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Respondent, :

-against- :

PEDRO SANCHEZ, :

Defendant-Appellant. :

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**PRELIMINARY STATEMENT**

By permission of the Honorable Richard C. Wesley, Associate Judge of the Court of Appeals, granted June 14, 2002, appellant Pedro Sanchez appeals from an order of the Appellate Division, Second Department, dated October 29, 2001, affirming a judgment of the Supreme Court, Queens County, rendered on April 9, 1998 (Eng, J.), convicting him, after a jury trial, of criminal sale of a controlled substance in the first degree [P.L. § 220.43 (two counts)], and criminal possession of a controlled substance in the first, second and third degrees [P.L. §§ 220.21, 220.18, 220.16], and sentencing him to two consecutive prison terms of 20 years to life on the first-degree sale counts, and to concurrent terms of 20 years to life, 8 years to life, and 8 1/3 to 25 years on the first-, second-, and third-degree possession counts, respectively.

On August 28, 2002, this Court granted appellant poor person relief and assigned Lynn W.L. Fahey as counsel on this appeal. No stay of execution has been sought. Appellant is currently incarcerated and serving his sentence.

This Court has jurisdiction pursuant to C.P.L. § 450.90(1) to entertain this appeal and review the issue raised. The issue was preserved by defense counsel's timely objection to the court's finding that Juror # 11 was qualified to serve, and by his oral and written motions to set aside the verdict on the ground that Juror # 11 was not qualified because she did not understand English.

## QUESTION PRESENTED

Was appellant denied his constitutional right to a trial before 12 qualified jurors when his conviction was allowed to stand after one of the jurors reported, during deliberations, that she had not understood the trial, the lawyers or the court; and the court's inadequate inquiry further established that she did not understand English well enough to perform the fundamental functions required of a juror?

## SUMMARY OF ARGUMENT

Mr. Sanchez had a fundamental right to have his fate decided by 12 jurors who could understand and evaluate all of the evidence, arguments, and legal instructions at his trial, and communicate effectively with one another in the jury room. During deliberations, Juror # 11 informed a court officer that "she really didn't understand what was going on here; she didn't understand the lawyers and she didn't understand the judge." The trial court's ensuing inquiry required 12 questions of the juror to establish that she had spoken to the court officer, revealed that she had relied entirely on the other jurors to explain things to her, and even elicited that she did not know the meaning of the word "conviction." The inquiry thus further established that her ability to understand or communicate in English was so limited that she was "grossly unqualified" to serve on Mr. Sanchez's jury. Since the trial court's determination that Juror # 11 was qualified was both without support in the record and based on its erroneous belief that a "newly relaxed" standard had been enacted in the amendment of Judiciary Law § 510(4), it is entitled to no deference on appeal. Furthermore, the court reached that decision after conducting only a cursory, non-specific inquiry that fell far short of the "probing and tactful" one to which appellant was entitled, and which defense counsel specifically requested. Therefore, the trial court's ruling, over defense counsel's post-inquiry objection, that Ms. Wu was a qualified juror, and its denial of counsel's motion to set aside the verdict, violated Mr. Sanchez's right to a jury before 12 qualified jurors, and this Court should reverse Mr. Sanchez's conviction and order a new trial.

## STATEMENT OF FACTS

Introduction

Mr. Sanchez was arrested on March 29, 1995, and indicted on multiple counts of criminal sale and possession of a controlled substance and related crimes in connection with two drug sales that took place during an undercover operation instigated by a paid confidential informant. He went to trial before Hon. Randall Eng and a jury.

During the second round of jury selection, when the court asked the panel, "does anybody have any problem understanding me language wise?," prospective Juror Homel Wu told the court "My English is not very well." In the ensuing colloquies, Ms. Wu gave simple one- or two-word answers to general questions about her occupation, family, education and day-to-day activities. Defense counsel challenged Ms. Wu for cause "because of her inability to understand." The court denied the challenge, stating, "Ms. Wu has demonstrated a sufficient level of understanding to participate within the parameters as outlined by the Judiciary law." Ms. Wu was seated as Juror No. 11.

After deliberations began, Ms. Wu informed a court officer that she had not understood what was going on; she had not understood the lawyers or the judge. While the court was assembling the parties to determine a course of action, the jury announced that it had reached a verdict. The court took the verdict, convicting Mr. Sanchez of eight counts. Defense counsel requested that the court inquire about Ms. Wu's ability to understand the testimony and legal instructions in this case but the court refused, electing instead to ask only general questions, many calling for yes or no answers. Ms. Wu had repeated difficulty answering many variations of the simple question, "did you speak with a court officer." She also incorrectly answered the question "have you ever been convicted of a crime in any court," by stating, "No. First time," and she generally demonstrated an extremely limited understanding of English. Nevertheless, the trial court, over timely objection, found her

properly qualified to serve on Mr. Sanchez's jury. When defense counsel renewed the argument in a written motion to set aside the verdict, the court adhered to its ruling.

The Trial

Jury Selection

During the second round of jury selection, the court asked the panel, "does anybody have any problem understanding me language wise?" (A 4).[1] Prospective Juror Homel Wu raised her hand and told the court "My English is not very well" (A 4). A colloquy ensued:

> THE COURT: What is your language?
>
> PROSPECTIVE JUROR 2: Chinese.
>
> THE COURT: How long have you lived in the United States?
>
> PROSPECTIVE JUROR 2: Thirty years.
>
> THE COURT: What kind of work to you do?
>
> PROSPECTIVE JUROR 2: Dress maker.
>
> THE COURT: How much education do you have?
>
> PROSPECTIVE JUROR 2: In my country, only finish the six grade (A 4-5).

The court asked counsel, in open court, whether they would consent to discharge Ms. Wu and two other jurors who had expressed language difficulties, but defense counsel declined, and jury selection continued (A 6).

The prosecutor questioned Ms. Wu as follows:

> MR. LUZIO [Prosecutor]: Ms. Wu, you heard me speak to Mr. Chen. I'm asking you the same thing. As a dress maker you probably didn't speak anything but Mandarin when you were at work?
>
> PROSPECTIVE JUROR 2: No, only Chinese.
>
> MR. LUZIO: How many children do you have?

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[1] Numbers in parentheses preceded by "A" refer to pages of the appendix; numbers in parentheses without prefix refer to pages of the trial transcript.

PROSPECTIVE JUROR 2: One.

MR. LUZIO: And how long have you been here?

PROSPECTIVE JUROR 2: Thirty years.

MR. LUZIO: Based upon the few things I have heard, I have had no trouble communicating with you here. If you could try to tell me what your difficulty is with the language. If you could try to express that to the Court. Can you tell me anything more about the trouble you are having understanding?

PROSPECTIVE JUROR 2: Because I finish the sixth grade in my country. I come to this country I go to the high school in evening and enroll in English class.

MR. LUZIO: You went to a Chinese school here?

PROSPECTIVE JUROR 2: No, just learning in this country. I learn English.

MR. LUZIO: And in your daily life when you go to the store and do things, what language do you use there?

PROSPECTIVE JUROR 2: Go to the supermarket.

MR. LUZIO: Yeah, what language do you speak?

PROSPECTIVE JUROR 2: English.

MR. LUZIO: You have to use a little English?

PROSPECTIVE JUROR 2: Yes (A 7-8).

Defense counsel also asked Ms. Wu several questions during voir dire:

MR. GONZALEZ: Ms. Wu, how are you?

PROSPECTIVE JUROR 2: Fine

MR. GONZALEZ: You have a daughter?

PROSPECTIVE JUROR 2: Yes.

MR. GONZALEZ: What does she do?

PROSPECTIVE JUROR 2: Works in a hospital.

MR. GONZALEZ: She is a nurse or a doctor?

PROSPECTIVE JUROR 2: She took biology.

MR. GONZALEZ: She could be testing or doing stuff like that?

PROSPECTIVE JUROR 2: Yes.

* * *

MR. GONZALEZ: Ms. Wu, what does your husband do?

PROSPECTIVE JUROR 2: Retired.

MR. GONZALEZ: What did he use to do before he retired?

PROSPECTIVE JUROR 2: Restaurant (A 9-11).

At the challenge conference following that round of voir dire, defense counsel initially declined to challenge Ms. Wu "if the Court feels comfortable with Ms. Wu's ability to understand" (A 13-14), but eventually challenged her for cause "because of her inability to understand" (A 15). Without further discussion, and with the prosecutor taking no position, the court denied the challenge, stating, "Ms. Wu has demonstrated a sufficient level of understanding to participate within the parameters as outlined by the Judiciary law" (A 15). Neither side exercised a peremptory challenge of Ms. Wu, who was seated as Juror No. 11.

The People's Case

**JOHN VALLEJO** was a confidential informant paid by the Queens Narcotics Division of the New York Police Department to provide information about drug dealers (784-92). On March 3, 1995, a bouncer at the El Inca restaurant/bar introduced Vallejo to Mr. Sanchez (783). Thereafter, they had telephone conversations about possible drug purchases (793, 799, 809). On March 16, 1995, Vallejo told Mr. Sanchez that he had a buyer for one kilogram of cocaine (813). Mr. Sanchez replied that he would "put one aside" for him (813). Detective **LUIS ALVAREZ**, an undercover officer posing as Vallejo's client, accompanied him to a meeting at which Mr. Sanchez offered Alvarez three bags of crack cocaine (Alvarez 353, 360; Vallejo 814, 823). When Det. Alvarez expressed dissatisfaction with the crack, which was supposed to have been uncut powdered cocaine, Mr. Sanchez urged him to take

the crack on consignment; the undercover could pay him later or, if he was unable to sell it, return it to him (Alvarez 362-63).

Det. Alvarez took the crack back to the precinct where he and Detective **ANTHONY TARDALO** decided that Det. Alvarez would purchase one bag and return the other two (Alvarez 364; Tardalo 637). The bag Det. Alvarez was to buy weighed 248 grams; all three bags together weighed 1005 grams (Tardalo 637). Later the same evening, Det. Alvarez returned the two bags of crack to Mr. Sanchez, and gave him $3960 in pre-recorded buy money that was never recovered (Alvarez 366). Police chemist **GAJENDRA JOSHI** confirmed that the bag Det. Alvarez bought contained 8 ounces of crack (622).

On March 29, 1995, Undercover Officer **UC-1434**, posing as Vallejo's client, accompanied him to another meeting at which Mr. Sanchez gave them five samples of heroin in different forms and a price list (UC-1434 484, 486-92; Vallejo 837, 838). UC-1434 took the samples, ostensibly to have them checked for quality, and called Mr. Sanchez back later to order 250 grams of heroin (UC-1434 509). UC-1434 and Vallejo met Mr. Sanchez again later that night (UC-1434 510). UC-1434 took one of the two 125-gram packages, paying $10,000 in pre-recorded buy money (UC-1434 510-13).

When Mr. Sanchez left the meeting and got into his car, Det. Tardalo pulled him over and arrested him and another occupant of the vehicle (Tardalo 644). Det. Tardalo recovered a bag of heroin, the buy money, and Mr. Sanchez's pager, from the car (646). Police chemist **LESLIE MAGUET** confirmed that the bag UC-1434 bought contained 4 3/8 ounces of heroin (514, 517), and that the bag recovered from his car contained 3 5/8 ounces of heroin (1010).

On cross-examination, Vallejo denied that he had induced Mr. Sanchez to pretend he was a supplier (989), that he called Mr. Sanchez from pay phones to avoid having this plan appear on the wiretap tapes (991), that he met with Mr. Sanchez after the first sale to retrieve

the money the police had paid him (998), and that he gave Mr. Sanchez heroin and had Mr. Sanchez pretend to sell it (999).

During the course of trial, the jurors each were provided, and asked to read, English transcripts of various wiretap recordings of telephone conversations and meetings, all conducted in Spanish, about which Vallejo and the police witnesses testified (407, 491, 501, 514).

The Summations

Defense counsel argued that Vallejo had lied to the police and to the jury (1077). Vallejo, counsel noted, who was used to engaging in difficult and dangerous activities in the drug trade, had the ability to remain cool and collected even though he was lying on the stand (1078). Counsel argued that Vallejo's testimony that he was not a drug dealer prior to 1987 had to be false because no one is able to "wake up one morning" and start selling kilos of drugs (1079). Counsel argued that Vallejo's testimony that his father was a doctor, rather than a porter as his father had acknowledged in a financial affidavit, and that he himself was a store manager, rather than a clerk, meant that Vallejo's testimony could not be trusted (1082).

Vallejo's testimony against Mr. Sanchez was also suspect because his claims concerning his mother's presence when he was arrested in his own drug sale case were not believable (1090-91; 1102-04). Counsel also attacked the competency of the police investigation in general (1098), and challenged the validity of the wiretap transcripts on the ground that the undercover officer was not a qualified translator (1096).

The prosecutor countered with arguments based on the strength of the wiretap evidence, claiming that Mr. Sanchez had not been acting during the taped conversations (1118, 1122, 1124), and that the recordings proved that he knew the language of drug dealing (1124-26). He claimed that Vallejo's testimony was credible despite defense counsel's quibbles with details like Vallejo's claims about his and his father's employment (1116-17).

The prosecutor also argued that the wiretap evidence, physical evidence, and circumstances surrounding the sales corroborated Vallejo's testimony (1120-25). Finally, the prosecutor took great pains to debunk the idea that the drugs the undercovers bought had actually belonged to Vallejo, and that he had set Mr. Sanchez up to pretend he was a seller so Vallejo could collect informants' pay and the buy money (1120-28).

The Court's Final Instructions

In addition to the usual instructions concerning the roles of judge and jury, what constitutes evidence, the credibility of witnesses generally, and the burden of proof, presumption of innocence and reasonable doubt, the court gave detailed instructions about police witnesses (1155), expert witnesses (1157), and interested witnesses (1160-61); about the proper use of prior statements used to impeach a witness (1159), and evidence of prior crimes used to attack credibility (1160); and about the operation of permissive, rebutable evidentiary presumptions (1162-63).

The court also instructed the jury in detail concerning the 10 counts that would be submitted to it. First, the court submitted first-degree criminal sale of a controlled substance (knowingly sold a narcotic drug of an aggregate weight of two ounces or more), and third-degree criminal sale of a controlled substance (knowingly sold a narcotic drug), as to the March 16th transaction in the alternative as counts 1 and 2 (1165-70). During those instructions, the court defined the terms "narcotic drug," "sell," "knowingly," and "unlawfully" (1170-72). Next, the court submitted first-degree criminal possession of a controlled substance (knowingly possessed an aggregate weight of two ounces or more of a narcotic drug with intent to sell), and third-degree criminal possession of a controlled substance (knowingly possessed a narcotic drug with intent to sell) as to the March 16th transaction–but not in the alternative–as counts 3 and 4 (1172-78). The court again defined the relevant terms (1173-74). The court instructed the jury in the same manner concerning the corresponding first- and -third degree sale and possession charges that applied to the

March 29th transaction, including the relevant definitions, as counts 5, 6, 7, and 8 (1179-90). Counts 5 and 6 were submitted in the alternative, but counts 7 and 8 were not. Finally, the court instructed the jury on second-degree criminal possession of a controlled substance (knowingly possessed an aggregate weight of two ounces or more or a narcotic drug) and third-degree criminal possession of a controlled substance (knowingly possessed a narcotic drug with intent to sell) as to the March 29th transaction, in the alternative (1195-2101).

The Verdict and Juror Inquiry

Once deliberations began, the court discharged the alternate jurors (1225). During the first hour of deliberations, Ms. Wu informed Court Officer **SCOTT McDONALD** that she had not understood the case (A 18). According to Officer McDonald,

> Juror number 11 . . . stood up in the jury room and raised her hand in front of the rest of the jurors and told me that she really didn't understand what was going on here; she didn't understand the lawyers and she didn't understand the judge (A 18).

Before the court could convene the parties to address the issue, the jury sent a note stating that it had reached a verdict (A 18). The parties agreed to take the verdict first, and then conduct any necessary inquiry (A 19-20). During their discussion, the prosecutor pointed out that defense counsel had not exercised a peremptory challenge of Ms. Wu or exhausted his peremptory challenges (A 20). The court noted that its decision to deny defense counsel's challenge for cause had been made according to the standard contained in section 510 of the Judiciary Law, which states that a prospective juror must "be able to understand and communicate in the English language" (A 21; quoting Judiciary Law § 510(4)).

The jury announced that it had found Mr. Sanchez guilty on two counts of criminal sale of a controlled substance in the first degree and one count each of criminal possession of a controlled substance in the first, second, and third degrees (A 22-25). Notwithstanding the court's detailed instructions and annotated verdict sheet, the jury had considered all of the greater and lesser counts in the alternative, so that it failed to render a verdict as to the third-

degree possession charges in counts 4, 8 and 10. The court sent the jury back to complete its deliberations on those three counts (A 28). The jury then found Mr. Sanchez guilty on the three remaining counts as well (A 37).

After the verdict was taken, defense counsel asked to inquire of Ms. Wu concerning the degree to which she had experienced difficulty "understanding the evidence and charge and so forth" (A 41). The prosecutor objected to questions being posed directly by counsel, suggesting instead that the court conduct the inquiry (A 41). Without discharging the jury, the court decided to conduct the inquiry itself, with the benefit of questions suggested by counsel (A 41). But when defense counsel suggested that the court inquire about "her understanding of the witnesses, her understanding of the charge and obviously her understanding [of] whatever happened in the deliberating room," the court declined to do so (A 42-43). The court stated that it was unsure whether the law required that it attempt to assess her understanding of the evidence, and decided instead simply to "confirm her qualifications" under section 510 of the Judiciary Law (A 43).

Defense counsel then pointed out that Ms. Wu's ability to communicate about common experiences might be markedly different from her ability to understand what had occurred during trial:

> Actually, the troubling part for me, Judge, is you may obviously ask questions and see if she can answer your questions, but if the questions are related to common everyday occurrences, she may be able to understand those and give answers to those but may not have been able to understand the other matters that happened in this trial (A 43).

The court responded with the facetious proposal that it ask Ms. Wu to "repeat for me the elements of the criminal possession of a controlled substance in the first degree by rote" (A 43). The court then conducted the following inquiry of Ms. Wu:

> THE COURT: . . . . Ms. W[u], is it correct that a few minutes after the jury was charged this afternoon, given the case, you spoke with a court officer? Did you say something to a court officer?

THE JUROR: (Nodding.)

THE COURT: You have to answer in words.

THE JUROR: Yes.

THE COURT: However, did you have a conversation with that officer? Did you talk to that officer who is over there, to this officer? Did you speak to this court officer?

THE JUROR: Where?

THE COURT: The one that I am pointing out right now, Officer MacGregor [sic]; did you talk to this officer right here?

THE JUROR: No.

THE COURT: Did you talk to this officer at some time?

THE JUROR: When?

THE COURT: Did you talk to this officer and the other jurors in the jury room after the jury started to talk about this case?

THE JUROR: Yeah, in the jury room.

THE COURT: In the jury room?

THE JUROR: Yes.

THE COURT: And what did you say?

THE JUROR: I talk about this case, that the guy that sell the drugs on the March 16 and March 29.

THE COURT: But did you say something to the other jurors in the presence of this officer about yourself? Did you –

THE OFFICER: She said it to me.

THE COURT: Did you say something to this officer? I am indicating this officer right over here, Officer MacGregor [sic]; did you say something to him?

THE JUROR: When?

THE COURT: This afternoon, this afternoon just after the case was given to the jury, did you say something to him?

THE JUROR: To who?

THE COURT: To the officer who I am pointing to.

THE JUROR: Him?

THE COURT: Yes.

THE JUROR: Oh, yes.

THE COURT: And what did you say to him?

THE JUROR: I say that, say something, right.

THE COURT: Yes?

THE JUROR: And I'm not sure –

THE COURT: Yes.

THE JUROR: – I understand. Just some.

THE COURT: Just some you didn't understand?

THE JUROR: Yeah. And they explain to me, all explain to me, so I understand now.

THE COURT: After it was explained to you, you understood?

THE JUROR: Yeah, right.

THE COURT: And did you have any trouble at all understanding after they told you and you talked about the case in the room, any trouble?

THE JUROR: No, no trouble.

THE COURT: Now I want to ask you some questions here, Ms. W[u]: Are you a United States citizen?

THE JUROR: Yes, I am.

THE COURT: Do you live in Queens?

THE JUROR: Yes.

THE COURT: And you are more than 18 years old?

THE JUROR: Yes, sure.

THE COURT: Have you ever been convicted in a court of any kind of a crime?

> THE JUROR: No. First time.
>
> THE COURT: Well, let me ask you this: Have you ever been, yourself, been charged with a crime yourself, ever?
>
> THE JUROR: No.
>
> THE COURT: No. And are you able to understand and communicate in English; do you understand what I'm saying?
>
> THE JUROR: Yeah, I understand now (A 44-48).

The court ruled that there was "no lack of qualification under the present judiciary law and it appears that this juror engaged in the deliberating process, participated and understood, is what she told us" (A 48).

Defense counsel took exception to the court's conclusion, pointing out that the court was forced to ask "about 15" times whether Ms. Wu had spoken to Officer McDonald before she finally answered the question, and that she was unable to formulate a sentence any more complex than three words (A 49). Counsel also argued that Ms. Wu's report that she understood what the other jurors told her did not demonstrate that she had understood the complex issues that were involved in this case (A 50). Counsel explained that deliberations call for the jurors to "remember[] and reflect[] on what they heard and then make[] an opinion on it and then they discuss that opinion based on what they remember" (A 50). Counsel pointed out that, if a juror who had not heard the evidence were to deliberate with jurors who had, that juror's "ability to agree with the other jurors is not necessarily what the deliberation is all about and that's where my concern is" (A 50).

When the prosecutor declined to take a position on the issue, the court adhered to its initial ruling:

> The Court finds, again, no infirmity regarding this juror's qualifications under the present judiciary law, and once again, so everyone is clear regarding the present state of the law, the only standard, and I went through every standard enumerated under the law, and she met every standard under 510.4, "be able to understand and communicate with the English language" . . . . All of the old standards requiring intelligen[ce], good character, ability to read and write the

> English language with a certain degree of proficiency, all of that is stricken and is not the law. I find that these qualifications have been met here (A 51-52).

The court then acknowledged counsel's exception, noted Mr. Sanchez's right to challenge the conviction in a post-verdict motion, and discharged the jury (A 52).

The Motion to Set Aside the Verdict

Defense counsel moved to set aside the verdict on the ground, inter alia, as a result of Ms. Wu's limited understanding of English, that Mr. Sanchez had been convicted by a jury of fewer than 12 qualified jurors (A 53; January 12, 1998 Motion to Set Aside the Verdict and accompanying Affirmation). Counsel argued that most of Ms. Wu's answers to the court's questions were unresponsive, and that she could not understand the simple question whether she had spoken to Officer McDonald (A 54). Counsel also argued that Ms. Wu told the court she had not understood the proceedings until the other jurors had explained it to her. Therefore, "any verdict reached by juror number 11, was not as a result of her evaluation of the testimony and charge by the court but of what had been explained to her by the other jurors" (A 54).

Counsel acknowledged that section 510(4) of the Judiciary Law required that jurors be "able to communicate in the English language as opposed to subdivision 5 of the previous law which required the juror[s] to be able to read, write and speak English in an understandable manner" (A 54). Nevertheless, he argued, Ms. Wu gave incomplete or incorrect answers to most of the court's questions, and gave no sign of having been "able to understand the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberation, and comprehend the applicable legal principals of law as instructed by the Court" (A 55; citing People v. Guzman, 76 N.Y.2d 1 (1990)). Counsel argued that Ms. Wu's statement to Officer McDonald that she had not understood the lawyers, or the judge, or what was going on, coupled with her poor responses to the court's simple questions, indicated that she was not qualified as a juror (A 55).

Counsel also alleged that Ms. Wu's inability to understand the English language adequately was not a mere technical qualification that could be waived; rather, it affected her ability to deliberate in a fair, impartial manner (A 55). The result was a verdict by only 11 jurors, a violation of Mr. Sanchez's right to a verdict by 12 qualified jurors as guaranteed by the federal and state constitutions and C.P.L. § 270.05 (A 55). Counsel concluded:

> [Her m]ere presence in the room [did] not constitute deliberation even if [she was] willing to participate in the deliberation as she [was] unable to articulate and intelligently discuss the testimony or charge with the other jurors (A 55).

The prosecutor responded that Ms. Wu had demonstrated sufficient command of the English language to be considered "qualified" under the 1995 amendments to the Judiciary Law, which required only that she "be able to understand and communicate in the English language" (A 63; Affirmation and Memorandum of Law in Opposition at 9). In support of that conclusion, the prosecutor offered his own perception that Ms. Wu had appeared to be reading and turning the pages of the written transcripts that were used as aides when the taped recordings of telephone conversations were played at trial (A 64). The prosecutor also pointed to Ms. Wu's presence in this country for 30 years, and the fact that she had taken English courses, as indications of her proficiency in English (A 64).

In a written decision dated March 20, 1998, the trial court denied Mr. Sanchez's motion to set aside the verdict (A 69; Memorandum Decision). The court recounted the voir dire at length and noted defense counsel's decision not to exercise a peremptory challenge of Ms. Wu (A 71-74). Comparing the language of section 510 of the Judiciary Law, which governed the qualification of jurors, with the recently amended version, the court concluded that the amendment had relaxed the standard applicable to determining whether a person has sufficient command of the English language to be a qualified juror (A 77-78). The court then ruled that Ms. Wu had met the "newly relaxed" standard for determining a juror's capacity to "understand and communicate in the English language" (A 78).

> [N]otwithstanding some inherent lack of proficiency with the English language, Ms. Wu demonstrated to this Court that she understood the evidence presented, was able to evaluate the evidence in a rational manner, was able to communicate effectively with the other jurors during the very brief period of deliberations and was able to comprehend the legal principles delivered by the Court in its charge on the law (see, People v. Guzman, 76 N.Y.2d 1, 5).[2]

(A 78)

The Appellate Division's Decision

The Appellate Division found Mr. Sanchez's claim that Ms. Wu was grossly unqualified to serve "without merit" because "[t]he Trial Justice, whose determination in this area is accorded great deference, providently exercised his discretion in finding that the subject juror was qualified under Judiciary Law § 510(4) after conducting a hearing" (A 21; Decision & Order of October 29, 2001).

[2] The prosecutor argued, in the alternative, that, under C.P.L. § 270.20(2), defense counsel waived any objection to Ms. Wu's qualifications by failing to peremptorily challenge her during voir dire, and by failing to exhaust his peremptory challenges (A 66-67). The court similarly ruled, in the alternative, that "[a]ssuming, arguendo, that the Court's ruling denying the defendant's challenge for cause with respect to Ms. Wu was in error, the defendant has, nevertheless waived his right to relief pursuant to C.P.L. 330.30 since he failed to comply with the express language of C.P.L. 270.20(2)" (A 78). Specifically, the court ruled that defense counsel "cannot now claim error in the Court's ruling" denying his for-cause challenge because he elected not to use a peremptory challenge to strike Ms. Wu from the jury during jury selection (A 78-79).

## ARGUMENT

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A TRIAL BEFORE 12 QUALIFIED JURORS WHEN HIS CONVICTION WAS ALLOWED TO STAND AFTER ONE OF THE JURORS REPORTED, DURING DELIBERATIONS, THAT SHE HAD NOT UNDERSTOOD THE TRIAL, THE LAWYERS, OR THE COURT; AND THE COURT'S INADEQUATE INQUIRY FURTHER ESTABLISHED THAT SHE DID NOT UNDERSTAND ENGLISH WELL ENOUGH TO PERFORM THE FUNDA-MENTAL FUNCTIONS REQUIRED OF A JUROR. U.S. Const., Art. 2, § 3, Amends VI, XIV; N.Y. Const., Art I, § 2.

Mr. Sanchez, like any civil or criminal litigant in an American court of law, was entitled to a jury whose members could understand and evaluate all of the evidence and arguments at his trial, understand and apply the legal instructions given to them by the court, and communicate effectively with one another during deliberations. See People v. Guzman, 76 N.Y.2d 1 (1990). In New York, the right to 12 qualified jurors is so fundamental that, when it is discovered that a sworn juror is "grossly unqualified" to serve, that juror must be discharged and, if an alternate juror is unavailable, the court must declare a mistrial. In re Stressler v. Hynes, 169 A.D.2d 750, 750 (2d Dept. 1991); In re Bell v. Sherman, 174 A.D.2d 738, 738 (2d Dept. 1991). A criminal defendant may not consent to a verdict by fewer than 12 qualified jurors. Cancemi v. People, 18 N.Y. 128 (1858).

During deliberations in this case, Juror # 11, Homel Wu, reported to a court officer that "she really didn't understand what was going on here; she didn't understand the lawyers and she didn't understand the judge." The court's inquiry of Ms. Wu, even limited and non-specific as it was, nevertheless revealed that Ms. Wu did not, in fact, understand the English language well enough to be a qualified juror. The trial court's finding to the contrary was unsupported by the record and based on an incorrect legal standard. Therefore, it's refusal to set aside the verdict, or even to conduct the probing inquiry defense counsel requested and the law required, violated Mr. Sanchez's fundamental constitutional rights to due process and to a jury trial. U.S. Const., Art. 3, § 2, Amends. VI, XIV; N.Y. Const., Art. I, § 6; Morgan

v. Illinois, 504 U.S. 719 (1992); Rosales-Lopez v. United States, 451 U.S. 182 (1981);[3] People v. Guzman, 76 N.Y.2d 1 (1990).

A. Appellant was Entitled to 12 Jurors with a Sufficient Command of English to Perform their Essential Functions of Understanding and Evaluating the Evidence, Comprehending and Applying the Court's Instructions, and Communicating Effectively with Each Other During Deliberations.

The bulwark of the right to a jury trial is the right to jurors who can perform the basic functions required of them. Chief among a juror's functions is to hear and understand the evidence and base his or her decision upon it. A juror's "verdict must be based upon the evidence developed at the trial." Morgan v. Illinois, 504 U.S. 719, 727 (1992). "Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence." Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 526 (1956). As this Court has noted:

> the essence of the jury system is the deliberate process by which a number of intellects are brought to bear on assessing and evaluating the evidence presented at trial to arrive at a just verdict.

People v. Antommarchi, 80 N.Y.2d 247, 251-252 (1992).

In order to evaluate the evidence, moreover, jurors must understand not only what they heard from the witness stand, but also the applicable law contained in the court's charge and how to apply it. As this Court said in People v. Mussenden, 308 N.Y. 558, 562 (1955), the "proper function or duty" of a jury in a criminal case consists of "applying the legal definitions of crime, as laid down by the trial court, to the evidence."

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[3] Although the United States Constitution does not guarantee a trial before 12 qualified jurors as the New York State Constitution does, Mr. Sanchez, nonetheless, was entitled, under the Sixth and Fourteenth Amendments to a jury whose members all were qualified to serve. Since, as the following arguments demonstrate, the trial court's finding that Juror # 11 was qualified was without record support, and its ruling denying defense counsel's motions for a mistrial and to set aside the verdict was erroneous, an unqualified juror participated in Mr. Sanchez's verdict in violation of his Sixth and Fourteenth Amendment rights.

Indeed, the entire format of the trial is designed to facilitate the jurors' understanding and evaluation of the evidence according to the applicable legal principles: from the requirement of C.P.L. § 260.30(3) that the prosecution's opening statement provide the jurors with "sufficient evidence to intelligently understand the nature of the case," People v. Kurtz, 51 N.Y.2d 380, 384 (1980), to the requirement–an "integral part of the structure of an adequate trial," People v. Gonzalez, 293 N.Y. 259, 263 (1944)–that the court respond meaningfully to deliberating jurors who request "aid in understanding the application of the law to the facts." People v. Malloy, 55 N.Y.2d 296, 301 (1982).

In recognition that this is the essential role of jurors, the standard jury charge in New York informs the jurors that they are "the sole and exclusive judges of the facts," and that they must "decide each and every issue of fact which has arisen during the course of the trial." 1 CJI(NY) § 5.10 at 222. The jurors must also apply the "laws and rules given" by the court "to the facts as [the jurors] find the facts to exist." Id., § 42.00 at 967-68. To accomplish these tasks and reach a unanimous verdict, each juror has a duty to "consult with one another and to deliberate with a view to reaching an agreement," and to engage in "an impartial consideration of the evidence with his fellow jurors." Id., § 42.07 at 983-84.

An impartial consideration of the evidence requires that jurors be able to communicate with each other during deliberations. "[I]f the system is to work as intended, the jurors must engage in reasoned discussion of the evidence." Antommarchi, 80 N.Y.2d at 252. Regardless of whether a case is civil or criminal, "a valid verdict requires that all . . . jurors participate in the underlying deliberations." Sharrow v. Dick Corp., 86 N.Y.2d 54, 60 (1995).

> The parties are entitled to a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other [jurors].

Id.

Drawing upon these universally established principles, this Court spelled out the minimum requirements for a juror in People v. Guzman, 76 N.Y.2d 1 (1990). It noted that

the hearing-impaired were not automatically disqualified from jury service, but also recognized a defendant's right to jurors who could perform their essential functions:

> The question in each case . . . must be whether the individual is capable of doing what jurors are supposed to do. . . . defendant's constitutional rights to a fair trial and to trial by jury demand no less.

Id. at 5. It went on to spell out "what jurors are supposed to do," setting out the minimum requirement for jury service as follows:

> At a minimum, a juror must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court.

Id.

Since American trials are conducted in English, the ability to understand English, and especially spoken English, and to communicate effectively in English, are obviously necessary if a juror is to do what he or she is "supposed to do." The Legislature has specifically recognized that, in order to perform the basic juror functions, a person must be "able to understand and communicate in the English language." Judiciary Law §510(4).

The current statutory formulation is different from the previous one, which required that a juror be "able to read and write the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire, and be able to speak the English language in an understandable manner." Former Judiciary Law §510(5). But that change was clearly not meant to gut a litigant's fundamental right to jurors who can understand the evidence, apply the law to it, and effective communicate their views during deliberations. Rather, the legislative history reveals that the reformulation was "promoted to eliminate a possible conflict with the Federal Americans With Disabilities Act . . . , [and] to conform the statute more closely with caselaw articulating the minimum requirements for jury service (see, People v. Guzman, 76 N.Y.2d 1 (1990))." Senate Memorandum in Support of 1995 N.Y. Session Laws Ch. 86 at 1889 (amending Judiciary Law § 510).

The requirement that a juror be able to "communicate" in English is no different from the prior requirement that he or she be able to "speak" English "in an understandable manner." The new formulation does not specifically require that jurors be able to "read and write" English, which is far less crucial to a juror's job than the ability to understand the English spoken by witnesses, attorneys, and the judge. Rather, it focuses on the overarching requirement that a juror be able to "understand" English–be it spoken or written. To interpret the statute to require less of jurors than the minimum qualifications set forth in Guzman not only would be at odds with the Legislature's intent to "conform the statute more closely" with Guzman and other "caselaw articulating the minimum requirements for jury service," Senate Memorandum at 1889, but would deprive litigants of the fundamental rights to a fair trial and a trial by jury.

Furthermore, as when any concern arises that a sitting juror may be grossly unqualified to serve, the court may not disregard or override that concern without conducting a "probing and tactful" inquiry of the juror, under the particular circumstances of the case, and making certain he or she is, in fact, qualified to continue serving. See People v. Buford, 69 N.Y.2d 290, 299 (1987). Such an inquiry is necessary whenever the qualification of a sworn juror is called into question. People v. Anderson, 70 N.Y.2d 729, 730 (1987). That juror may then continue to serve only if the court determines, as a result of the inquiry, that she was not "grossly unqualified." Id. at 730; see C.P.L. § 270.35.

B. Juror # 11's Announcement That She "Didn't Understand What Was Going on Here; She Didn't Understand the Lawyers and She Didn't Understand the Judge," Together with Her Revelations That She Had Depended on the Other Jurors to "Explain to [Her]" and Her Demonstrated Inability to Understand Even the Most Basic Legal Concepts, Revealed That She Was Unable to Perform the Essential Functions Required of Jurors.

Ms. Wu told a court officer that she had not understood what had gone on during the trial, and had not understood the lawyers or the judge. She essentially admitted that she did lacked the minimum language capabilities required for jury service. See People v. Guzman, 76 N.Y.2d 1, 5 (1990). Her report that she "really didn't understand what was going on here" indicated an inability to understand the evidence presented so she could evaluate it in a rational manner. Id. That she "didn't understand the lawers" indicated her inability to grasp the competing arguments–including the theory of the defense–so as to be able to consider whether the evidence, or lack of evidence, supported those arguments. Id. And that she "didn't understand the judge" was a sure sign that she could not comprehend, much less apply, the legal principles as instructed by the court. Id.

Ms. Wu never disavowed her report or demonstrated that she had, after all, understood the proceedings sufficiently well to be a qualified juror. Rather, the court's inquiry into her ability to understand English confirmed that her report to the court officer was credible and accurate. It also demonstrated that Ms. Wu could not meet sole remaining Guzman factor: upon being asked, "Just some you didn't understand?," she replied, "Yeah. And they explain to me, all explain to me, so I understand now" (A 47; emphasis supplied). This response vividly demonstrated her inability to engage in the kind of give-and-take that is the hallmark of deliberations. See Guzman, 76 N.Y.2d at 5.

Ms. Wu's other responses during the court's inquiry further revealed her inability to fulfill essential functions required of a juror. For example, it was necessary for the court to reframe the simple question "did you say something to a court officer" no fewer than 12 times before finally eliciting a knowledgeable response from Ms. Wu (A 44-47). Ms. Wu gave answers to that repeated question that ranged from "No," to "where?" "When?" and

"Who?", to "Yes. . . I talk about the case, that the guy that sell the drugs on the March 16 and March 29" (A 44-47). The closest Ms. Wu was able to come to a coherent answer to whether she had spoken with the court officer was, "I say that, say something, right. . . . And I'm not sure I understand. Just some" (A 46-47). That level of difficulty understanding the simple question whether she had a conversation with someone was a dramatic demonstration that she did not understand English well enough to communicate effectively with the other jurors during deliberations.

Nor was Ms. Wu's unresponsive answer that "the guy that sell the drugs on the March 16 and March 29" (A 46), particularly enlightening regarding her ability to deliberate. Because it was followed closely by her admission that "they explain to me, all explain to me, so I understand now" (A 47), that portion of the inquiry revealed that Ms. Wu had come to the conclusion that Mr. Sanchez was guilty of selling drugs on March 16 and March 29 only because the other jurors told her it was so.

The inquiry revealed that her understanding of the most basic legal concepts was severely limited. The court asked only two questions addressing legal terms. Ms. Wu's response to the first showed a dramatic lack of comprehension:

> THE COURT: Have you ever been convicted in a court of any kind of crime?
>
> THE JUROR: No. First time (A 48).

The follow-up question, which was the only other one to address a legal concept, was whether Ms. Wu had ever been charged with a crime. But, contrary to the People's claim in the Appellate Division, see Brief for Respondent at 13, n. 5, because her one-word answer, "no" (A 48), might have been either appropriate or inappropriate, depending on whether she had a record, it was not particularly helpful in determining her understanding of legal concepts. Her confusion with respect to whether she had told the "court officer" something, on the other hand, was another indication that her comprehension of legal concepts was insufficient.

Ms. Wu's report, together with her inability follow simple conversational English about whether she had spoken with the court officer, and her lack of understanding of legal concepts such as "conviction," demonstrated that defense counsel's hypothesis was correct: Ms. Wu was able to answer simple questions about her personal background, but was unable to carry on a conversation, and could not possibly have understood the evidence presented or the legal principles contained in the court's instructions to the jury (some of which were complex enough to confuse the other jurors), much less been able to debate them with the other jurors. As counsel made clear following the inquiry, Ms. Wu's inability to understand English rendered her unqualified to be a juror, and the verdict could not stand (A 59-60).

The trial court blatantly ignored the clear record that Ms. Wu was unable to understand the evidence, evaluate it, communicate with the other jurors and comprehend legal principles. Instead, in an attempt to salvage the trial, the court rendered "findings," unsupported by the record, that Ms. Wu had satisfactorily "demonstrated" all four of the skilss enumerated in Guzman (A 78; Memorandum Decision at 9). The court's baseless "findings" were no substitute for record evidence that, despite her own report of not having understood the trial, Ms. Wu was a qualified juror, and are entitled to no deference on this appeal.

The court also came to its incorrect conclusion through the application of the wrong legal standard. The trial court incorrectly surmised that the 1995 amendment of section 510(4) of the Judiciary Law reflected a "newly relaxed" standard for determining juror qualification (A 78). Actually, the amended version was intended to comport with this Court's analysis in Guzman, and the trial court was bound to evaluate Ms. Wu's abilities according to the standard outlined in that case. Senate Memorandum in Support of 1995 N.Y. Session Laws Ch. 86 at 1889 (amending Judiciary Law § 510). The court made clear, however, that in evaluating whether Ms. Wu understood English well enough to be a qualified juror it applied a standard that was less demanding than the Guzman standard. For this

reason as well, the trial court's ruling finding that Ms. Wu was a qualified juror is not entitled to the deference this Court would otherwise give it on appeal. See People v. Toliver, 89 N.Y.2d 843, 845 (1988); People v. Rodriquez, 71 N.Y.2d 214, 219 (1988).

C. The Trial Court Failed to Conduct the "Probing and Tactful" Inquiry to Which Appellant Was Entitled When Juror # 11 Announced That She Did Not Understand What Was Going on at His Trial.

Once Ms. Wu reported, during deliberations, that she "really didn't understand what was going on here; she didn't understand the lawyers and she didn't understand the judge" (A 18), the trial court was bound to conduct the "probing and tactful" inquiry that is necessary whenever the qualification of a sworn juror is called into question. People v. Anderson, 70 N.Y.2d 729, 730 (1987); People v. Buford, 69 N.Y.2d 290, 299 (1987). Because the inquiry the court conducted in this case was inadequate in both its nature and its scope, it was not sufficiently "probing and tactful" to serve as a proper basis for the trial court's determination that Ms. Wu understood English well enough to be a qualified juror.

Defense counsel argued, in advance of the inquiry the court conducted, that the court should ask Ms. Wu questions designed to elicit whether she had understood the testimony, legal instructions, and deliberations in this case (A 42). Defense counsel very reasonably postulated that Ms. Wu had been able to avoid an English proficiency challenge during voir dire because of her capacity to answer simple demographic questions about herself and her family, and that a more specific inquiry about her ability to understand English in the context of Mr. Sanchez's trial was necessary to determine whether she understood the trial proceedings (A 49).

The trial court's refusal to conduct a specific inquiry was error. Ms. Wu's specific report that she had not understood the lawyers or the judge put the trial court on notice of the nature of her potential disability. Its inquiry could be considered probing and tactful only if it concerned the substance of that report. People v. Thomas, 196 A.D.2d 462, 464 (1st Dept. 1993). In Thomas, the Appellate Division described the juror qualification inquiry the

trial court should have conducted concerning a conversation between police witnesses and the jury foreperson that the prosecutor overheard:

> Once the foreperson claimed an inability to recall the nature of the conversation, the court's inquiry should have been more probing, focusing on the specifics of what the prosecutor allegedly heard.

Thomas, 196 A.D.2d at 464. Here, because Ms. Wu had disclosed specifically that she had been unable to understand the testimony, arguments and legal instructions, the court should have inquired specifically about those issues.

The court's facetious remark about asking Ms. Wu to recite the elements of the crimes "by rote" revealed its refusal even to consider counsel's request. But, of course, no such extreme inquiry was necessary. There were several reasonable avenues of inquiry open. The court could have asked Ms. Wu about her understanding of various legal terms applicable to the case, such as "interested witness," "credibility," "burden of proof," or "presumption of innocence." It could have asked whether she understood the difference between the sale counts and the possession counts. It could have asked whether she understood what the prosecutor and defense counsel had said during their summations. Some inquiry along those lines was necessary to test Ms. Wu's report that she had understood nothing about the trial.

In fact, the court need have looked no further than this Court's decision in Guzman to determine the nature of the inquiry that was necessary. The court should, at the very least, have asked Ms. Wu whether she had been able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court. Guzman, 76 N.Y.2d at 5. Absent that inquiry, and having posed no questions designed to establish whether Ms. Wu was minimally capable in those four areas, the court's "findings" that she was were without a shred of support in the record.

The inquiry the court did undertake appeared almost consciously to have avoided the appropriate questions. For example, when Ms. Wu informed the court that "they explain to

me, all explain to me, so I understand now" (A 47), rather than inquire whether "they" and "all" meant the other jurors (as seems obvious), and just what it was they had explained, the court simply accepted her response as if her having understood whatever the other jurors had told her was adequate proof that she had understood all the testimony, arguments and legal instructions in the case. The court merely asked, "did you have any trouble at all understanding after they told you and you talked about the case in the room any trouble?" Not surprisingly, given this leading and conclusory question, Ms. Wu replied, "No, no trouble" (A 47).

Notably, this vague question did not seek clarification of what she now claimed to have understood, or what the other jurors had told her. Indeed, previously during the inquiry, when the court was trying to establish that Ms. Wu had spoken to a court officer, she offered the non-responsive answer, "I talk about this case, that the guy that sell the drugs on the March 16 and March 29" (A 56). It seems likely that what she "understood" was what the other jurors had told her, and that her entire understanding of the case boiled down to her blind acceptance of the other jurors' position that Mr. Sanchez was guilty of the crimes charged. At the very least, her responses to the inquiry in general indicated that this was a substantial possibility, requiring the court to make certain that she had actually understood the trial, arguments of counsel, and final instructions independently of whatever the other jurors had told her.

The only other question the court asked that bore on Ms. Wu's understanding of the proceedings was the relatively innocuous question whether Ms. Wu had ever been convicted of a crime. Her response, "No. First time," (A 48), clearly demonstrated that she had an inadequate understanding of legal concepts expressed in English. Again, however, the court eschewed a pointed inquiry along those lines, preferring instead to simply restate its question as whether she had ever been charged with a crime (A 48). When Ms. Wu answered, "no," the court ended the inquiry with a compound question that did not touch directly on whether

Ms. Wu had understood the trial: "And are you able to understand and communicate in English; do you understand what I'm saying?" (A 48). Ms. Wu's answer, "Yeah, I understand now" (A 48; emphasis supplied), gave the court yet another indication that further inquiry was necessary, but the court did not follow up by asking whether she had understood what had occurred at the trial before.

The court's failure to conduct an appropriately specific inquiry cannot be excused on the ground that the court's general one was sufficiently thorough as to constitute a "probing and tactful" inquiry. As should have been obvious, and as counsel specifically pointed out, whatever difficulty Ms. Wu had with English would not be apparent from an inquiry that focused only her ability to answer questions about personal demographics like her family members and their employment, or on simple day-to-day activities. Thus, even if the court was not required to ask specifically about Ms. Wu's report that she had not understood the trial, the lawyers, or the judge, it was at the very least required to make some assessment of her capacity to understand English that went beyond what had been elicited during the voir dire.

Instead, having needed 12 tries to elicit that Ms. Wu had spoken to the court officer (A 44-47), the court quickly abandoned any attempt to inquire about her understanding of the trial in favor of asking a series of four simple pedigree questions, the answers to which were totally irrelevant to the issue at hand. The court asked Ms. Wu whether she was a United States citizen, whether she lived in Queens, whether she was over 18 years of age, and whether she had been convicted of a crime (and then, upon Ms. Wu's inappropriate response, whether she had been charged with one) (A 47-48). That short series of yes-or-no questions, coming on the heels of the court's difficulty establishing that Ms. Wu had actually spoken to the court officer, and her indication that she had understood only what the other jurors had explained, fell far short of the inquiry the court should have conducted to determine whether Ms. Wu's report that she had understood nothing about the trial was inaccurate. The court's

final question, whether Ms. Wu understood what the court was saying, and her affirmative answer, established nothing more than that Ms. Wu understood the series of questions the court had just asked. Any doubt about her overall qualification to serve that existed after the court's inadequate inquiry should have been resolved by dismissing her and declaring a mistrial. People v. Monroe, 211 A.D.2d 470, 471 (2d Dept. 1995) (neither trial court's inquiry concerning a juror's report that he was angry about the delay caused by the defendant's absence, nor the juror's responses, was sufficient to meet the standard for finding the juror qualified to serve).

D. Defense Counsel Did Not Waive Mr. Sanchez's Objection to Juror # 11's Participation In the Deliberations By Failing to Exercise a Peremptory Challenge or to Exhaust His Peremptory Challenges.

Mr. Sanchez did not waive his objection to Ms. Wu's qualification to serve on the jury for at least three reasons. First, through no fault of the court or either party, it did not become clear that Ms. Wu did not understand English well enough to serve on Mr. Sanchez's jury until she said as much during deliberations. She had answered the background questions posed by the court and counsel during voir dire in simple but responsive terms. Because those questions related only to such day-to-day subjects as address, occupation, and citizenship–subjects with which she had some familiarity–none of her answers revealed that her understanding of English was inadequate to the task of serving as a juror. As defense counsel pointed out following the court's inquiry of Ms. Wu after the verdict, it appears she had sufficient understanding of day-to-day English usage to answer the simple background questions asked during the voir dire, but insufficient to be a qualified juror. Since neither the court nor counsel could have known, from voir dire alone, that Ms. Wu's understanding of English was limited to the context of the questions they had asked (indeed, the court denied counsel's challenge for cause), counsel's decision not to use a peremptory challenge on language grounds did not waive an objection to Ms. Wu's qualification to serve when the degree of her language disability later became apparent.

This case is not unlike People v. Maragh, 94 N.Y.2d 569 (2000), in which this Court held that defense counsel's failure to seek to disqualify a prospective juror on the basis that she was a nurse "cannot justify the later insertion of nonrecord opinion evidence" when that juror, and another, shared their professional opinions during deliberataions. Although that case involved juror misconduct and this one involved juror disqualification, the principle is the same: defense counsel need not anticipate a problem with a juror's service before it occurs in order to raise a claim that can only be made once the problem becomes apparent.

Second, Mr. Sanchez had a fundamental right to have his fate decided by a jury of no fewer than 12 qualified jurors. The State Constitution permits the defendant to waive a jury trial altogether, People v. Ahmed, 66 N.Y.2d 310 (1985), or to consent to the substitution, during deliberations, of an alternate juror for a regular juror, People v. Page, 88 N.Y.2d 1, 9 (1996), but the defendant may never consent to a jury trial before fewer than 12 jurors. Cancemi v. People, 18 N.Y. 128 (1858); In re Stressler v. Hynes, 169 A.D.2d 750, 750 (2d Dept. 1991); In re Bell v. Sherman, 174 A.D.2d 738, 738 (1991); see People v. Lester, 149 A.D.2d 975 (4th Dept. 1989). The Appellate Division has consistently and appropriately followed the rule that, since "[a]n indicted defendant cannot consent to a trial by fewer than 12 jurors," a finding that a sworn juror is grossly unqualified to serve requires the declaration of a mistrial unless a qualified alternate juror remains available to serve. In re Stressler, 169 A.D.2d at 750; see In re Bell, 174 A.D.2d at 738. Thus, even if defense counsel's failure to use a peremptory challenge to strike Ms. Wu, or to exhaust the defense peremptory challenges, could be construed an attempted "waiver" of Mr. Sanchez's right to a jury of 12 qualified jurors, it was ineffective.

Nor was Ms. Wu's inability to understand English a mere technical statutory disqualification that could have been waived by counsel during voir dire on that ground. Although this Court has recognized that a failure to object to the technical personal qualifications of a potential juror during jury selection waives a later claim of a trial before

fewer than 12 jurors, the court expressly limited that exception to the no-waiver rule to "legal and technical" statutory qualifications (many of which have since been abolished) other than those "which go to the character of the juror, and show that he labored under prejudices and prepossessions which rendered him incapable of acting impartially in the case." People v. Cosmo, 205 N.Y. 91, 103 (1912). Since Ms. Wu's inability to understand English rendered her grossly unqualified to serve on Mr. Sanchez's jury, he could not waive that argument by failing to challenge her during jury selection before she was sworn as a trial juror. Id. at 103; People v. Thomas, 141 Misc. 2d 182, 185 (N.Y. Co. Sup. Ct. 1988) (When "an objection to a sworn juror relates not to prejudice or incompetence, but to technical statutory disqualifications, such disqualifications are waived for failure to assert").

Finally, under the State Constitution, a defendant may waive his right to a jury trial only by executing the waiver in writing, in open court, with the approval of the judge. Page, 88 N.Y.2d at 6-9; People v. Diaz, 10 A.D.2d 80, 89 (1st Dept. ), aff'd 8 N.Y.2d 1061 (1960). Obviously, Mr. Sanchez did no such thing in this case. Since that requirement is strictly construed, and not a mere technicality, see Page, 88 N.Y.2d at 8-9, Mr. Sanchez cannot be said to have waived his challenge of the integrity of the jury verdict through defense counsel's failure to exercise a peremptory challenge during jury selection.

* * *

Ms. Wu's report that she had not understood the trial, the lawyers, and the judge, together with her inability to answer simple conversational questions the court asked during its inquiry, or to understand the legal concept of "conviction" demonstrated that she did not possess the minimum language capacity necessary to perform the fundamental functions required of a juror. The trial court's erroneous conclusion to the contrary, which was based on an inadequate, non-specific, inquiry, and arrived at through the application of an incorrect legal standard, is entitled to no deference on appeal. Since Ms. Wu was not a qualified juror,

Mr. Sanchez's conviction violated his fundamental constitutional rights to a trial before 12 qualified jurors. Therefore, this Court must reverse his conviction and order a new trial.

## CONCLUSION

THIS COURT SHOULD REVERSE MR. SANCHEZ'S CONVICTION AND ORDER A NEW TRIAL.

Respectfully Submitted,

LYNN W.L. FAHEY
Appellate Advocates
Counsel for Defendant-Appellant

By: Paul Skip Laisure
Of Counsel
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