary in the first degree," that he "will receive a sentence promise," and that he "will be waiving [his] right to appeal" (P. 4-5). The court never inquired whether he was voluntarily waiving his right to appeal. Rather, the court's discussion clearly indicated that the waiver of appeal was part of the plea by which there would be no trial. As a result, appellant had no reason to believe that the waiver of the right to appeal was something to

which he was agreeing as a condition of the plea rather than part of the plea itself. *See People v. Smith*, 156 A.D.3d 1336, 1336 (4th Dept. 2017) ("the court further muddied the distinction by indicating that the waiver of the right to appeal 'is separate and [a]part from your plea of guilty, rather than indicating that it was a condition of the guilty plea but separate from the rights that defendant automatically forfeited by the plea"); *People v. Harris*, 125 A.D.3d 1506, 1506 (4th Dept. 2015).

To make matter worse, during its explanation of the rights forfeited by guilty plea, the court stated, "by pleading guilty you give up your right to allege the police did anything wrong in this case" (P. 5). This explanation, which seems to apply to an unlawful seizure or identification procedure, improperly suggested that it was the guilty plea, not just the waiver of the right to appeal, that would prevent a challenge to the suppression ruling. This further conflated the waiver and the guilty plea.

The other waiver explanation the court offered was that Mr. Roots would be giving up not just his right to appeal the conviction and sentence, but to make post-conviction challenges overall, to file motions to vacate the judgment in particular, and to pursue habeas corpus relief in the state and federal courts. This, too, rendered Mr. Roots's waiver of

his right to appeal invalid because it was overbroad, essentially mischaracterizing the waiver as being an absolute bar to all appellate and collateral challenge without noting that he retained the right to review of selected fundamental claims. *People v. Bisono*, 36 N.Y.3d 1013, 1017-18 (2020); *People v. Nathan,* 192 A.D.3d 1502, 1503 (4th Dept. 2021); *People v. Murphy*, 188 A.D.3d 1668, 1669 (4th Dept. 2020).

Finally, that Mr. Roots signed a waiver of appeal form did not salvage the waiver. Courts have found purported waivers of the right to appeal to be invalid in the absence of an inquiry of the defendant as to whether he understood a written waiver. *People v. Callahan*, 80 N.Y.2d 273, 283 (1992) (waiver of appeal invalid where record did not disclose the circumstances surrounding defendant's signature on the written waiver form and the court did not ascertain that the defendant was aware of its contents); *People v. McCaskell*, 206 A.D.2d 547, 548 (2d Dept. 1994) (although defendant apparently signed waiver form in open court, court made no record inquiry regarding whether defendant understood its implications and voluntarily agreed to it).

Here, although Mr. Roots signed a written appeal waiver form, the court never explained it or elicited facts sufficient to indicate that he

understood it. While the court elicited that defense counsel had explained the waiver to Mr. Roots, it did not ensure on the record that he "understood the implications of the waiver" or that defense counsel explained to him "the extent of the appellate rights he would be required to waive." *Dongo*, 244 A.D.2d at 353. Accordingly, the purported waiver was invalid and is unenforceable. *Callahan*, 80 N.Y.2d 273, 283 (1992); *McCaskell* 206 A.D.2d at 547.

In any event, the written waiver suffered from the same fatal flaw as the court's colloquy in that it purported to waive "any and all rights to appeal from the judgment of conviction . . . [and] any and all rights to make post conviction motions challenging the underlying judgment of conviction . . . ." *See Bisono*, 36 N.Y.3d at 1017-18.

Absent a valid appeal waiver, a defendant has a statutory right to appeal a decision by the hearing court denying a suppression motion prior to a guilty plea. C.P.L. § 710.70; *People v. Thomas*, 53 N.Y.2d 388, 343 (1981). Since the record did not establish that the court ensured that Mr. Roots's waiver of his right to appeal was knowing, intelligent, and voluntary, this Court may consider his argument that defense counsel's representation of him at the suppression hearing was not meaningful.

Point II: Appellant's Guilty Plea Was Coerced by the Court When it Demanded an Immediate Plea Decision in the Face of Appellant's Explanation That Counsel Had Not Provided Him with Information about the Strength of the People's Case.

After Mr. Roots and his attorney spent the morning reviewing videotapes, the court suddenly demanded that he make an immediate decision whether to agree to spend 14 years in prison. Although Mr. Roots told the court that his attorney had not given him discovery information and that all he knew about the case was the testimony at the suppression hearing, the court pressed Mr. Roots to make a decision. Given the credibility of Mr. Roots's complaint that his attorney was not adequately informing him about the case, *see* Point III, *post*, the court's demand for an immediate decision was coercive. Accordingly, Mr. Roots is entitled to have his plea vacated. U.S. Const., Amend. XIV; N.Y. Const., Art. 1, § 6; *North Carolina v. Alford*, 400 U.S. 25 (1970); *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985) *People v. Picciotti*, 4 N.Y.2d 340 (1958).

To comply with due process, a guilty plea must reflect a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford,* 400 U.S. at 31; *People v. Peque*, 22 N.Y.3d 168, 184 (2013); *People v. Francabandera*, 33 N.Y.2d 429, 434 (1974). In order to

make a voluntary and intelligent choice about whether to plead guilty, a defendant must receive accurate information about his options. In particular, he must be given accurate information not only as to the consequences of pleading guilty, but as to his potential sentencing exposure if he declines to plead guilty and goes to trial. *Chaipis v. State Liquor Authority*, 44 N.Y.2d 57 (1978); *People v. La Voie*, 125 A.D.2d 862 (3d Dept. 1986). Whether a plea was knowing, intelligent, and voluntary depends on many factors, including "the nature and terms of the agreement" and "the reasonableness of the bargain. *People v. Garcia*, 92 N.Y.2d 869, 870 (1998) (quoting *People v. Hidalgo*, 91 N.Y.2d 733, 736 (1998)).

If a guilty plea is "'to any degree induced by fear or coercion, it will not be permitted to stand.'" *People v. Hollmond*, 191 A.D.3d 120, 121 (2d Dept. 2020) (quoting *People v. Pearson*, 55 A.D.2d 685, 686 (2d Dept. 1976). In that case, Hollmond made allegations similar to the one Mr. Roots made in this case, that counsel refused to proceed on some occasions due to a lack of attorney/client visitations, pushing the trial date back. Hollmond also alleged that counsel could not effectively represent him "due to the lack of knowledge and understanding to this matter."

Hollmond 191 A.D.3d at 128. Hollmond made those allegations in a motion to vacate the plea but the court summarily denied the motion and sentenced him. On appeal the court found that the record "substantiates the defendant's claim that his plea was effectively coerced by the ongoing violation of his Sixth Amendment right to counsel," creating an issue of fact requiring a hearing. *Id*. at 128-29; *see People v. Flowers*, 30 N.Y.2d 315, 318-19 (1972) (on-the-record facts established that plea was coerced).

In this case, Mr. Roots claimed that counsel was not adequately communicating with him about the evidence against him before the plea, triggering the court's duty to inquire into whether Mr. Roots's plea was being voluntarily entered. *People v. Lopez*, 71 N.Y.2d 662, 666 (1988); *see People v. Pitcher*, 126 A.D.3d 1471, 1472 (4th Dept. 2015). Rather than conduct any such inquiry, however, the court ignored Mr. Roots's claim, telling him that Mr. Roots knew what he had or had not done and must immediately decide whether to spend the next 14 years of his life in prison. But Mr. Roots's inquiry into the strength of the People's case went to whether they could prove his guilt beyond a reasonable doubt, an important consideration when considering a guilty plea. Mr. Roots was

forced to make his plea decision without the information counsel was apparently withholding from him.

That is exactly the quandary the Legislature addressed when it recently amended the New York's discovery statutes by requiring that the prosecutor make good faith efforts to disclose all discovery to a detained defendant within 20 days of arraignment. C.P.L. § 245.10. The measure was meant to "enable[] the defendant to make a more informed plea decision" and "minimize the tactical and often unfair advantage to one side," among other goals. Donino, *Practice Commentary,* C.P.L. § 245.10 (quoting *People v. Copicotto,* 50 N.Y.2d 222, 226 (1980)). Mr. Roots recognized his predicament and pleaded for more information about the case against him, to no avail.

While it is clear that a court's requiring a plea decision within a short time period is not, by itself, considered coercive, *People v. Green*, 140 A.D.3d, 1660, 1661 (4th Dept. 2016); *Pitcher,* 126 A.D.3d at 1472, the problem for Mr. Roots was the combination of a lack of information and the court demanding an immediate decision. Indeed, it was the court's call for the trial to begin, with no inquiry into what information counsel

had provided to Mr. Roots, that induced his agreement to plead guilty at that moment.

Mr. Roots's coercion claim survives a valid waiver of the right to appeal, *see People v. Williams,* 198 A.D.3d 1308, 1309 (4th Dept. 2021), but was not preserved by the filing of a motion to vacate the plea. *See People v. Carlisle*, 50 A.D.3d 1451, 1451 (4th Dept. 2008). Nevertheless, as this Court has done in other cases involving coerced pleas, it should reverse the conviction and vacate the plea in the interest of justice. *People v. Thigpen-Williams*, 198 A.D.3d 1366, 1367 (4th Dept. 2021); *People v. Boyde*, 122 A.D.3d 1302, 1302 (4th Dept. 2014); *People v. Flinn*, 60 A.D.3d 1304, 1305 (4th Dept. 2009).

Point III: Defense Counsel Failed to Provide Meaningful Representation When He Did Not Request a *Dunaway* Hearing Challenging Appellant's Arrest Leading to Recovery of a Gun and Statements Appellant Made, and Did Not Challenge Two Unnecessary and Suggestive Showup Identification Procedures.

Testimony at the suppression hearing revealed that the police who arrested Mr. Roots may not have had probable cause to do so given a lack of information connecting him to an apparently anonymous tip, and that the police did not see the gun recovered from him until after they had

grabbed his arms to arrest him. The hearing testimony also established that since two showup identifications had been made at the scene, there was no need to conduct two more inherently suggestive showups at a hospital two hours after the burglary. Although defense counsel had served an undated draft of an onmibus motion long after its statutory due date, he apparently never filed it, despite the court's order during the hearing that he do so. As a result, there was no request for a probable cause hearing filed, and counsel never argued that there was a lack of probable cause for Mr. Roots's arrest. Counsel also failed to argue for the suppression of the two hospital showups on the ground that they were unnecessary. Since the finding of the gun and the denial of suppression of two of the identifications likely affected Mr. Roots's decision to plead guilty, he did not receive meani26ngful representation by defense counsel. Accordingly, his plea should be vacated and a new *Wade/Dunaway* hearing ordered. U.S. Const. Amend. VI; N.Y. Const. Art I, § 6; *Strickland v. Washington,* 466 U.S. 668 (1984); *People v. Baldi*, 54 N.Y.2d 137 (1981).

The Sixth Amendment right to the effective assistance of counsel entitles a criminal defendant to "competent" representation that does not

fall below an "objective standard of reasonableness," *Strickland*, 466 U.S. at 687-88 (1984), or to "meaningful representation." *Baldi*, 54 N.Y.2d at 140. Under *Strickland*, a defendant must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" means simply "a probability sufficient to undermine confidence in the outcome." *Id*. at 694. The requisite level of prejudice "lies between prejudice that had 'some conceivable effect' and prejudice 'that more likely than not altered the outcome in the case.'" *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (quoting *Strickland*, 466 U.S. at 693); *accord Cox v. Donnelly*, 387 F.3d 193, 199 (2d Cir. 2004).

The right to effective assistance of counsel under the New York constitution does not require a specific showing of prejudice, but rather focuses on whether counsel's errors affected the "fairness of the process as a whole." *People v. Stultz*, 2 N.Y.3d 277, 284 (2004); *People v. Benevento*, 91 N.Y.2d 708, 714 (1998). This standard reflects the fundamental concern that counsel's performance not "undermine confidence in the proceeding's result." *Strickland* 466 U.S. at 687. Thus, in New York, a

showing of prejudice is "a significant but not indispensable element in assessing meaningful representation. *Stultz*, 2 N.Y.3d at 284.

As the Court of Appeals made clear long ago, a defendant has a Sixth Amendment right to an attorney who is familiar with the facts of the case and knows and is able to apply the relevant law. *See People v. Droz*, 39 N.Y.2d 457, 462 (1976) ("[I]t is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense and who is familiar with, and able to employ at trial basic principles of criminal law and procedure"); *accord People v. LaBree*, 34 N.Y.2d 257, 260 (1974); *People v. Bennett*, 29 N.Y.2d 462, 466 (1972); *People v. Robinson*, 39 A.D.3d 1266, 1267 (4th Dept. 2007).

Strategy decisions made by defense counsel, such as what motions to make, what defense to pursue, and what evidence to present, are "reasonable," such that counsel's representation is effective, only to the extent that such decisions are based on counsel's reasonable and diligent investigation of the facts and applicable law. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Lindstadt*, 239 F.3d 191 (2d Cir. 2001); *Droz*, 39 N.Y.2d 457,

384 N.Y.S.2d 404 (1976); *People v. Hobot*, 200 A.D.2d 586, 595 (2d Dept. 1994).

This Court of Appeals has recognized that an attorney's failure to make a particular pretrial suppression motion will constitute ineffectiveness if a defendant "demonstrate[s] the absence of strategic or other legitimate explanations for counsel's failure to pursue 'colorable' claims." *People v. Garcia*, 75 N.Y.2d 973, 974 (1990); *see People v. Rivera*, 71 N.Y.2d 705, 709 (1988). *People v. Cyrus*, 48 A.D.3d 150 (1st Dept. 2007) (counsel ineffective for failing to make a viable suppression argument); *People v. Johnson*, 37 A.D.3d 363, 364 (1st Dept. 2007) (no legitimate strategic or tactical reason for attorney's failure to make a colorable suppression argument); *People v. Noll*, 24 A.D.3d 688, 689 (2d Dept. 2005) (failure to seek suppression constituted ineffectiveness).

A. Defense Counsel Failed to Argue That Mr. Roots Was Entitled to a Probable Cause Hearing to Challenge the Lawfulness of His Arrest and Search

According to the limited information adduced at the *Wade/Huntley* hearing, Officers Dann and McDonald knew two things when they walked into the corner store at 255 Jay street nearly an hour earlier. First, that two Black men in their early twenties, one wearing a hoodie with an

emblem on it, had committed a burglary at 50 Saratoga Avenue. Second, Officer Dann had spoken with an unnamed former police officer who told her that there were two Black men in their early twenties, one wearing a hoodie with a teddy bear on it and possibly carrying a gun, who looked suspicious. Since both descriptions were extremely vague and nothing about the former officer's call alleged anything about the Saratoga Avenue burglary, the police were without reasonable suspicion to immediately seize the men. Officer Dann's immediate seizure of Mr. Roots, therefore, may well have violated Mr. Roots's rights to be free of unreasonable searches and seizures as guaranteed by both the Federal and State Constitutions. U.S. Const., Amends. IV, XIV; N.Y. Const., Art. I, § 12; *Florida v. J.L.*, 529 U.S. 266, 272 (2000); *People v. Moore*, 6 N.Y.3d 496, 498-501 (2006); *People v. William II*, 98 N.Y.2d 93, 99 (2002); *People v. DeBour*, 40 N.Y.2d 210 (1976). In light of those facts, defense counsel's failure to request a *Dunaway* hearing demonstrated deficient representation.

The Fourth Amendment and the parallel provision of the New York State Constitution, Article I, section 12, protect a person from unreasonable seizures. Thus, before an officer "places a hand on the

person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." *Sibron v. New York*, 392 U.S. 40, 64 (1968); *see California v. Hodari D.*, 499 U.S. 621, 626 (1991) (equating "seizure" with "a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful"). In determining whether a seizure is reasonable, courts must resolve two questions: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 20 (1968)30.

The police demand that Mr. Roots put his hands in the air and Officer Dann's handcuffing of Mr. Roots, which began before she saw a gun in his waistband, effected at least a level-three seizure of Mr. Roots for which reasonable suspicion was required. *People v. Foster*, 85 N.Y.2d 1012, 1014 (1995); *People v. Hicks*, 68 N.Y.2d 234, 238 (1986). All the police had as a predicate for "laying on of hands," was that two young Black men, one wearing a hoodie with an emblem on it, had committed a burglary, and an apparently anonymous tip that two "suspicious" young

Black men, one wearing a hoodie with a teddy bear on it, were in a store at 255 Jay Street.

An anonymous tip alone seldom demonstrates sufficient indicia of reliability to provide reasonable suspicion justifying a seizure. *William II,* 98 N.Y.2d. at 99. Rather, only when the anonymous tip "contains predictive information – such as information suggestive of criminal behavior – so that the police can test the reliability of the tip," is there reasonable suspicion to justify a seizure. *Moore*, 6 N.Y.3d at 499. Thus, officers acting upon an anonymous tip, which has a low degree of reliability, must have more corroborating information to establish the requisite quantum of suspicion. *Alabama v. White*, 496 U.S. 325, 330 (1990). *See also Florida v. J.L.*, 529 U.S. at 272 (reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person"); *William II*, 98 N.Y.2d at 99 ("tipster's reliability would be demonstrated only if the suspect subsequently engaged in actions, preferably suggestive of concealed criminal activity, which the anonymous tip predicted in detail") (citing *J.L.*, 529 U.S. at 271-72). The police would also have reasonable suspicion if, upon responding to the location specified in the tip, they observe

conduct or other circumstances suggestive of criminality. *See People v. Bowens*, 9 A.D.3d 372, 373 (2d Dept. 2004); *People v. Alvarez*, 8 A.D.3d 58, 58-59 (1st Dept. 2004); *People v. Braun*, 299 A.D.2d 246, 247 (1st Dept. 2002).

In this case, the anonymous tip described at the hearing did not provide any predictive information that was confirmed by the police at the scene of the seizure. Two Black men in their twenties is far too vague a description to be sufficiently "matched" by police observation at the scene, and a hoodie with an emblem is simply not the same as a hoodie with a teddy bear on it, particularly when neither description said whether the emblem or bear was on the front or back of the hoodie.

This Court has held that even when an anonymous tip is assumed to be reliable and has a sufficient basis of knowledge — not established in this case — a general description fails to amount to reasonable suspicion. In *People v. Spinks*, 263 A.D.3d, 1452, 1452 (4th Dept. 2018), there was a radio run of a taxicab robbery with a description of three black males wearing all black clothing, one of whom carried a book bag, were headed east on a particular street east of State Street in Rochester. Four to six minutes later, an officer saw three black men in dark clothing walking

southwest, west of State Street. Two of the men fled but the defendant did not.

Noting that the tip had indicated the suspects ran from the scene and none of the three men were out of breath, the Court concluded that the hearing court had not taken adequate account of the distance between the crime scene and the stop of the defendant. The Court also noted that although the three men were the only ones in the area, the police had not searched in the direction of the crime scene to see if anyone else was around. The Court held that, under these circumstances, the officer did not have reasonable suspicion to stop the men. Here, the description was even more vague.

Also, the tipster in this case had said nothing about a burglary, only that the men looked suspicious. Mr. Roots and Tony Roots were engaged in nothing even vaguely criminal when the police arrived at the store. This is not a case in which a general description was combined with a police observation consistent with criminality, such as a waistband bulge, *People v. Coon*, 212 A.D.2d 1009 (4th Dept. 1995); *People v. Terry*, 124 A.D.2d 1062 (4th Dept. 1986). Here, the police did not see a gun until they

had already laid their hands on Mr. Roots, and because they had laid their hands on him.

Obviously, in the absence of a *Dunaway* hearing, none of these "facts" were tested, and the People were without an opportunity to establish that the police knew more than was adduced at the hearing. But those facts demonstrated that counsel had good reason to formally request the *Dunaway* hearing he made in the motion he served but did not file, and to argue for one prior to the *Wade/Huntley* hearing. Since there was no possible strategic advantage to permit the arrest to go unchallenged, counsel's performance fell below any reasonable standard of representation. As the Court of Appeals recognized in *People v. Hobot,* 84 N.Y.2d 1021, 1022 (1995):

> Where a single, substantial error by counsel so seriously compromises a defendant's right to a fair trial, it will qualify as ineffective representation.

See People v. Caban, 5 N.Y.3d 143, 152 (2005)35 ("A single error may qualify as ineffective assistance").

B. Defense Counsel Failed to Seek Suppression of Two Hospital Showups That They Were Not Conducted at the Scene of the Crime When No Exigent Circumstances Justified Them

The showup procedures the police conducted at the hospital involving Mr. Candena and Mr. Lampere took place two hours after the crime and, more importantly, after two identifications had already been made by each man's roommate. Because those showup identifications were not prompt and at the scene, and no exigent circumstance requiring them existed, they were improper and those identifications should have been suppressed. U.S. Const. Amend. XIV; N.Y. Const. Art I, § 6; *Manson v. Brathwaite*, 432 U.S. 98, 113 (1977). Given the likelihood of success of an argument to suppress those identifications, and the lack of any possible strategic reason for allowing them to be used at trial, defense counsel's failure to seek suppression fell below any standard of reasonable performance.

"Showup identifications are disfavored, since they are suggestive by their very nature," *People v. Ortiz*, 90 N.Y.2d 533, 537 (1997), but are permissible where they are reasonable under the circumstances and the procedure used is not unduly suggestive. *See People v. Howard*, 22 N.Y.3d 388, 403 (2013); *People v. Brisco*, 99 N.Y.2d 596, 597 (2003); *see also*

People v. Gilford, 16 N.Y.3d 864, 868 (2011) ("The due-process inquiry for showups calls upon the suppression court to decide whether the showup was reasonable under the circumstances . . . and, if so, whether the showup as conducted was unduly suggestive."). The New York Court of Appeals has adopted a "rule excluding improper showups and evidence derived therefrom" in order to "reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures employed by the police." *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *People v. Adams*, 53 N.Y.2d 241, 250-251 (1981); *see People v. Marte*, 12 N.Y.2d 583, 586 (2009). Only when it is conducted at or near the crime scene promptly after the crime, or when exigent circumstances require an immediate identification, do other interests justify the use of a showup. *People v. Johnson,* 81 N.Y.2d 828, 831 (1993); *People v. Riley*, 70 N.Y.2d 523, 529 (1987).

Though the defendant bears the ultimate burden of making such a showing, in order to admit evidence from a showup, the People must: (1) demonstrate that the showup was reasonable under the circumstances, and (2) produce evidence relating to the showup itself that demonstrates that the procedure was not unduly suggestive. *See Ortiz*, 90 N.Y.2d at

537; *People v. Calero*, 105 A.D.3d 864, 864 (2d Dept. 2013); *see People v. Crittenden* 179 A.D.3d 1543, 1544 (4th Dept. 1997) ("the People met their burden of demonstrating that the showup was reasonable"). Here, the People did not meet their burden of establishing that the showup was reasonable because it occurred two hours after the crime at a different location altogether – Rochester General Hospital.

Nor was there any exigency that justified the showup. *See People v. Rivera*, 22 N.Y.2d 453, 455 (1968). Although hospital showups have been approved as an exception to the rule requiring that the showup be prompt and at the scene, that exception is meant for circumstances in which the victim's injuries were such that it was unknown whether he would survive to make a later identification. It is the possibility that a witness will become unavailable that creates the exigency, not the mere fact of injury. *People v. Price*, 111 A.D.2d 568, 569 (3d Dept. 1985). "In general, hospital room showups, because they are invariably one-to-one confrontations, are easily susceptible to being unduly suggestive and, therefore, may only be used in most unusual circumstances, such as if there is a doubt that the victim may survive." *Rivera*, 22 N.Y.2d at 455 (showup at hospital while gunshot victim undergoing treatment). Therefore, even a timely hospital

showup is unnecessary, and impermissible, if there is "no doubt as to the victim's survival." *Price*, 111 A.D.2d at 569; *cf. People v. Blanche*, 90 N.Y.2d 821, 822 (1997) (hospital showup was not unduly suggestive where identifying witness had been shot in the abdomen and therefore there was "the necessity of a prompt identification"). The Candena and Lamere showups in this case were not made necessary by any doubt as to their survival. Thus, even if Mr. Roots had not been previously identified, those showups were impermissible; lineups should have been conducted.

But Mr. Roots had been previously identified by their roommates, Mr. Velazquez and Mr. Mogan, in showups conducted at the scene one hour and twenty minutes after the burglaries, rendering the subsequent hospital showups unnecessary. In *People v Knox*, 170 AD3d 1648 (4th Dept 2019), two showup identification procedures were conducted approximately 90 minutes after the crime, about five miles from the scene of the crime. The first showup, which was not at issue on appeal, occurred in the victim's hospital room and resulted in the victim identifying defendant as the person who shot him. The second showup, the one challenged on appeal, occurred in the hospital parking lot shortly after the first showup. During the second showup procedure, the noncomplainant

witness to the shooting identified defendant as the shooter. This Court concluded that "[g]iven the identification made by the victim" during the first showup, the second witness's identification conducted far from the scene of the crime was "not rendered tolerable in the interest of prompt identification." *See People v Seegars*, 172 AD2d 183, 186 (1st Dept 1991) (given previous identification of the defendant by another witness, showup at hospital was "not rendered tolerable in the interest of prompt identification"); *cf. Blanche*, 90 N.Y,2d at 822 (significant injury to witness rendered hospital showup necessary even though the defendant had been identified by another witness); *Rivera*, 22 NY2d at 455 (1968) (same).

The People offered no reason that a lineup identification procedure would have been unduly burdensome under the circumstances. *Knox*, 170 A.D.3d at 1650. Here, as in *Knox*, absent any exigency or spatial proximity to the crime scene, and given that the showup occurred two hours after the crime, while defendant was handcuffed and standing next to a police officer, the hospital showup identification procedures were "infirm." *See People v Burnice*, 113 AD3d 1115, 1115 (4th Dept 2014).

Given the clarity of this Court's decisions concerning unnecessary hospital showups, and the absence of any strategic reason not to challenge

the Candena and Lamere showups, counsel's failure to seek suppression can only have been the result of a lack of diligence or understanding of the applicable law. *People v. Wiggins*, 213 A.D.2d 965 (4th Dept. 1995) (counsel's ignorance of fundamental and prophylactic rules of law constituted ineffective assistance of counsel).

* * *

Mr. Roots's claims of ineffective assistance of counsel with respect to the suppression hearing survive his plea of guilt in this case because counsel's errors infected the plea process and affected Mr. Roots's decision to plead guilty. *See People v. Petgen*, 55 N.Y.2d 529, 534-35 (1982) (defendant must show that the "acceptance of the plea was infected by any ineffective assistance of counsel"); *People v. Morris*, 94 A.D.3d 1450, 1450-51 (4th Dept. 2012) (defendant must show the ineffectiveness infected the plea process or that defendant pled guilty because of counsel's poor performance). Here, as in *People v. Allen*, 154 A.D.3d 1076, 1079 (4th Dept. 2020), evidence at a *Dunaway* hearing could well have "resulted in suppression of the handgun and, concomitantly, dismissal of some . . . of the indictment). Similarly, in the event Mr. Candena and Mr. Lamere did not have an independent source for their in-court identifications of Mr.

Roots, suppression of those identifications could have seriously jeopardized the People's case as to other counts of the indictment.

And even if the effects of the suppression alone were insufficient to show that counsel's deficient performance affected Mr. Roots's decision to plead guilty, he made clear before the plea that the People's case against him was an important consideration in that decision. He spent all morning before taking the plea discussing the case and reviewing videotape evidence. He also cited counsel's failure to provide him with information about the People's case as a reason he was hesitant to plead guilty. Had he known that the gun, as well as his statements, and possibly two of the four identification, would have been suppressed, he likely would not have pleaded guilty. Accordingly, this Court should reverse the judgment, vacate the plea, order a *Dunaway* hearing, suppress the Lamere and Candena showup identifications, and order an independent source hearing.

CONCLUSION

For the reasons stated in Point I, this Court is urged to find appellant's waiver of the right to appeal invalid; for the reasons stated in

Point II, the Court is urged to reverse the conviction and vacate the plea; and for the reasons stated in Point III, the court is urged to reverse the conviction, vacate the plea, order a *Dunaway* hearing, suppress the Candena and Lamere showup identifications, and order an independent source hearing as to those two complainants.

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Respectfully submitted,

_____

PAUL SKIP LAISURE
Of counsel
Attorney for Defendant-Appellant
(571) 477-1003

JILL PAPERNO
Acting Monroe County Public Defender
10 N. Fitzhugh Street
Rochester, New York 14614

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