To be argued by:
David Billingsley
*15 mins. requested*

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent*,

-against-

DOMINICK DAVIS,

*Defendant-Appellant*.

# BRIEF FOR DEFENDANT-APPELLANT DOMINICK DAVIS

Bronx Cty. Ind. No. 1684-2012

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## PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on January 12, 2016, by the Supreme Court, Bronx County. Dominick Davis was convicted after a trial of one count of Murder in the Second Degree, N.Y. Penal Law § 125.25, and Criminal Possession of a Weapon in the Second Degree, N.Y. Penal Law § 265.03(3). Mr. Davis was sentenced to 25-years-to-life in prison on the murder count and ten years in prison with five years of post-release supervision on the weapon possession count, to run consecutively.

Justice Ethan Greenberg presided over the suppression hearing, trial and sentencing. Timely notice of appeal was filed. No stay of execution has been sought. Mr. Davis is currently serving his term of imprisonment.

## QUESTIONS PRESENTED

1. Did the trial court erroneously deny Mr. Davis's motion to suppress his post-arrest statements where the sole basis for Mr. Davis's arrest was unreliable informant testimony and where the police located Mr. Davis by unlawfully relying on real time cell-site location information that they secured without a warrant?

2. Did Mr. Davis receive ineffective assistance of counsel where his trial counsel unreasonably failed to move to re-open the suppression hearing after learning that the police made false statements to support a finding of exigent circumstances and justify a warrantless arrest?

3. Was criminal possession of a weapon in the second degree a material element of second degree murder, or did the offenses constitute a single, continuous transaction, such that Mr. Davis's sentences were required to run concurrently?

4. Were Mr. Davis's consecutive sentences of 25 years to life and ten years unduly harsh and excessive given the nature of his offense, his young age, and his demonstrated prospects for rehabilitation?

## INTRODUCTION

Constitutional and legal errors afflicted the suppression hearing, trial, and sentencing that led to Dominick Davis's conviction and sentence for second degree-murder and weapon possession.

The police violated the Fourth Amendment in obtaining written and videotaped statements from Dominick Davis. Specifically, they arrested Mr. Davis without probable cause and they conducted an unconstitutional search of private cell-site location information (CLSI) in order to locate Mr. Davis. After the trial court refused to suppress these statements in spite of these violations, these statements formed the primary basis for Mr. Davis's conviction. Then Mr. Davis's attorney inexplicably failed to move to re-open the suppression hearing after obtaining police documents showing that the police made a false allegation in support of their claim of exigent circumstances to access Mr. Davis's CSLI.

The errors continued into Mr. Davis's sentencing when the court illegally imposed consecutive sentences. Even if consecutive sentences had been proper, they were not justified under the circumstances of Mr. Davis's case.

These errors thus present four bases for reversal of Mr. Davis's conviction, or modification of his sentence:

*First*, Mr. Davis's statements should have been suppressed as the fruit of an illegal arrest. Mr. Davis was arrested solely on the basis of a statement from an alleged accomplice, Alejandro Campos. This statement was unreliable because it was not

corroborated by independent police investigation, it was not made under oath, and Mr. Campos had never given the police reliable information in the past. Under these circumstances, Mr. Campos's statement could not establish probable cause to arrest Mr. Davis.

Additionally, the police unlawfully relied on real-time CSLI tracking – known as "pinging" – to locate and arrest Mr. Davis without a warrant. Recent Supreme Court jurisprudence recognizes that CSLI and other emerging technologies offer the state extraordinary and historically unprecedented ability to effect profound invasions of privacy without a warrant and that such state action requires restriction. Here, the police, acting without a warrant, relied on exactly such technology to "ping" Mr. Davis's phone and locate him. This is exactly the kind of invasive search that the courts have deemed to be illegal without a warrant. The written and videotaped statements that were the fruit of that unlawful arrest must be suppressed.

*Second*, Mr. Davis was deprived of constitutionally effective assistance of counsel. After the pre-trial suppression hearing, the trial court ruled that the police did not need a warrant to ping Mr. Davis's phone because the search was justified by exigent circumstances. Specifically, the police testified that that Mr. Davis was a flight risk and was considered a potentially armed murder suspect at large. However, after the trial court's suppression decision, in the weeks before the start of trial, defense counsel received the actual paperwork that was prepared by the police officers on the night of Mr. Davis's arrest. In their requests to the NYPD Technical Assistance

Research Unit (who conducted the pinging) and Mr. Davis's phone carrier (who granted access to the CSLI), the investigating officers presented a false justification for their need for a warrantless search: they claimed that Mr. Davis used his phone to threaten witnesses. Even though (a) the trial court specifically relied on the testimony that the police believed that Mr. Davis was a flight risk and a danger to find that exigent circumstances excused the failure to secure a warrant; (b) the contemporaneous records completely contradicted the police claims on which the trial court relied in making its suppression hearing ruling; and (c) the police witnesses admitted at trial that the claim of exigent circumstances made in the paperwork prepared on the night of Mr. Davis's arrest was false, defense counsel inexplicably failed to move to re-open the suppression hearing – even after the trial court suggested he do so.

Because the actual basis for the claim of exigent circumstances was false and the police testimony at the suppression hearing was false, there was a reasonable probability that Mr. Davis's statements would have been suppressed had defense counsel moved to re-open the hearing. The suppression of Mr. Davis's written and videotaped statements would have required either the dismissal of the charges or an acquittal because the only other evidence implicating Mr. Davis in the robbery and shooting was the uncorroborated hearsay statement of the alleged accomplice, Mr. Campos, and such testimony cannot support a conviction. Trial counsel's needless

waiver of this central suppression issue was objectively unreasonable, severely prejudicial, and deprived Mr. Davis of meaningful representation.

*Third*, in the event that this Court finds that Mr. Davis's conviction should stand, it should modify Mr. Davis's sentences to run concurrently. The trial court illegally imposed consecutive sentences for the murder and weapon possession convictions. Because no reasonable view of the evidence could have supported a conviction for second-degree murder without also supporting a conviction for possession of a loaded handgun, the weapon possession count was a material element of the felony murder. Additionally, the trial evidence demonstrated that Mr. Davis formed the intent to possess the weapon well before – and for the sole purpose of – the commission of the robbery, rendering the weapon possession counts and murder counts a single, continuous transaction. For both these reasons, concurrent sentences were required.

*Finally*, Mr. Davis's sentence was unduly harsh and excessive. Even if consecutive sentencing was permissible – which it was not – such a sentence was inappropriate because the second-degree murder count, as charged, could only have been committed with the use of a gun. The murder conviction therefore fully contemplated the moral culpability of the conduct and the need for deterrence, without additional time for the weapon possession count. Moreover, Mr. Davis was relatively young, showed significant promise for rehabilitation, and continually expressed remorse in his statements to police and at sentencing. This Court should

modify his sentences to run concurrently and reduce the length of his sentences closer to the minimum terms.

## STATEMENT OF FACTS

On May 25, 2012, Dominick Davis and Alejandro Campos were charged with several felony counts by Bronx County Indictment No. 1684-2012 (hereinafter, "Indictment") in relation to the robbery and shooting death of Huang Yang on the night of April 18, 2012. Mr. Davis was charged with one count of murder in the first degree (N.Y. Penal Law § 125.27(1)(a)(vii)), one count of murder in the second degree (Penal Law § 125.25(1)), one count of murder in the second degree (Penal Law § 125.25(3)), one count of robbery in the first degree (Penal Law § 160.15(1)) and one count criminal possession of a weapon in the second degree (N.Y. Penal Law § 265.03(3)). *See* Indictment. Mr. Davis was also charged with several counts relating to an unrelated robbery.[1] *See* Indictment.

### A. Pre-Trial Suppression Hearing.

The trial court held a *Huntley/Dunaway/Mapp* hearing on October 2, 2015, in which defense counsel sought to suppress written and videotaped statements allegedly made by Mr. Davis following his arrest. H.[2] 1, 225-37. New York City Police Department (NYPD) Detectives Sean O'Leary, James Campbell, and Lieutenant Sean O'Toole testified to the circumstances leading up to their warrantless arrest of Mr. Davis. H. 12, 50, 254.

[1] Mr. Davis was acquitted of all charges in relation to this robbery after trial. For the sake of brevity, the details of the proceedings related to these robbery charges will be abbreviated.

[2] Citations to "H." refer to suppression hearing proceedings held on Oct. 1 – Oct. 21, 2015. Citations to "T." refer to trial proceedings held on Nov. 9 – Dec. 8, 2015. Citations "S" refer to the sentencing on Jan. 12, 2016.

1. *Alejandro Campos Sold Huang Yang's Missing iPhone On Craigslist, Leading Police to Interview Mr. Campos.*

At approximately 12:30 AM on April 19, 2012, Det. Campbell testified that he arrived near the intersection of W 232nd St. and Cambridge Ave. in the Bronx, where Huang Yang was found dead. H. 14, 53, 91. Det. Campbell testified that police interviewed a 911 caller, who reported seeing a "male wearing a gray hooded sweatshirt running on the sidewalk and the male walked over to a silver or gray minivan." H. 93; *see also* H. 96 ("gray hoodie"). Police also received information that the minivan had out-of-state license plates. H. 20. There was "no information to indicate that the perpetrator of the homicide is a particular race," H. 95-96, and the police had no other descriptive information about the offender.

Although the police found "white ear buds that are usually attached to a phone" at the scene, and later obtained a video that appeared to show Mr. Yang carrying a phone, no phone was found near Mr. Yang's body, leading police to conclude that the phone was stolen. H. 54-55. Det. O'Leary testified that after speaking with Mr. Yang's family and learning that he typically carried an iPhone, the police requested records from Apple. H. 14-15.

These records showed that Mr. Yang's device had been "accessed" using a phone number with a 917 area code, which was not Mr. Yang's. H. 15. The detectives learned from the owner of the 917 phone number that on April 26, 2012, Mr. Yang's iPhone was one of two offered for sale in a Craigslist ad and ultimately sold to a man

named Franklin Jimenez. H. 15-18, 54-56. The incorrect 917 number resulted from Mr. Jimenez briefly placing a different sim card into Mr. Yang's phone to confirm that the phone worked before completing the purchase. H. 54-55. Mr. Jimenez described the person who sold the phone to him; his description did not match Mr. Davis. H. 95-96.

Mr. Jimenez gave the detectives a screenshot of the Craigslist ad showing that the phones were sold by someone named "Alex," who listed his phone number as 718-930-0242. H.18-20, 27. The police determined that this phone number was associated with a previous police report made by Alejandro Campos regarding a break-in to his "silver Odyssey" – a minivan "with out-of-state Ohio plates." H. 20. This police report listed Mr. Campos's address at 2850 Webb Avenue in the Bronx. H. 57, 103, 107. Det. Campbell found Mr. Campos at this address on Apr. 26 at approximately 6:00 PM. H. 20-21, 28-30. The detectives brought Mr. Campos to the precinct for questioning. H. 20-21, 28-30.

2. *Alejandro Campos Incriminates Himself in the Robbery of Huang Yang When Police Question Him.*

The detectives first questioned Mr. Campos about the shooting of Mr. Yang. Mr. Campos made a statement, which was written by the detectives and signed by Mr. Campos. People's Hearing Exh. 4, First Written Statement of Alejandro Campos

dated Apr. 26, 2012 (hereinafter, "Campos First Written Statement"[3]). Mr. Campos's written statement is noted to begin at 8:30 PM and end at 9:05 PM on Apr. 26, 2012. *Id.*

In his statement, Mr. Campos explained to the police that he drives a silver Honda Odyssey. *Id.* He said that he spent April 18, 2012 hanging out with someone named "Nick." *Id.* According to Mr. Campos, that evening, he and Nick were driving around in Mr. Campos's car at about 6 or 7 PM when they began talking about "getting someone," i.e., robbing someone. *Id.* They separated at approximately 7 PM but at 10 PM, Nick called and asked Mr. Campos to pick him up. *Id.* Nick was wearing a grey hooded sweatshirt and jeans. *Id.*

Mr. Campos said that he and Nick discussed doing a robbery again, and then drove around until, sometime after 11 PM, they identified a person in the West 231st St. area, whom they followed for some time until Mr. Campos pulled over. *Id.* At this point, Mr. Campos claimed that Nick first revealed that he had a gun. *Id.* Mr. Campos asserted that he had not previously known that Nick was armed. *Id.* According to Mr. Campos, Nick got out of the van, and walked down the street while Mr. Campos stayed in the car. *Id.* After about 10 minutes, Mr. Campos heard a shot. *Id.* Nick returned to the car and told Mr. Campos to drive. *Id.* When Mr. Campos asked about

[3] This is denoted as Mr. Campos's first written statement to avoid confusion with a later written statement in the record made by Mr. Campos relating to the April 13, 2012 robbery, of which Mr. Davis was acquitted.

the shot, Nick said, "I shot in the air so he could run." *Id.* The next morning, he and Nick took the phone, along with another, to a store to be unlocked, after which Mr. Campos posted both phones on Craigslist to be sold. *Id.* Mr. Campos agreed to sell the phones to someone in Queens. He drove with Nick and two other friends to Queens to make the sale. *Id.*

Mr. Campos told the police that he and Nick lived in the same apartment building. H. 103. A police search of records indicated that someone named Dominick Davis lived in this building. H. 103-04. The police showed Mr. Campos a photograph of Dominick Davis and Mr. Campos identified him as "Nick" at approximately 9:15 PM. H. 68. Prior to interrogating Mr. Campos, police "never got a name Dominick Davis or a nickname Nick." H. 183.

3. *Police Ping Mr. Davis's Phone to Ascertain His Location and Arrest Him Without a Warrant by Claiming Exigent Circumstances.*

Mr. Campos gave detectives Mr. Davis's phone number after telling them that Mr. Davis was Nick. H. 257. The detectives then gave this phone number to the NYPD's Technical Assistance Response Unit (TARU) between 11PM and 12PM in order to "ping" Mr. Davis's phone – i.e., use real time cell-site location information (CSLI) from Mr. Davis's phone – to locate him. H. 258-261, 273. Specifically, the police contacted T-Mobile, Mr. Davis's phone carrier, to arrange for the transmission of his phone's real-time CSLI. H. 259-261, H. 278. The functionality that transmits

CSLI cannot be disabled as long as the phone is turned on. H. 280. The pings occurred about once every 15 minutes. H. 279.

Det. O'Toole testified that the pinging process began at approximately 11:15 PM. H. 279. Police received four pings, once about every fifteen minutes, before they were able to locate Mr. Davis at about 12:30 AM. H. 279-80. The pings first indicated that Mr. Davis was in the vicinity of 2850 Webb Ave, leading some officers to search for him there. H. 261. Mr. However, the pings later indicated that Mr. Davis was in a "completely different" area of the Bronx, near a subway station at 231st Street and Broadway. H. 261-262. The last ping then indicated that Mr. Davis's phone was in a parking lot across the street from the detectives' own precinct. H. 263-64. Detectives identified the car Mr. Davis was in, immediately removed him from the vehicle and arrested him, brought him into the police station, put him into an interview room and held him there until he completed making his statements. H. 169, 174, 266.

The police never sought a warrant or court order to ping Mr. Davis's phone or to arrest Mr. Davis. Detective O'Toole claimed that the police were concerned that a warrant application would take too long given that Mr. Davis might have seen Mr. Campos leaving 2850 Webb Avenue with the police and attempt to flee. H. 108, 260, 269-70. Det. O'Toole also claimed that they were concerned that Mr. Yang's killer was armed and the gun used in the shooting had not been recovered. H. 260. The trial prosecutor did not provide the written requests made by the detectives and Lt. O'Toole to TARU and T-Mobile to defense counsel or the court at the hearing,

therefore the court specifically allowed defense counsel leave to re-open the hearing upon receipt of any document from TARU that "raises any issue." H. 209-10, 281.

*After Mr. Davis was arrested*, a judge signed an order, pursuant to N.Y. C.P.L. § 705.10 and § 705.30 and 18 U.S.C. § 2703, authorizing T-Mobile to use a "pen register and a trap and trace device" to obtain "subscriber information" and "past call detail reports…with cell site information." *See* Order of Hon. Martin Marcus Dated Apr. 27, 2012. H. 178. The order did not give the police prospective or retrospective authorization to secure *real-time* location information by pinging Mr. Davis's phone and none of the statutes under which the court authorized location information mention the use of real-time location information. The application for the order also failed to mention that the pinging was already done and Mr. Davis was already in custody. *See* Affirmations of Joshua Gradinger and Joseph O'Neil (in support of ex parte motion for cell site, call detail and subscriber information), Dated Apr. 27, 2012.

4. *Mr. Davis Makes Written and Videotaped Statements at the Precinct.*

Approximately 2.5 hours after his arrest, at 3:00 AM on April 27, 2012, Mr. Davis was read *Miranda* warnings, after which he gave a written statement. H. 169; People's Hearing Exh. 6, Written Statement of Dominick Davis, dated Apr. 27, 2012 (hereinafter, Davis Written Statement) at 1. His statement indicated that he spent April 18, 2012 hanging out with Mr. Campos. Davis Written Statement at 1. Later in the evening, the two drove around in Mr. Campos's van looking for someone to rob. *Id.* After seeing "a kid" (Mr. Yang), they followed him and eventually Mr. Davis got

out of the car. *Id.* He approached and said, "Give me your stuff." *Id.* When Mr. Yang hesitated, Mr. Davis pulled out a gun. *Id.* Mr. Yang then "flinched as if he was going for a weapon." *Id.* This "scared" Mr. Davis, so that he "panicked," and pulled the trigger. *Id.* at 2. Mr. Yang ran away for a short distance but then fell. *Id.* Mr. Davis went over to Mr. Yang "to make sure he was okay," picking up Mr. Yang's dropped iPhone along the way. *Id.* Then, "[a]fter [Mr. Davis] saw he was still alive," he returned to Mr. Campos's car, and they drove away. *Id.* He stated that he "didn't mean to hurt him" over a "dumb ass [iPhone]" and "blacked out because I was hoping the kid was okay." *Id.* Mr. Davis said that he "stayed awake thinking … for about 4 to 5 hours[.]" *Id.* The next day Mr. Davis took the phone to be unlocked, and accompanied Mr. Campos to Queens to sell it. Mr. Davis concluded the statement by saying, "I'm sorry I didn't mean for any of this to happen. I wish the night never happened. It's a bad dream which I woke up in." *Id.* 1-2.

Mr. Davis's videotaped statement began at 4:16 AM and ended at 4:38 AM and contained much of the same information. People's Hearing Exh. 3, Videotaped Statement of Dominick Davis (hereinafter, Davis Video Statement). However, on video, Mr. Davis also stated that he did not have the gun on him all day. Davis Video Statement at 1:23:30:00-1:23:40:00.[4] He stated after initially seeing Mr. Campos earlier in the day, he went to borrow the gun from a friend at approximately 9 or 10PM, and

[4] This timestamp notation refers to the time markings visible in the middle of the screen beginning with the letters "TCR", as in "TCR 01:23:36:00."

then returned to meet up with Mr. Campos after acquiring it. Davis Video Statement at 1:24:00:00 – 1:24:45:00. He also stated that he aimed downward towards Mr. Yang's waistband, but ended up shooting higher than he had aimed. *Id.* at 1:15:40:00 - 1:16:10:00. He also stated that Mr. Yang was alive, conscious and breathing when Mr. Davis returned to the car. *Id.* at 1:16:20:00 – 1:16:50:00. He concluded the statement by saying "I'm totally sorry for everything that happened." *Id.* at 1:29:30:00-1:29:45:00.

*5. The Trial Court Denies Mr. Davis's Motion to Suppress His Statements.*

The trial court denied Mr. Davis's motion to suppress his statements. The court found the officers to be "credible witnesses" despite extensive argument from counsel for both Mr. Davis and Mr. Campos that their testimony was implausible and self-contradictory. Decision and Order of Hon. Ethan Greenberg Dated Nov. 9, 2015, (hereinafter, "Hearing Decision") at 17-18.

*First,* the court held that the ping of Mr. Davis's phone did not constitute a search because Mr. Davis had no reasonable expectation of privacy "concerning his whereabouts when he is out in public." *Id.* at 4-6. It observed that the ping process only lasted approximately an hour (relying on *People v. Hall*, 86 A.D.3d 450 (1st Dep't 2011)), unlike the prolonged period of surveillance involved in *People v. Weaver*, 12 N.Y.3d 453 (2010) (65 days) and *United States v. Jones*, 565 U.S. 400 (2012) (28 days). *Id.* at 5. The court declared that Mr. Davis was "unwise … to sit[] with his phone turned on" in a parking lot near the police station and thus had a diminished expectation of privacy. *Id.* at 6.

The court also found that the pinging was not authorized by N.Y. Crim. Proc. Law § 705.10 (under which the order to access Mr. Davis's CSLI was granted), since "trap and trace" and "pen register" devices do not describe methods of revealing the physical location of a cellphone in real time. Hearing Decision at 12-15. It also concluded that pinging of Mr. Davis's phone may have violated the Stored Communications Act (SCA), 18 U.S.C. § 2702, which requires an order granting access to electronically stored communications data, except, *inter alia*, in the event of imminent death or serious injury – but *not* when there is a flight risk of a suspect, as the prosecutor argued at the hearing. *See* 18 U.S.C. § 2702(c)(4); Hearing Decision at 14-15.

The court noted that it was "*very* disturbing" (emphasis in original) that the application withheld from the issuing judge the key fact that the "ping[s] had *already* been done" (emphasis in original). *Id.* The court was skeptical that a retroactive order would be consistent with the SCA since it contained no explicit provision for such a backward looking order and an "essential reason for the warrant requirement is to obtain an objective determination *before* a search is conducted[.]" Hearing Decision at 14. (emphasis in original). Nonetheless, the court held that suppression was not required because it found no constitutional violation. Hearing Decision at 16-17.

*Second*, the court held that even if the ping was a search, a warrant was not required because there were exigent circumstances. *Id.* at 6-9. In this regard, the court specifically relied on the officer's testimony that they believed Mr. Davis was a flight

risk, that he might be armed, and that he presented a public safety risk. *Id.* at 6-9, 16-19.

*Third*, the court held that the police had probable cause to arrest Mr. Davis based solely on Mr. Campos's statement. Hearing Decision at 26, 34-40. It held that Mr. Campos's statement was sufficiently reliable, claiming that it was consistent with certain aspects of the police investigation about the time, place and nature of the robbery, including that the robbers drove away in "silver van" and that one perpetrator wore a "grey hoodie." *Id.* at 34-37. Relying on *People v. DiFalco*, 80 N.Y.3d 693 (1993), the court held that there was no need for Mr. Davis's identity as the shooter to be corroborated by evidence other than Mr. Campos's statement. *Id.* at 38 n. 6. The court also stated that Mr. Campos's claims were against his penal interest and an accomplice's confession is "usually" regarded as reliable. *Id* at 34. In response to defense counsel's argument that Mr. Campos's statements taken together showed that he was attempting to minimize his own criminal liability, the trial court found that Mr. Campos was not likely to lie the police while believing that that he was "in serious trouble." *Id.* at 35-37.

*Fourth*, the court held that even if the arrest of Mr. Davis was illegal, it was attenuated from Mr. Davis's later statements because of the intervening time period between the arrest and the statements, and the fact that his statements followed *Miranda* warnings. *Id.* at 9-12.

*Last*, the trial court ruled that Mr. Davis's written and videotaped statements were made voluntarily. *Id.* at 40-41.

6. *The Actual Forms Used by the Police to Support the Warrantless Search of Mr. Davis and His Phone Contradict the Police Hearing Testimony.*

After the hearing decision and approximately one month before trial, defense counsel received a "TARU Exigent Circumstances Declaration Form" which documented the actual exigent circumstances proffered by the police to support the warrantless pinging of Mr. Davis's phone. T. 372-73. This form, prepared by "Det. O'Neil," said that the phone at issue was "used to by perp #2 in a 2-perp homicide to threaten the only eyewitness in this case." *See* Def. Trial Exh. C, TARU Exigent Circumstances Declaration Form. The form makes no mention of potential flight by Mr. Davis, nor does it assert that Mr. Davis might be armed or make any mention of a gun.

Defense counsel also received an "exigent circumstance request form" directed at T-Mobile which requested access to Mr. Davis's phone without a warrant or court order because the "emergency which exists is as follows: Threats to a witness." Def. Trial Exh. D, Exigent Circumstances Declaration Form. This form also makes no mention of weapons or potential flight by Mr. Davis.

Despite having been given leave to move to re-open the suppression hearing if any TARU documents "raised any issue," H. 209-10, defense counsel made no such motion.

**B. Trial.**

Mr. Davis and Mr. Campos were tried separately.

*1. No Physical Evidence Linked Mr. Davis to Mr. Yang's Shooting.*

None of the DNA recovered from the scene of Mr. Yang's shooting matched Mr. Davis. T. 712-13. Mr. Yang's earphones and jacket were tested for gunshot residue, and hair and fiber analysis, but nothing linked Mr. Davis to the scene of the crime. T. 28-29.

*2. Only One Person Saw the Perpetrator and Her Only Description Was That the Perpetrator Was a Male in a Gray Hooded Sweatshirt.*

Danielle Eddy testified that she was in her apartment at approximately 11:30 PM on Apr. 18, 2012. T. 115, 129-30. As she stood on her balcony, she noticed a "silver" or "whitish" minivan sitting at a nearby intersection with its lights on. T. 116. Approximately half an hour after going inside her apartment from the balcony, she heard a shot, followed by the sound of running footsteps. T. 115-116, 125.

When she looked outside, she saw a person running toward a "mound" in the middle of the street. T. 117. She saw the person "nudge" this "mound," but "not maliciously," as "if you saw something like garbage or [a] dead animal, you would want to know if it was moving, that kind of thing." T. 119.

She then saw the person using two fingers "pull[] up something on this mound and it dropped" at which point she realized it was the arm of someone laying on the ground. T. 119. Ms. Eddy then called 911. T. 119. When she returned to the window,

she saw the person "continuing…to nudge at the body with their foot." T. 119-20. The person then "bent a little further down, looking down," such that he was "in close contact" or "in close view of" the person on the ground. T. 120. This lasted between "20 seconds to two minutes." T. 139. The person then got into the passenger side of the minivan she had noticed earlier and left. T. 120-23.

On a 911 call recording, Ms. Eddy described the person as a "definitely a male" in a "gray hooded sweatshirt," with the "hood up." People's Trial Exh. 30, 911 Call Recording, at 1:17-1:37.[5] When she testified at trial, Ms. Eddy was unable to offer any identifying features except to say that he "wasn't pale" and he "definitely [wasn't] Irish like me. Whether it was Latino, whether it was black, or whether it was – I don't know what they were but definitely not Albino." T. 140. When asked, "Anything else you could tell us about him though?" Ms. Eddy provided no further physical description. T. 140.

*3. Franklin Jimenez Identified Only Mr. Campos as the iPhone Seller.*

Franklin Jimenez testified that on April 19, 2012, he was looking to buy a phone for his son and found a Craigslist ad offering two iPhones for sale. T. 154-56. The seller listed his phone number as 718-930-0242. T. 156. Mr. Jimenez's son

[5] The 911 dispatcher repeatedly urged Ms. Eddy to describe the person and suggested that the offender was black. The dispatcher said, "Did you get a description of the person that was shooting? A male black?" *Id.* at 1:17. Ms. Eddy replied that he wore a grey hooded sweatshirt. *Id.* at 1:21. The 911 dispatcher then interrupted her saying, "Was it male black? White?" *Id.* at 1:26. Ms. Eddy then says, "It was definitely a male. He had a gray sweatshirt on with the hood up. It's dark, it's looks as though he would be black, I- I don't wanna make that assumption." *Id.* at 1:28.

contacted the seller by email at the address alex.campos99@gmail.com. His son further called and texted the listed number to arrange a sale. T. 156-58, 170.

Mr. Jimenez met Mr. Campos outside of a supermarket near Mr. Jimenez's home shortly after midnight on Apr. 20, 2012. T. 158-59. Mr. Campos arrived in a "gray" minivan "with a ladder on top" with Ohio plates, accompanied by three other people. T. 160-162. He said that the two people in the back were described as having "light skin" and being "Hispanic." T. 163. The person in the front passenger seat was a "dark skinned person with a hoodie," T. 180, but "physically [he] was unable to see" what he looked like, and saw his face "very little." T. 162-63. Although Mr. Jimenez attempted to speak with the person in the front passenger seat, he was unable to communicate with him because Mr. Jimenez speaks only limited English. T. 175, 181. Since Mr. Campos spoke Spanish, the transaction was conducted through Mr. Campos. T. 161, 181, 175, 186. Mr. Jimenez told the police that he could not identify the front passenger. T. 182.

After making sure that both phones worked by turning them on after placing his wife's SIM card into them, Mr. Jimenez completed the purchase. T. 164-65. The phone given to Mr. Jimenez's son was determined to be Mr. Yang's iPhone. *See* T. 96-114 (testimony of David Lu, Apple Loss Prevention Manager, describing Apple logs of activation events on Apple servers relating to the serial number of Mr. Yang's phone); T. 219-251 (Det. Campbell describing how Apple records were used to locate Mr. Campos).

4. *Defense Counsel Admits That He Received Documents Showing That the Police Sought Access to Mr. Davis's Phone on a False Basis.*

During the cross-examination of Det. Campbell at trial, defense counsel asked, "Was there any time you received information on the 26th that my client had called a witness, an eyewitness to the homicide and threaten them?" to which Det. Campbell responded "No, sir." T. 364. This prompted a robing room discussion in which defense counsel stated he had received a "TARU exigent circumstances declaration form" and an "internal police department document" that was prepared by Det. O'Neil, and signed by Lt. O'Toole, as well as an "exigent circumstances form" sent to T-Mobile "as a request for the ping." T. 364-65, 373. Counsel explained the both forms stated that the sole exigent circumstance relied on by the police to support warrantless access to Mr. Davis's CSLI was that Mr. Davis's phone number was used to make "threats to a witness." T. 365-66. Defense counsel explained that, in direct contrast with the suppression hearing testimony, none of the forms mention weapon possession or potential flight by Mr. Davis as the reason for the request. T. 364-66. Defense counsel argued that Det. Campbell's admission that he knew of no threats to witnesses demonstrated that the officers had "made up [the threats] so they could argue exigent circumstances." T. 366-67. The court eventually agreed that the TARU Exigent Circumstances Declaration Form submitted to the TARU unit could be admitted as "a police record." T. 372; Def. Trial Exh. C, TARU Exigent Circumstances Declaration Form.

The following exchange then occurred, in which defense counsel admitted that he failed to re-open the hearing even though he received the form well before trial:

| | |
|---|---|
| THE COURT: | …Actually I don't know why you don't move to reopen the hearing, because this [form] is approved by [Lt.] O'Toole, who is the fellow who will say the reason for the application is flight. |
| MR. WATTERS: | I would be happy to. |
| THE COURT: | You had this quite a while. |
| MR. WATTERS: | I don't think it's necessary. We had this after the hearing. |
| THE COURT: | Like a month ago. |
| MR. WATTERS: | Time flies when you're having fun, Judge. |

T. 372.

Later, defense counsel cross examined Det. Joseph O'Neil, whose signature was on the TARU Exigent Circumstances Declaration Form. Det. O'Neil admitted that when he signed the form, he was not aware of any eyewitnesses to the shooting of Mr. Yang. T. 674. But first, he disavowed knowledge of the form's contents before he signed it. T. 672-73. He then claimed that the mention of threats had been "misconstrued" because the police believed Franklin Jimenez had been threatened. T. 675. Thereafter Det. O'Neil admitted that he not only knew that Mr. Jimenez was not an eyewitness, but also acknowledged that there was no information suggesting that Mr. Jimenez had been threatened. T 676. Ultimately, Det. O'Neil admitted that the

claim of threats to an eyewitness on the form was "absolutely" false. T. 677. Defense counsel still did not move to re-open the suppression hearing.

*5. Verdict.*

After the summations, Count Two of the indictment, charging Mr. Davis with "intentional" murder in the second degree, under N.Y. Penal Law § 125.25(1), was dismissed. T. 959.

Mr. Davis was acquitted of murder in the first degree. T. 1104-05. He was convicted of murder in the second degree and criminal possession of a weapon in the third degree. T. 1104-05.

**C. Sentence.**

Mr. Davis was adjudicated a second violent felony offender at sentencing. S. 4.

After presenting a statement from Mr. Yang's sister, S. 5-6, the prosecution argued that Mr. Davis's sentences should run consecutively because the criminal possession of a weapon offense was completed prior to the commission of the robbery. S. 8. The prosecution also argued that, given the nature of the offenses and Mr. Davis's record of three prior felonies, consecutive sentencing was appropriate. S. 6-9.

Defense counsel, on the other hand, highlighted Mr. Davis's remorse and willingness to accept responsibility, and how he "expressed from day one his sorrow for the suffering of the family of the victim." S. 9-10. He noted that Mr. Davis admitted his involvement, and that Mr. Davis had been willing to accept a plea before

trial but never received an offer other than a plea to murder in the first degree – of which Mr. Davis was acquitted. S. 9-10. He further noted that Mr. Davis was only 20 years old at the time of the shooting, he did not have any disciplinary infractions during the several years he was incarcerated awaiting trial and, during that time, Mr. Davis completed several self-improvement and vocational development courses. S. 11-12.

Mr. Davis himself offered an apology, saying that he was sorry that Mr. Yang's family had "lost a love[d] one" due to his "senseless act" and that he was "incarcerated by the grace of God." S. 13.

The court, relying on *People v. Salcedo*, 92 N.Y.2d 1019 (1998), held that Mr. Davis's sentences could run consecutively. S. 13-15. In response to defendant's objection that consecutive sentences were not permissible, the court stated that "It may be that on appeal [the sentences] may run concurrently." S. 19-20.

The court further stated that Mr. Davis's sentences were appropriate because Mr. Davis's weapon possession elevated the danger of his conduct from a "mundane" occurrence to a deadly one. S. 16. The court stated that Mr. Davis had already been convicted of several felonies, including robbery, and claimed that, although the jury found that Mr. Davis did not intentionally kill Mr. Yang, Mr. Davis also did not attempt to help Mr. Yang and that it was "clear" that Mr. Davis purposely left Mr. Yang to die. S. 18.

The Court then sentenced Mr. Davis to the maximum term of 25 years to life on the second-degree murder count, to be served consecutively to a ten-year sentence on the weapon possession count, with five years' post-release supervision. S. 19-20.

## ARGUMENT

## POINT I

### DOMINICK DAVIS'S STATEMENTS WERE THE DIRECT PRODUCT OF AN UNLAWFUL SEARCH AND ARREST.

Dominick Davis's written and videotaped statements should have been suppressed for three reasons:

First, Mr. Davis's arrest lacked probable cause because it was based solely on Alejandro Campos's unreliable statement that Dominick Davis was the "Nick" with whom he committed the robbery. U.S. Const. Amends. IV, XIV; N.Y. Const. Art. I., § 6; *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *People v. Rodriguez*, 52 N.Y.2d 483, 489 (1981); *People v. Griminger*, 71 N.Y.2d 635, 639 (1988). Mr. Campos had no record of providing reliable information to police. Mr. Campos's claim that Mr. Davis was the shooter was not corroborated by independent police investigation. And Mr. Campos's statement was not made under oath. Under these circumstances, Mr. Campos's statement could not, in and of itself, form the basis for probable cause to arrest Mr. Davis. *People v. Yedvobnik,* 48 N.Y.2d 910, 911 (1979); *People v. Bigelow*, 66 N.Y.2d 417, 426 (1985); *People v. Burks*, 134 A.D.2d 604, 605–06 (2d Dep't 1987).

Second, Mr. Davis's arrest was the product of an unlawful warrantless search. The extraordinary and historically unprecedented surveillance power offered by cellphones has given law enforcement the ability to make profound invasions of

privacy that state and federal courts have repeatedly found to constitute a search. *See* U.S. Const. Amends IV, XIV; N.Y. Const. Art. I., § 12; *Carpenter v. United States*, 138 S.Ct. 2206, 2216-21 (2018); *People v. Weaver*, 12 N.Y.3d 453 (2010). The pinging method used to locate Mr. Davis without a warrant was no less invasive and also constituted a search. Because the police offered false testimony to justify their claim of exigent circumstances (*see* Point II, *infra*), the arrest that flowed from the unlawful search was unconstitutional.

Finally, Mr. Davis's statements were not attenuated from the unlawful search and arrest. His statements followed within a relatively short time frame, nothing intervened to interrupt the causal chain of events between Mr. Davis's unlawful arrest and his statements, and Miranda warnings alone could not establish attenuation. *Brown v. Illinois,* 422 U.S. 590, 603-04 (1975); *Dunaway v. New York*, 442 U.S. 200, 218 (1979); *People v. Johnson*, 66 N.Y.2d 398, 407-08 (1985). All statements made by Mr. Davis which were a product of this unlawful arrest must therefore be suppressed. U.S. Const. Amends IV, XIV; N.Y. Const. Art. I., § 6. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

### A. Mr. Davis's Arrest was the Unlawful Product of Unreliable Informant Testimony.

A lawful arrest must be based on probable cause. *See, e.g., People v. DeBour*, 40 N.Y.2d 210, 223 (1976). While the statements of a police informant can establish probable cause, courts may not "blithely accept as true the accusations of an

informant unless some good reason for doing so has been established." *Griminger*, 71 N.Y.2d at 639, *quoting Rodriguez*, 52 N.Y.2d at 489. To establish probable cause, an informant's statement and its surrounding circumstances must satisfy both of two criteria: that the informant has a sound basis of knowledge, and that the statement's contents are also sufficiently reliable. *See Aguilar,* 378 U.S. at 114-15; *Spinelli*, 393 U.S. at 416; *Griminger*, 71 N.Y.2d at 637 (holding that, although federal courts are no longer required to, "as a matter of state law, [New York] courts should apply the *Aguilar-Spinelli* test."); *Rodriguez*, 52 N.Y.2d at 489. *Rodriguez*, 52 N.Y.2d at 489. Put another way, in order for an informant's statement to be deemed reliable, there must be sufficient indicia that the informant knows what he is talking about, and that what he is saying is actually true. Without both, an informant's statement standing alone cannot establish probable cause.

There are several factors for both law enforcement and the courts to consider when evaluating an informant's reliability, including: whether the informant's information was given under oath; whether the informant's statement was against their penal interest; whether the informant has a track record of providing reliable information; and/or whether the details of the informant's statement are corroborated by independent police investigation. *Johnson*, 66 N.Y.2d at 442-43. No single factor establishes veracity, and a statement that contains none or almost none of these markers of credibility generally cannot support a finding of probable cause. *Id.* at 442-46; *People v. Griminger*, 127 A.D.2d 74, 81-82 (2d Dep't 1987), *aff'd* 71 N.Y.2d at 638.

To establish informant veracity through independent police corroboration, the details corroborated must be inconsistent with the accused's innocence of the alleged crime. *Yedvobnik,* 48 N.Y.2d 910, at 911; *see also Delgado v. City of New York,* 86 A.D.3d 502, 508-09 (1st Dep't 2011) (holding that there was no probable cause for search where the corroborated details of the informant's statement failed to demonstrate that the informant was telling the truth about the relevant criminal activity). This rule protects against the possibility that "an ill-willed informant attempting to implicate or vilify an innocent person could provide a few accurate but innocuous details" in order to give a false appearance of veracity. *People v. DiFalco*, 80 N.Y.2d 693, 699 (1993).

In *Yedvobnik*, the informant's affidavit in support of a search warrant was under oath, and the informant had previously provided reliable information. However, the affidavit failed to provide "any basis for believing contraband or evidence could be found in the apartment to be searched." *Yedvobnik,* 48 N.Y.2d at 911. Although the police saw the defendant come and go from his apartment for five consecutive days, all their observations were "consistent with defendant's innocence." *Id.* The other corroborated aspects of the informant's statements about the defendant's activities were "too general to cast an aura of suspicion" on the defendant. *Id.*

Accordingly, New York courts have repeatedly found that there was no probable cause for an arrest where the informant's statements provided only details that were consistent with innocence. In *Burks*, 134 A.D.2d 605–06, an informant claimed that the defendant sold drugs out of his apartment. Although the police

confirmed that the defendant lived in the building, and the informant made a controlled buy of cocaine on behalf of the police in that building, the police had no independent corroboration for the informant's claim that there was cocaine in the *defendant's* apartment. *Id.* Finding that the "presence of cocaine in the building was as consistent with the defendant's innocence as with guilt," the Court held that the veracity of the informant's accusation of the defendant was unfounded, and the police lacked probable cause to arrest. *Id.* Thus, the police must corroborate details establishing the defendant's involvement; merely corroborating the occurrence of a crime is not, in and of itself, enough to establish reliability.

Similarly, in *Bigelow*, 66 N.Y.2d at 426, police observed the defendant engage in a suspicious (but not necessarily criminal) pattern of mailings as part of a drug investigation. Ultimately, the defendant's arrest was based on an informant's statement which contained details consistent with that which the police had independently observed. *Id.* However, the informant's statement – which included a claim that the defendant was a "drugger" – offered no information with which the police could corroborate their belief that the defendant had committed a crime. *Id.* Since the evidence was consistent with innocent activity by the defendant, there was no probable cause. *Id.*

1. *The Police Failed to Establish the Reliability of Mr. Campos's Identification of Mr. Davis as "Nick" Because They Corroborated Only Details That Were Consistent With Mr. Davis's Innocence.*

The trial court found that the police corroborated Mr. Campos's statement but, like in *Yedvobnik*, *Burks*, and *Bigelow*, none of the corroborated details were inconsistent with Mr. Davis's innocence. Mr. Campos's statement contained information that was already known to the police (and was therefore corroborated) before Mr. Campos was questioned, such as the fact that a silver minivan, like the one Mr. Campos admitted he drove, was involved in the robbery. H. 20, 164; Campos First Written Statement[6] (stating that he drives a "Honda Odyssey, silver"). According to the hearing decision, Mr. Campos also "accurately described the location and time of the murder and correctly stated it was a shooting," Hearing Decision at 37. Mr. Campos also stated that a stolen phone had been sold the next day. *Id.* at 38.

But nothing about the location or manner of the robbery, nor what was stolen or how it was disposed of implicated Mr. Davis. This case is similar to *Burks*, where the informant was able to supply plenty of details corroborating the crime – but nothing to show that the defendant was involved in it. *Burks*, 134 A.D.2d at 605–06. These details do not establish the veracity of Mr. Campos's later claim that Mr. Davis was "Nick" because each of these details is consistent with Mr. Davis's innocence. *Yedvobnik*, 48 N.Y.2d 910 at 911; *Bigelow*, 66 N.Y.2d at 426.

[6] Mr. Campos's First Written Statement was also admitted at trial as People's Trial Exh. 38.

Mr. Campos's statements about Mr. Yang's shooting were far "too general to cast an aura of suspicion" on Mr. Davis. *Yedvobnik,* 48 N.Y.2d at 911. This is particularly so given that Det. Campbell admitted that prior to interrogating Mr. Campos, the police "never got a name Dominick Davis or a nickname Nick," H. 183, and, indeed, had no other descriptive information about the shooter, except that the person was a male wearing a "gray hooded sweatshirt and [j]eans." H. 93; *see also* H. 95-96 (police had "no information to indicate that the perpetrator of the homicide is a particular race" and Mr. Davis did not match description of phone seller given by Franklin Jimenez). The fact that Mr. Campos's extremely general description – which could have matched countless other people in the Bronx – matched the description the police obtained hardly establishes that Mr. Campos's accusation of Mr. Davis was truthful.

At most, the police investigation corroborated Mr. Campos's *basis of knowledge* – that is, his personal knowledge – by establishing that *Mr. Campos* was involved in the robbery of Mr. Yang. They did not, however, establish the *veracity* of his claim that Mr. Davis is "Nick." *See Griminger,* 127 A.D.2d at 81-82 (details from informant's statement alleging that defendant had large quantity of marijuana in his home established basis of knowledge, but not veracity, where informant failed to provide independently corroborated details about presence of marijuana).

The trial court claimed, relying on *DiFalco*, 80 N.Y.2d at 699, that corroborated details about the defendant's activity or identity need not be criminal in themselves.

*See* Hearing Decision at 38 n. 6. However, this was a misapplication of *DiFalco*. In *DiFalco*, the police gave the informant money to give to the defendant to make a purchase of cocaine. The informant correctly predicted (confirmed by surveillance and a traffic stop) the exact route and timing of the defendant's subsequent movements in such detail that the defendant's activities could hardly have had an innocent explanation. *Id.* Although the route and timing were, taken by themselves, not indicative of a crime, they were inconsistent with the defendant's innocence because they "fit within the informant's story of the contemplated crime as activities which are significant and essential to carrying it out." *Id.* at 609. The informant's correct predictions were so essential to how the particular crime would be committed that it effectively identified the defendant as a drug dealer. *Id.* at 700. Under these circumstances, the Court of Appeals held that although the corroborated details were "non-criminal if taken separately, when viewed collectively [the details] are strongly suggestive" of the defendant's involvement in drug sales. *DiFalco*, 80 N.Y.2d at 700. And, contrary to the trial court's conclusion, *DiFalco* means that a court need not find that the defendant was *directly observed to perform illegal acts* in order to establish veracity through corroboration. But the court must find that, taken together, the identifying details must make it unlikely the defendant is being falsely implicated. *Id.* at 609.

In this case, the only corroborated detail identifying "Nick" was that he was wearing a grey hooded sweatshirt and jeans. Campos First Written Statement; H. 93, 95-96. This was not a detail that was so "significant" or "essential to carrying…out"

the crimes Mr. Campos described that it could have given any reliable indicator of Nick's identity. *DiFalco*, 80 N.Y.2d at 699. Even taken together with the rest of Mr. Campos's statement, this description could not have reliably identified Mr. Davis. Thus, the trial court misapplied *DiFalco*.

2. *The Fact That Mr. Campos Made a Statement Against Penal Interest Could Not, By Itself, Support a Finding a Probable Cause.*

Although the trial court properly noted that Mr. Campos's statement was against his own penal interest, this factor alone cannot be determinative of reliability. *Johnson*, 66 N.Y.2d at 442-46 (no single factor is determinative in reliability assessment); *Griminger*, 127 A.D.2d at 81-82 (penal interest alone did not establish veracity of informant statement in view of absence of other indicia of reliability).

In any event, the rationale behind deeming a statement against penal interest reliable does not apply here. In theory, a person would not ordinarily make a false statement that increased their own criminal liability. *See, e.g., People v. Thibodeau*, 31 N.Y.3d 1155, 1159 (2018) (holding that certain statements made at hearing were not admissible under hearsay exception for statements against declarant's penal interest). However, the applicability of this rationale must be evaluated on a case-by-case basis. *Id.* ("As with all generalizations, however, human motivation and personality render[] the stated reason" for deeming such statements reliable "immediately suspect." *Id.* (quoting *People v. Settles*, 46 N.Y.2d 154, 168 (1978))).

Here, that rationale did not apply. Mr. Campos was trying to minimize his knowledge of and role in the crime as much as possible and laid the lion's share of the culpability on "Nick." Mr. Campos thus thought he was protecting his penal interest, not acting against it. The police began by telling Mr. Campos that they were an investigating an "incident that happened at 232nd and Riverdale on the 19th of the month," H. 141 – thus, at all times during the interrogation, Mr. "Campos must have understood he was in serious trouble because Campos had sold the dead man's phone less than 24 hours earlier." Hearing Decision at 39. Perhaps unsurprisingly, given the circumstances, Mr. Campos then claimed that he did not know "Nick" had brought a gun until just before "Nick" got out of the car to approach Mr. Yang; that he did not get out of the car or see anything take place; and that he was told that the shot was "into the air." *See* Campos First Written Statement. Because Mr. Campos's goal was plainly to exonerate himself – not implicate himself – it should be considered *less* reliable. Contrary to the trial court's decision, this factor added no credibility to his claim that "Nick" was Dominick Davis. *See People v. Moses*, 63 N.Y.2d 299, 305 (1984) ("Especially where circumstances suggest that the motivation behind an accomplice's testimony may have been to curry favor with the prosecution and receive lenient treatment, accomplice testimony lacks the inherent trustworthiness of testimony of a disinterested witness.").

Because Mr. Campos's statement was not made under oath; because he had not previously provided reliable information in the past; and because the police could not

independently corroborate the veracity of anything that showed Mr. Davis was involved, Mr. Campos's statement was not sufficiently reliable to support probable cause for the arrest of Mr. Davis. The trial court's decision to the contrary was incorrect. *Johnson*, 66 N.Y.2d at 442-43; *Yedvobnik,* 48 N.Y.2d at 911; *Burks*, 134 A.D.2d at 605–06.

### B. Pinging Mr. Davis's Phone to Determine His Location Constituted a Warrantless Search, Requiring Suppression.

Both the United States Constitution and the New York Constitution prohibit unreasonable searches and seizures. U.S. Const. Amends. IV, XIV; N.Y. Const. Art. I, § 12. A police action that violates a reasonable expectation of privacy without a warrant constitutes a presumptively unreasonable search under both the federal and New York constitutions. *Katz,* 389 U.S. 347 at 360-61 (1967) (Harlan, J., concurring); *People v. Weaver*, 12 N.Y.3d 433, 441 (2009). Evidence that is the product of such a warrantless search – and that does not fall into one of the warrant requirement exceptions – must be suppressed. *Katz v. United States*, 389 U.S. 347, 357 (1967); *People v. Gonzalez*, 39 N.Y.2d 122, 127 (1976). The police use of real-time CSLI to locate Mr. Davis without a warrant constituted an unreasonable search. Mr. Davis's arrest and the statements that flowed from that arrest should have been suppressed.

#### 1. *Recent Fourth Amendment Jurisprudence Indicates That Accessing Real-Time CSLI Constitutes a Search Requiring a Warrant.*

In denying Mr. Davis's motion to suppress his statements, the trial court relied on the doctrine that information turned over to third parties is not subject to a

reasonable expectation of privacy. *See United States v. Miller*, 425 U.S. 435, 443 (1976); *United States v. Knotts*, 460 U.S. 276, 281 (1983). It also relied on the doctrine that information about a person's movements in public are not subject to a reasonable expectation of privacy. *See Knotts*, 460 U.S. at 281; *Smith v. Maryland*, 442 U.S. 735 (1979). However, these principles have recently been deemed inadequate bases to justify the warrantless use of CSLI and other emerging technologies to surveil a person's location.

In *United States v. Carpenter*, the United States Supreme Court found that neither the third-party nor the public-movements doctrine support a warrantless search using CSLI because when those principles were announced, the courts did not contemplate "a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements." *Carpenter*, 138 S.Ct. at 2217. But, today, people "compulsively carry their cell phones with them all the time," and, as a result, location information is not only "continuously" transmitted, it is "detailed, encyclopedic, and effortlessly compiled." *Id.* at 2216, 2218. Allowing law enforcement to have unfettered access to this information is equivalent to allowing the police to follow everyone "every moment of every day," so that "only the few without cell phones could escape this tireless and absolute surveillance." *Id.*

Given this reality, *Carpenter* held that the public movements doctrine did not insulate CSLI from the warrant requirement because such an interpretation would

mean that any person with a cellphone "surrender[s] *all* Fourth Amendment protection by venturing into the public sphere." *Id.* at 2217 (emphasis added). *Carpenter* also held that the third-party doctrine does not exempt CSLI from the warrant requirement because "[v]irtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates." *Id.* at 2220. Thus, there is no way for a person to avoid generating a "comprehensive dossier of his physical movements" except by disconnecting the phone. *Id.* at 2218. Because the cell phone is now indispensable to "participation in modern society," cell phone users do not voluntarily turn over CSLI to a third party in any meaningful sense merely by making use of the phone. *Id.* at 2220; *see also Riley v. California*, 573 U.S. 373, 395-98 (2014) (finding that "[m]odern cell phones are not just another technological convenience," but rather "such a pervasive and insistent part of daily life" that they are almost a "feature of human anatomy").

Although *Carpenter* did not address a real-time location tracking situation that took place over the course of an hour, all of the invasions of privacy that animated the Court's decision in *Carpenter* are implicated by the circumstances presented here. The effortless perfection of this surveillance, regardless of the duration, constitutes an all-seeing eye that can be opened and closed at will by state agents. While an hour-long invasion of privacy is less grave than one that takes place over several weeks, it is only

because the *quantity* of information recovered is less. The act of surveillance, however, is equally intrusive.

Indeed, this case stands as a powerful illustration of the profoundly invasive power of real-time location surveillance. Within an hour, the police went from having no idea where Mr. Davis was, to knowing the specific car in the particular parking lot in which Mr. Davis was sitting. H. 261-64, 279-80. All they had to do was send an email with Mr. Davis's phone number to the appropriate cellphone carrier. H. 275. If state agents can use CSLI to ascertain a person's location, anytime, anywhere, nearly instantaneously, and without any judicial oversight, then technology and law have combined to "alter the relationship between citizen and government in a way that is inimical to democratic society." *Jones v. United States*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring). A society whose citizens know that it is possible that "every movement [is] scrutinized" by the state will see a serious chilling effect on the freedoms of movement, association and peaceable assembly. George Orwell, *1984*, at 2 (Signet Classics Ed., 1977) (1949).

While the 2015 suppression decision in this case preceded *Carpenter* and *Riley*, it did not precede other cases which made clear that the third-party and public movements doctrine did not contemplate – and, therefore, do not support – warrantless police use of technologically novel forms of location surveillance. For example, *Weaver,* which was announced in 2009, found that placing the power to "instantaneously" acquire a wealth of "indisputably private" information about a

person's life in the "unsupervised discretion of agents of the state" was not "compatible with any reasonable notion of personal privacy or ordered liberty[.]" *Id.* at 442. The Supreme Court recognized the same in 2012, when it acknowledged *Weaver*'s findings and invalidated the use of a GPS tracker to monitor a suspect's movements. *See Jones*, 565 U.S. at 417 (Sotomayor, J. concurring) (finding that the third-party doctrine is "ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."). Thus, it was clear at the time of the trial court's decision that the principles on which it relied to affirm the warrantless use of real-time CLSI were inapplicable. The court's reliance on *People v. Hall,* 86 A.D.3d 450, 451–52 (1st Dep't 2011) – where this Court, relying on the third-party and public movements doctrines, held that accessing CSLI in any length of time, and in particular one shorter than 65 days, was not a search for the purposes of the Fourth Amendment – was misplaced.

This Court should reassess its holding in *Hall* and hold that CSLI monitoring – regardless of its duration – is a search requiring a warrant.

*2. There Were No Exigent Circumstances Justifying a Warrantless Arrest.*

In order for exigent circumstances to justify a warrantless police arrest, the police must have, among other factors, probable cause to believe the person committed a grave offense, and it must be likely that the person will escape if not apprehended quickly. *Dorman v. United States*, 435 F.2d 385, 392–93 (D.C. Cir. 1970); *see People v. Cloud*, 168 A.D.2d 91, 92-94 (1st Dep't 1991) (applying *Dorman*). Such an

arrest requires more than "merely the minimum of probable cause, … but beyond that a *clear showing* of probable cause, including *reasonably trustworthy information* to believe the suspect committed the crime involved." *Dorman*, 435 F.2d at 392-93 (emphasis added).

The trial court held that the warrantless arrest of Mr. Davis was justified by the need to prevent Mr. Davis's flight and the need to protect public safety by apprehending an armed suspect. *See* Hearing Decision at 6-8. But, as discussed above, Mr. Campos's claim that "Nick" was Dominick Davis was not reliable. Thus, the police did not have probable cause to believe that Mr. Davis had committed any offense, much less a strong reason to believe that he was armed or that he would flee. Thus, exigent circumstances were not present.

Moreover, prior to Mr. Davis's arrest, the police falsely alleged that Mr. Davis had used his phone to threaten witnesses in their exigent circumstances applications to ping access Mr. Davis's phone's location data. *See* Point II, *infra*. They made no mention of threats at all at the suppression hearing, and later admitted at trial that their claims of threats were false. *See* Point II, *infra*. This further undermines the legitimacy of the claim of exigent circumstances.

### C. Mr. Davis's Statements Were Not Attenuated From His Illegal Arrest.

The trial court incorrectly concluded that Mr. Davis's statement was sufficiently attenuated from any unlawfulness in his arrest to be admitted against him at trial. In order to establish attenuation and avoid suppression, the prosecution must prove that

intervening events broke the causal connection between the illegal police activity and the illegally obtained evidence. *Brown,* 422 U.S. at 603-04; *Dunaway*, 442 U.S. at 218 (suppressing confession where no "intervening event of significance" occurred between unlawful arrest and confession); *Johnson*, 66 N.Y.2d at 407-08. Factors that defeat a showing of attenuation include a close temporal proximity between the arrest and the statement, an absence of intervening circumstances, and purposeful or flagrant police misconduct. *People v. Harris*, 77 N.Y.2d 434, 440–41 (1991).

The circumstances of Mr. Davis's illegally obtained statements are nearly identical to those of the statements suppressed in *People v. Johnson*, 66 N.Y.2d 398, 400–02 (1985). *Johnson* involved an arrest based on an informant's statement that was not sufficiently reliable to support probable cause. *Id.* at 402-05. As here, the police gave *Miranda* warnings, and secured written and videotaped statements within hours of the arrest. *Id.* As here, the written and videotaped statements were concluded within four-and-a-half hours of the unlawful arrest. *Id.* at 407-08. Nonetheless, the Court of Appeals concluded that "[t]here were no intervening events in either case to break the causal connection between the arrests and the statements." *Id.* In the absence of such attenuation, both the written and videotaped statements were suppressed. *Id.* For the same reasons, Mr. Davis's statements should have been suppressed.

Mr. Davis's written statement was taken after 2.5 hours, sooner than the three-hour period in *People v. Byas*, 172 A.D.2d 242, 242-44 (1st Dep't 1991) (*Miranda*

warnings prior to videotaped statement three hours after separate illegally obtained statements insufficient to establish attenuation). Mr. Davis's videotaped statement was made within 4 hours of his illegal arrest, less than the time frame in *Johnson*, 66 N.Y.2d at 407 (4.5 hours); H. 169, 279-80. For this reason, the court's reliance on the non-controlling authority of *People v. Green*, 182 A.D.2d 704, 705 (2d Dep't 1992), in which the time period between the illegal arrest and the statements exceeded that of *Johnson* and *Byas*, was misplaced. *See* Hearing Decision at 10.

Nothing broke the causal connection between Mr. Davis's arrest and the giving of his statements. In that time period, Mr. Davis was taken inside the police station and placed into an interrogation where he was held until he was questioned. H. 169, 174, 266. Thus, the trial court's contention that Mr. Davis was not interrogated at the time and place of his illegal arrest is not meaningful given that the police merely moved him from the parking lot outside of the police station to the inside of the precinct. Hearing Decision at 11, 29. For the same reason, the Court's reliance on *People v. Jones*, 151 A.D.2d 695 (2d Dept. 1989), which involved an interrogation that took place at a different time and place than the arrest, is misplaced. *Id.*; *Johnson*, 66 N.Y.2d at 407. And, although the Court noted that *Miranda* warnings can support a finding of attenuation, Hearing Decision at 10, *Miranda* warnings are not, in and of themselves, sufficient to break causality. *See Dunaway*, 442 U.S. at 219 (holding that *Miranda* warnings could establish voluntariness but do not alone imply a break in the causal connection between unlawful arrest and statement); *Johnson*, 66 N.Y.2d at 407;

*Byas* 172 A.D.2d at 244 ("We decline to hold, in this regard, that simply because an adequate set of Miranda warnings was administered just before the videotaped statement was taken, that there were therefore attenuating circumstances.").

Finally, the fact that the initial police misconduct, which led to Mr. Davis's arrest and subsequent statements, was purposeful and flagrant undercuts any claim of attenuation. *Harris*, 77 N.Y.2d at 440–41. Like in *Johnson*, Mr. Davis's arrest was based on the statement of an unreliable informant. *Johnson,* 66 N.Y.2d at 400-02; *see also Dunaway*, 442 U.S. at 209, 218 (suppressing statements in part because police conduct had a "quality of purposefulness" where defendant was arrested "without enough information to get a warrant"). Furthermore, the statutes under which police later sought an order to locate Mr. Davis did not authorize the method they used; the police failed to inform the court that the order was intended to retroactively authorize action that had already been taken; and retroactive authorization had no basis in law. Hearing Decision at 14-16. In addition to this, the police falsely alleged that Mr. Davis had threatened witnesses in order to secure access to his phone's CSLI. *See* Point II, *infra.*

Given the "the temporal proximity of the arrest and the statement, the absence of intervening circumstances and … flagrancy of the police misconduct," *Byas*, 172 A.D.2d at 244, none of Mr. Davis's statements can be considered attenuated from his unlawful arrest. All written, oral, and videotaped statements must therefore be suppressed. *Wong Sun*, 371 U.S. at 487-88.

## POINT II

### DOMINICK DAVIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL UNREASONABLY FAILED TO MOVE TO REOPEN THE SUPPRESSION HEARING AFTER LEARNING THAT THE SUPPRESSION DECISION WAS BASED ON FALSE STATEMENTS BY THE POLICE.

Mr. Davis's trial attorney inexplicably failed to move to re-open the suppression after he received internal police department paperwork that completely contradicted the testimony offered by the police at the suppression hearing about the basis for their request to ping Mr. Davis's phone without a warrant. Because this testimony was central to the trial court's denial of Mr. Davis's suppression motion, and because Mr. Davis's statements were central to the prosecution's case against him, counsel's failure was both unreasonable and prejudicial. As a result, Mr. Davis was denied constitutionally effective assistance of counsel and his conviction must be vacated. U.S. Const. Amends. VI, , XIV; N.Y. Const. Art. I, § 6; *People v. Kindell*, 135 A.D.3d 423, 423–24 (1st Dep't 2016).

Claims of ineffective assistance of counsel are governed by a two-part test. *First*, under both the New York and federal constitution, "[c]ounsel's performance should be objectively evaluated to determine whether it was consistent with strategic decisions of a reasonably competent attorney." *People v. Clark*, 28 N.Y.3d 556, 563 (2016) (*quoting People v. Benevento*, 91 N.Y.2d 708, 712 (1998)); *see Strickland v. Washington*, 466 U.S. 668, 688 (1984) (ineffective assistance occurs where defense

counsel's performance falls below "below an objective standard of reasonableness."). *Second*, under federal law, a person claiming to have received ineffective assistance of counsel must demonstrate 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. New York employs a different test: whether the defendant was deprived of "meaningful representation." *People v. Baldi*, 54 N.Y.2d 137, 147 (1981). A New York attorney fails to provide meaningful representation when his deficient performance deprives the defendant of a fair trial. *See Benevento*, 91 N.Y.2d at 713-14.

### A. The Failure to Move to Re-Open the Suppression Hearing Was Constitutionally Deficient Performance.

This court has held that the failure to move to suppress evidence where the record provides a clear basis for such motion is objectively unreasonable. *See People v. Johnson,* 37 A.D.3d 363, 363–64 (1st Dep't 2007) (defense counsel was ineffective for conceding suppression motion where the hearing testimony revealed "several colorable arguments which would have been available to defense counsel" and the subject evidence was "at the core of the prosecution"); *People v. Cyrus*, 48 A.D.3d 150, 159 (1st Dep't 2007) (defense attorney was ineffective for failing to move to suppress inculpatory un-Mirandized statements made under circumstances suggesting involuntariness); *People v. Gil*, 285 A.D.2d 7, 13 (1st Dep't 2001) (trial counsel was ineffective for waiving suppression issues "which could have resulted in seriously

impairing the People's case"); *People v. Zeh*, 144 A.D.3d 1395, 1397-99 (3d Dep't 2016) (holding that "the failure to seek suppression of evidence deprived defendant of his constitutional right to meaningful representation" where there was "colorable basis" the statements from defendant were unlawfully obtained).

A pre-trial motion may be renewed upon discovery of additional pertinent facts that could not have been discovered with reasonable diligence before the decision on the motion. N.Y. C.P.L. § 710.40(4). And counsel that does not seek to re-open a suppression hearing after new facts significantly call into question the basis upon which the suppression motion was denied is ineffective. *Kindell*, 135 A.D.3d at 423–24 (defense attorney held ineffective for failing to move to re-open suppression hearing where hearing testimony establishing plain view basis of search and seizure was "completely at odds" with trial testimony contradicting plain view).

Here, like in *Kindell*, new information revealed after the suppression hearing completely contradicted the suppression hearing testimony about the alleged exigent circumstances underlying Mr. Davis's arrest, yet counsel unreasonably failed to move to re-open the hearing. Specifically, at the suppression hearing, Lt. O'Toole testified that the police needed to conduct a warrantless search and arrest of Mr. Davis – by "pinging" his phone – because Mr. Davis might have seen Mr. Campos being arrested near his place of residence and he might flee before the police could secure an authorizing order. H. 108, 260, 269-70. Lt. O'Toole also suggested that the gun used to shoot Mr. Yang had not been recovered and that Mr. Davis was armed and at large.

H. 260. The trial court accepted and relied on this testimony to support its conclusion that exigent circumstances justified the warrantless search and arrest.[7]

However, after the suppression motion was denied – based, in part, on a finding that this police testimony was credible – and approximately one month before trial, defense counsel received the actual "TARU Exigent Circumstances Declaration Form" where, on the evening of Mr. Davis's search and arrest, the police explained the exigency that justified the warrantless pinging of Mr. Davis's phone. T. 372-73. This form, as completed by Det. O'Neil, never mentioned Mr. Davis potentially fleeing or being armed, but, instead, stated that Mr. Davis's phone was used "to threaten the only eyewitness in this case." *See* Def. Trial Exh. C, TARU Exigent Circumstances Declaration Form.

At that same time, defense counsel also received the form used by the police on the night in question to request that T-Mobile conduct a warrantless ping of Mr. Davis's phone. That form also made no mention of flight or of Mr. Davis being armed. Instead, on that document, the police again claimed that Mr. Davis's phone number had been used to make "threats to a witness." Def. Trial Exh. D, T-Mobile Exigent Circumstances Form.

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[7] Hearing Decision at 6-9, 27 ("The police decided to proceed without any prior court order, based on what they believed to be exigent circumstances - - namely a) that Davis was dangerous because he had shot and killed someone just a few days earlier, and b) that Davis might flee once he learned that Campos was talking with the police. Lieutenant O'Toole, the head of Bronx Homicide, explained at hearing that in his considerable experience it usually takes at least six hours to get a court order, and that in this case it might have taken longer because it was already late at night. For these reasons, the police proceeded without a court order.").

Given the central role that the police explanations of the exigent circumstances played in the trial court's order denying Mr. Davis's motion to suppress his statements, defense counsel should have immediately moved to reopen the suppression hearing pursuant to N.Y. Crim. Proc. Law § 710.40(4) once he received these forms. *See* H. 260 (Lt. O'Toole testifying about flight and unrecovered gun); Hearing Decision at 27 (suppression court stating that flight and unrecovered gun established exigent circumstances). These forms offered not only an explanation that was "completely at odds" with the one proffered at the suppression hearing, but also a *false* explanation for the police claim of exigent circumstances in their actual application to ping the phone. *Kindell*, 135 A.D.3d at 423-24; *see* T. 374 (Det. Campbell stating that he was not aware of any threats to witnesses); T. 677 (Det. O'Neill, who filled out the TARU Exigent Circumstances Form, admitting that the claim of threats to witnesses was "absolutely" false); *see also* T. 368.[8]

The fact that the detectives used false information to justify their claim of exigent circumstances to both T-Mobile and TARU – and then presented a completely different version of events to the trial court during the suppression hearing – severely undermined the legitimacy of the trial court's decision. The trial court had

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[8] "[Prosecutor]: I think it [the exigent circumstances form] is misphrased. I think it should say could use the phone [to make threats].
The Court: That's not a misphrase.
[Defense Counsel]: That is quite the misphrase.
The Court: Could be used is totally different than has been used."

already articulated serious concerns about the police conduct in this case – e.g., it found that the police attempt to retroactively secure a warrant, without informing the signing judge as such, was "*very* disturbing" (emphasis in original), Hearing Decision at 15. This new information demonstrating that they alleged a false basis for requesting to ping Mr. Davis's phone was likely to have led the court to conclude that the suppression testimony was incredible, and that the prosecution had failed to meet its burden of proving that Mr. Davis's search and arrest were lawful.

By failing to reopen the hearing based on this new information which was "completely at odds," *Kindell*, 135 A.D.3d at 423-24, with the exigent circumstances basis, defense counsel needlessly waived a significant suppression issue that could have "seriously impair[ed] the People's case." *Gil*, 285 A.D.2d at 13. With the "additional pertinent fact[]", C.P.L. § 710.40(4), that the police testimony at the suppression hearing regarding the reason they believed there were exigent circumstances was false, the court was even more likely to discredit the officers' hearing testimony and suppress Mr. Davis's statements.

Indeed, the court *invited* defense counsel to reopen the hearing following Det. Campbell's admission, saying, "I don't know why you don't move to reopen the hearing, because this [form] is approved by [Lt.] O'Toole, who is the fellow who will say the reason for the application is flight," and admonished defense counsel for holding on to the forms for a month without making such a motion. T. 372. Counsel's response – that he "didn't think it was necessary," and "time flies," T. 372 –

makes clear that he utterly failed to appreciate the significance of this evidence. As described above, it *was* necessary to move to reopen the suppression hearing: Mr. Davis's statements were critical to the prosecution against him; and police credibility regarding the claim of exigent circumstances was central to the trial court's decision denying the motion to suppress. Thus, Mr. Davis "had everything to gain and nothing to lose by moving for suppression of the evidence." *Gil*, 285 A.D.2d at 13; *see also Zeh*, 144 A.D.3d at 1397-98 (counsel ineffective for failing to move to suppress self-incriminating statements "heavily relied upon by the People" where there was colorable basis). Under these circumstances, counsel plainly rendered deficient performance under both the New York and federal standards because this decision was not "consistent with the strategic decisions of a reasonably competent attorney." *Benevento*, 91 N.Y.2d at 712. *See also Strickland*, 466 U.S. at 688.

### B. Mr. Davis Lost the Opportunity to Challenge the Central Evidence Against Him Due to His Attorney's Error.

To establish ineffective assistance, counsel's deficient performance must be prejudicial (under the federal standard) or demonstrate a lack of meaningful representation (under the New York standard).

Counsel's failure to move to reopen the suppression hearing meets the *Strickland* standard for prejudice because without Mr. Davis's statements, the prosecution would have lost the entire foundation of their case. *See*, *Strickland*, 466 U.S. at 694 (prejudice is demonstrated where "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different."). The only other evidence placing Mr. Davis at the robbery/shooting was Mr. Campos's out-of-court statements.

However, uncorroborated accomplice statements, like those made by Mr. Campos, cannot support a conviction. *See* N.Y. C.P.L. § 60.22(1) ("A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense."); *People v. Steinberg*, 79 N.Y.2d 673, 683 (1992) ("The corroboration must be independent of, and may not draw its weight and probative value from, the accomplice's testimony."); *People v. Moses*, 63 N.Y.3d 299, 306-309 (1984) (corroborating details must do more than merely establish general consistency with other evidence but specifically "connect [the defendant] with the commission of crime."). *See also People v. Picard*, 32 A.D.3d 317, 319-20 (1st Dep't 2006) (hearsay accomplice statements made against penal interest still require corroboration). The prosecution presented no evidence supporting Mr. Campos's claim that Mr. Davis was present for the robbery/shooting. There was no physical evidence connecting Mr. Davis to the robbery. The only eyewitness provided nothing more than a general description of the perpetrator as a male in gray sweatshirt and jeans of an indeterminate race. T. 140. The remaining evidence may have shown that Mr. Davis had participated in selling the stolen phone, but this could not corroborate Mr. Campos's claim that Mr. Davis actually robbed and shot Mr. Yang (otherwise, the

other passengers in the car at the time of the phone sale would also have been implicated in the robbery/shooting).

Given the centrality of Mr. Davis's statements to the prosecution's case, there was a strong chance that their suppression would lead to an acquittal or dismissal of the charges. *See People v. Velez*, 138 A.D.3d 1041, 1042 (3d Dep't 2016) (where failure to seek suppression "vitiated a viable defense" and "no strategic or other legitimate explanation exist[ed]" for such failure, defendant was prejudiced by counsel's ineffectiveness). Thus, there was a "reasonable probability that…the result of the proceeding would have been different," had defense counsel moved to re-open the hearing. *Strickland*, 466 U.S. at 694. As defense counsel's performance was deficient and objectively unreasonable, and Mr. Davis was prejudiced as a result, Mr. Davis's conviction must be reversed. *Id.*; U.S. Const. Amends. VI, XIV.

New York does not rely on the *Strickland* standard of prejudice. Instead, under New York law, ineffectiveness is established where trial counsel's deficient performance effected a deprivation of "meaningful representation." *Baldi*, 54 N.Y.2d at 147 (1981). A "single, substantial error by counsel [that] seriously compromises a defendant's right to a fair trial" deprives a defendant of meaningful representation. *People v. Hobot*, 84 N.Y.2d 1021, 1022 (1995).

Regardless of the outcome after re-opening the hearing, defense counsel had a duty to attack the core evidence without which there could be no conviction; yet he inexplicably failed to do so. Thus, it need not be shown that the suppression motion

would certainly have been successful after re-opening the hearing, since Mr. Davis's attorney's decision "not to make … a motion [to re-open the suppression hearing] was a decision not contest the admissibility of critical evidence against his client." *Kindell*, 135 A.D.3d at 425. This "single, substantial error seriously compromised [Mr. Davis's] right to a fair trial," *Hobot*, 84 N.Y.2d at 1022, because his attorney allowed his statements to remain in evidence in spite of the indications that they were admitted on a completely false basis, and in violation of the Fourth Amendment. *See also Cyrus*, 48 A.D.3d at 161 (failure to move to suppress deprived defendant of meaningful representation since he "was not required to show that he would have been acquitted 'but for' counsel's errors" and "a defendant need not fully satisfy the prejudice test of *Strickland*"); *Johnson,* 37 A.D.3d at 363–64 (holding that there was no need to pass on the ultimate success of the colorable suppression claims defense counsel needlessly conceded in order to find that meaningful representation was not provided); *Zeh*, 144 A.D.3d at 1398-99 (holding that since failure to move on colorable for suppression when there was "no strategic or legitimate reason to let any of this crucial evidence come in unabated at trial" deprived defendant of meaningful, there was no need to decide whether suppression motion "would have been ultimately successful"). This was fundamentally unfair to Mr. Davis and shows that Mr. Davis was deprived of meaningful representation, requiring reversal. N.Y. Const. Art. I, § 6. *Kindell*, 135 A.D.3d at 423–24. *Gil*, 285 A.D.2d at 13.

## POINT III

### DOMINICK DAVIS'S SENTENCES MUST BE RUN CONCURRENTLY BECAUSE THE WEAPON POSSESSION COUNT WAS A MATERIAL ELEMENT OF THE SECOND DEGREE MURDER COUNT, AND BECAUSE THE OFFENSES CONSTITUTED A SINGLE, CONTINUOUS TRANSACTION.

N.Y. Penal Law § 70.25(2) requires Mr. Davis's sentences to run concurrently for two reasons. First, the act of possessing a weapon was a material element of the crime of first-degree robbery; and robbery was a material element of his second-degree murder conviction. *People v. Williams*, 251 A.D.2d 266, 267 (1st Dep't 1998). Second, the evidence presented at trial made clear that Mr. Davis formed the intent to commit a first-degree robbery before he obtained the gun he used to commit that robbery. Thus, the possession of the weapon, robbery, and murder counts constituted a single, continuous criminal transaction. *People v. Brown,* 21 N.Y.3d 739, 751 (2013). If this Court does not reverse Mr. Davis's convictions for the reasons detailed above, it should modify his sentences to run concurrently.

A court must run sentences for multiple offense concurrently if the offenses were "committed through a single act or omission," or "through an act or omission which in itself constituted one of the offenses and also was a material element of the other." N.Y. Penal Law § 70.25(2). If *either* of these criteria is met, concurrent sentences are required. *People v. Day*, 73 N.Y.2d 208, 210 (1989). The burden is on the prosecution to establish that *neither* criteria is fulfilled. *People v. Parks*, 95 N.Y.2d 811,

815 (2000); *Day*, 73 N.Y.2d at 210; *People v. Murillo*, 144 A.D.3d 450, 450-51 (1st Dep't 2016); *People v. Michel*, 144 A.D.3d 948, 949 (2d Dep't 2016), *quoting Brown*, 21 N.Y.3d at 751. Here, both criteria were met.

### A. Mr. Davis's Second-Degree Weapon Possession Conviction Was a Material Element of the Second-Degree Murder Count, Requiring Concurrent Sentences.

Multiple sentences of imprisonment must be run concurrently if the offenses were committed "through an act or omission which in itself constituted one of the offenses and also was a material element of the other[.]" N.Y. Penal Law § 70.25(2). New York courts have repeatedly held that if a defendant uses a weapon to commit a first-degree robbery, and that robbery is an element of a second-degree murder conviction, the weapon possession sentences must run concurrent to the murder conviction sentences. *See Williams*, 251 A.D.2d at 267 (running sentences for second-degree weapon possession, first-degree robbery, and second-degree murder concurrently because "defendant's possession and use of the pistol to shoot the victim constituted a material element of each crime charged."); *People v. Whyte*, 299 A.D.2d 378, 379 (2d Dep't 2002) (holding that the trial court "erred in imposing a consecutive sentence for criminal possession of a weapon in the second degree, as the possession of the weapon was a material element of the robbery charge, and the robbery charge was a material element of the felony murder charge."); *People v. Nelson*, 171 A.D.2d 702, 705 (2d Dep't 1991) (noting that second-degree weapon possession sentence was properly run concurrently to felony murder count because weapon-

possession and robbery charges were material elements of felony murder charge); *People v. Riley-James*, 168 A.D.2d 740, 743 (3d Dep't 1990) (holding that weapon-possession counts must be run concurrently with first-degree robbery and felony murder sentences because weapon-possession was material element of robbery, and robbery was material element of felony murder).

Mr. Davis's case is nearly identical to those of *Williams*, *Whyte*, *Riley-James,* and *Nelson*, because his second-degree weapon possession conviction was a material element of his felony murder conviction. The court instructed the jury that in order to find Mr. Davis guilty of "felony murder," it must find that he caused Mr. Yang's death "in the course of and in furtherance of the commission of Robbery in the First Degree." T. 1098. The first-degree robbery was a material element of his second-degree murder conviction under N.Y. Penal Law § 125.25(3).[9]

The weapon-possession count was, in turn, a material element of the robbery. Mr. Davis was convicted of criminal possession of a weapon in the second degree,

[9] The Uniform Sentence and Commitment Sheet reads that Mr. Davis was convicted of second-degree murder N.Y. Penal Law § 125.25(1). This is a mistake. The correct statute and subsection should be § 125.25(3). The Penal Law § 125.25(1) charge against Mr. Davis, requiring intent to kill listed as Count Two of the Indictment, was dismissed. *See* T. 959 ("THE COURT: … People are now moving to dismiss the intentional murder charge correct? [DISTRICT ATTORNEY]: Yes.") *See also* T. 1098 (judge referring to second degree murder as "felony murder"); S. 18 (judge noting that Mr. Davis was acquitted of intentional murder.). The Uniform Sentence and Commitment Sheet also mistakenly states that Mr. Davis was convicted of N.Y. Penal Law § 265.03(1)(b), when he was actually convicted of N.Y. Penal Law § 265.03(3). *See* T. 1042 (Judge instructing jury that first count for them to evaluate is whether Mr. Davis possessed loaded firearm outside home or place of business); Verdict Sheet (finding Mr. Davis guilty on first count of possession of loaded firearm not in the home or place of business).

Penal Law § 265.03(3), which penalizes "possess[ion] of any loaded firearm" outside of a person's home or place of business. *See* Indictment at Count Seven. First-degree robbery, N.Y. Penal Law § 160.15(2), Count Four of the Indictment, is defined as the forcible stealing of property in which a person "is armed with a deadly weapon." The indictment stated that this weapon was a "loaded handgun." *See* Indictment at Count Four.

Thus, Mr. Davis was convicted of "possessing [a] loaded handgun" in order to "forcibly steal" from Mr. Yang in a manner that satisfied the "armed with a deadly weapon" element of first-degree robbery. Indictment at Count Four; T. 1104-05. Since Mr. Yang was found to have been killed by a gunshot wound, and Mr. Davis admitted to shooting him and stealing his phone in his statements, there was no reasonable view of the evidence under which Mr. Davis could have been found to have committed first-degree robbery without possessing a loaded firearm.

The second-degree weapon possession was, therefore, a material element of the second-degree murder charge, since it was a material element of the first-degree robbery. *Williams*, 251 A.D.2d at 267. Pursuant to N.Y. Penal Law § 70.25(2), Mr. Davis's sentences must be run concurrently. *Id.*

### B. Mr. Davis's Offenses Constituted a Single, Continuous, Transaction, Requiring Concurrent Sentences.

Because Mr. Davis did not obtain the firearm until after he had formed the *mens rea* to commit first-degree robbery which was the predicate for the second-degree

murder count, his sentences for criminal possession of a weapon and murder must be run concurrently.

In order to run sentences consecutively, the prosecution needed to establish that the possession of the gun was complete before the intent to commit robbery had formed. A "simple" weapon-possession offense (i.e., one without an intent requirement such as N.Y. Penal Law § 265.03(3)) is complete prior to the commission of a later offense using that weapon when the defendant "possesses a loaded firearm *before* forming the intent to cause a crime with that weapon." *Brown*, 21 N.Y.3d at 751 (emphasis added). Thus, when the possession of a weapon is completed *prior* to forming the intent to commit a later crime, its sentence may be run consecutively to the later offenses (assuming it was not a material element of another offense). *Id.* at 751.[10] But when the prosecution fails to establish that the possession of a firearm was completed prior to the formation the intent to commit a later offense with that

[10] "[C]ompletion is measured by the 'point at which' a defendant's 'relevant intent changes.'" *Id.* at 750 (quoting *People v. Wright*, 19 N.Y.3d 359, 356 (2012) (holding that the intent to use a weapon unlawfully must be separate and distinct from the intent of a subsequent crime committed with the weapon for a consecutive N.Y. Penal Law § 265.03(1)(b) sentence)). The record in *Brown* and its companion cases clearly established that each defendant possessed a loaded gun prior to forming an intent to kill. As the defendant Brown formed the intent to kill, he was separately keeping a loaded gun under his dominion and control in a van. He retrieved the gun from the van and used it to shoot the victim. *Id.* In *People v. Harris*, the defendant possessed the weapon well before he formed the intent to kill the victim, whom he encountered "fortuitously." *Id.* Thus, Harris's intent to kill formed after he had already completed possession of the gun. *Id.* In a second companion case, *People v. Carter*, the defendant was handed a gun to participate in a robbery. He was convicted of intentional murder because the evidence showed that he later formed a separate intent to kill while "chasing down" the victim. *Id.* Carter stated that his intent in possessing the gun was not to commit a robbery but, instead, to defend himself and his friends if a fight broke out at a party they were attending. *Id.*

weapon, the sentences must run concurrently. *Id.*; *Michel*, 144 A.D.3d at 949 (relying on *Brown* to hold that N.Y. Penal Law § 265.03(3) sentence must be concurrent to robbery and felony murder sentences because there was no evidence that defendant possessed firearm before forming intent to cause a crime with that weapon, meaning that gun possession was not "separate and distinct" from robbery and murder).

Under the *Brown* rule, Mr. Davis's sentences must be run concurrently because he formed the intent to commit a first-degree robbery *before* he obtained the weapon necessary to commit it. Mr. Campos said that he and Mr. Davis first discussed "getting someone," i.e., robbing someone, between 6 and 7 PM. Campos First Written Statement. Mr. Davis then got a phone call at 7 PM, left Mr. Campos on Webb Avenue, and then met up with him again at 11 PM. *Id.*

In his videotaped statement, Mr. Davis stated that he borrowed the gun from a friend at around 9 or 10 PM on night of the April 18, 2012. Davis Video Statement at 1:24:20:00 – 1:25:20:00.[11] Mr. Davis did not meet up with Mr. Campos until about an hour after obtaining the gun, after which they discussed robbing someone again, and went on to do so. *Id.*; Davis Written Statement[12] at 1; Campos First Written Statement. This evidence establishes that Mr. Davis obtained the gun to commit a robbery. This evidence also shows that the requisite *mens rea* for the robbery – intent

[11] Mr. Davis's video statement was admitted at trial as People's Trial Exh. 40.
[12] Mr. Davis's written statement was admitted at trial People's Trial Exh. 39.

to forcibly deprive another of property[13] – which was a material element of the second-degree murder, was formed before the gun possession was complete. Under these circumstances, the gun possession was part of a single continuous transaction with the ultimate felony murder.

At sentencing, the prosecution incorrectly claimed that his possession offense was complete before he committed the robbery because he obtained the gun before Mr. Yang was identified as their target. S. 8. But the fact that they had not picked a specific person to rob was irrelevant, because intent need not be against any particular person to satisfy the *mens rea* element of robbery. Robbery is defined as using or threatening to use immediate force "in the course of committing a larceny." N.Y. Penal Law § 160.00. Larceny is defined as the wrongful taking of property "with the intent to deprive another." N.Y. Penal Law § 155.05(1). As long as one intends to use force or the threat of force in order deprive "another" of property, the requisite *mens rea* for robbery is satisfied.

Here, the "intent to deprive another" by using force had formed by 6 or 7 PM, when Mr. Davis and Mr. Campos discussed "getting someone," which they both understood to mean that they would commit a robbery. Campos First Written

[13] *See* N.Y. Penal Law § 160.00 ("Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of *committing a larceny*, he uses or threatens the immediate use of physical force upon another person.") (emphasis added); N.Y. Penal Law § 155.05 ("A person steals property and commits larceny when, *with intent to deprive another of property* or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.") (emphasis added).

Statement. This intent formed well before the gun possession was completed at approximately 10 PM. Thus, the gun possession, felony murder constituted a single, continuous transaction, and the prosecution failed to meet their burden to show that consecutive sentencing was permissible. *Brown,* 21 N.Y.3d at 751; *Williams*, 251 A.D.2d at 267; *Parks*, 95 N.Y.2d at 815 (2000); *Murillo*, 144 A.D.3d at 450-51.

*People v. Salcedo*, 92 N.Y.2d 1019 (1998), on which the court relied to find that Mr. Davis's sentences could be run consecutively, is inapposite. S. 15. *Salcedo* found that a second-degree weapon possession sentence could run consecutive to a second-degree murder conviction sentence because the defendant initially obtained a gun in order to force the victim to leave a certain location with him, at which point he did *not* have the intent to kill her. *Salcedo*, 92 N.Y.2d at 1021-22. The offense of possessing a weapon with intent to use it unlawfully was complete once the defendant possessed a weapon with the intent to force the victim to leave. *Id.*; *see* N.Y. Penal § 265.03(1)(b). When the victim refused to leave, the defendant formed a *new*, *separate* intent to kill her with the gun. *Salcedo*, 92 N.Y.2d at 1022. Thus, the *mens rea* necessary for first-degree murder did not form until *after* the defendant had already completed the offense of second-degree weapon possession. *Id.*; *see also Brown*, 21 N.Y.3d at 750 (noting that in *Salcedo,* "We concluded that the possession was complete because Salcedo had specific intent to use the gun to compel the victim to leave, and only after she resisted did he form the intent to murder her."). This prevented two offenses

from being "so integrated that they constituted a single act for consecutive sentencing purposes." *Salcedo*, 92 N.Y.2d at 1022.

The *Salcedo* rule clearly does not apply to Mr. Davis's case. Here, Mr. Davis's and Mr. Campos's statements show that Mr. Davis's intent to commit robbery formed several hours before he obtained a gun. Under *Brown*, this integrates the weapon possession into a single continuous transaction with the robbery and second-degree murder, unlike *Salcedo*, where an intent to kill formed after the possession offense was complete.

Moreover, the jury acquitted Mr. Davis of first-degree murder under N.Y. Penal Law § 125.27(1)(a)(vii). The elements of first-degree murder under this subsection of the statute are identical to second-degree murder under Penal Law § 125.25(3) (of which Mr. Davis was convicted), except that intent to cause death is required in the first degree. Therefore, unlike in *Salcedo,* the jury must have specifically *rejected* a finding that Mr. Davis intended to kill Mr. Yang – which the court noted in explaining the basis for Mr. Davis's sentence.[14] S. 18.

Since there was no evidentiary basis nor any legal authority for finding that Mr. Davis's offenses were anything other than a single, integrated, continuous transaction, and the weapon-possession count was a material element of the first-degree robbery

[14] This also distinguishes Mr. Davis's case from each of the defendants in *Brown*, where each was found to have intent to kill. *See* n.15, *supra*. The prosecution's reliance on *Brown* in its argument for consecutive sentences was misplaced for this reason as well. S. 8.

and the second-degree murder counts, Mr. Davis's sentences must be run concurrently. N.Y. Penal Law § 70.25(2); *Brown*, 21 N.Y.3d at 751; *Williams*, 251 A.D.2d at 267.

## POINT IV

### DOMINICK DAVIS'S SENTENCES WERE UNDULY HARSH AND EXCESSIVE GIVEN THE NATURE OF HIS CONDUCT, HIS YOUNG AGE AND HIS DEMONSTRATED PROSPECTS FOR REHABILITATION AT THE TIME OF THE OFFENSE.

Mr. Davis's sentence was unduly harsh and excessive. Even if consecutive sentencing had been permissible, it was not appropriate. The fact of Mr. Davis's gun possession did not reflect any further moral culpability or need for deterrence than that of his murder conviction. Moreover, Mr. Davis was relatively young, he showed significant promise for rehabilitation, and he expressed remorse for his conduct. This Court should modify his sentences to run concurrently and reduce the length of his sentences closer to the minimum terms.

This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances . . . without deference to the sentencing court." *People v. Delgado*, 80 N.Y.2d 780, 783 (1992). The Court should consider "the nature of the crime, the defendant's circumstances, the need for societal protection, and the prospects for the defendant's rehabilitation." *People v. Fernandez*, 84 A.D.3d 661, 664 (1st Dep't 2011) (internal quotation omitted). The Court should also consider these factors with a view toward imposing the "minimum amount of confinement" necessary. *People v. Notey*, 72 A.D.2d 279, 282-83 (2d Dep't 1980) (internal citation omitted).

### A. The Integrated Nature of Mr. Davis's Offenses Indicates That Mr. Davis's Sentences Should Be Run Concurrently.

The record is clear that Mr. Davis obtained the gun for the purpose of committing a robbery. Assuming that this Court does not find that, as a legal matter, Mr. Davis's sentences were required to be consecutive, as a factual matter, for the reasons set forth in Point IV, *supra*, Mr. Davis's conduct in acquiring the weapon for the purpose of committing a robbery constituted a single criminal transaction for the purposes of sentencing. It should have been punished as such.

Although the court argued that Mr. Davis's weapon possession elevated the danger of his conduct from a "mundane" occurrence to a deadly one, S. 16, the deadly nature of his conduct was amply reflected in the fact that Mr. Davis was also convicted of murder in the second degree through the use of a gun. *See* N.Y. Penal Law § 125.25(3) (murder in the second degree committed by causing death as a result of first degree robbery); § 160.15(2) (robbery in the first degree requires a person to armed with a deadly weapon); Indictment at Count Four (charging Mr. Davis with committing robbery using a "loaded handgun"). Thus, Mr. Davis's murder conviction, which carries an indeterminate sentence with a life maximum, fully reflected the moral culpability of his conduct and fully satisfied the need for deterrence. No additional time for the weapon conviction serves these purposes any further. Consecutive sentencing was therefore inappropriate.

### B. Mr. Davis Was Young at the Time of the Offenses, Admitted His Conduct, Expressed Remorse, and Showed Significant Promise for Rehabilitation.

The United States Supreme Court has recognized that youth is a mitigating factor because young people are categorically less deserving of severe punishment due to "their diminished culpability and greater prospects for reform." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472. Young people are less culpable because they have an "inherent lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Id.* at 471 (internal quotation omitted). As young people mature, their ability to appreciate the consequences of their actions improves. *Id.* at 471-72. With less fixed character traits than older people, young defendants show a greater capacity to respond positively to rehabilitation. *Id.*

Young adults continue to show significant deficits with respect to appreciation of risk as compared to older adults. *See* Margo Gardner & Laurence Steinberg, Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, Dev. Psych. 41:4, 625-35, 630-32 (2005). Moreover, because a person's character is not usually fixed until later in the 20s, young adults demonstrate an ability for reform similar to that of younger teenagers. Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of

Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, Am. Psych. 58:12, 1009-1018, 1014 (2003).

Accordingly, New York courts have often reduced sentences for armed or weapon-related offenses in view of the defendant's youth, even where the defendant was in his early twenties. *See People v. Hampton*, 113 A.D.3d 1131, 1133 (4th Dep't 2014) (sentence reduced for robbery in the first degree in part because defendant was "relatively young"); *People v. Carter*, 74 A.D.3d 1375, 1376 (3d Dep't 2010) (sentence reduced on four counts of robbery and assault where defendant was 20 years old); *People v. Dyer*, 60 A.D.3d 690, 690-91 (2d Dep't 2009) (sentence reduced for criminal possession of a weapon in the third degree due in part to defendant's youth); *People v. Strawbridge*, 299 A.D.2d 584, 594 (3d Dep't 2002) (sentence for second-degree murder reduced in part due to 21-year-old defendant's youth).

Mr. Davis was only 20 years old at the time of these offenses. Although he already had a prior violent felony conviction at the time of this offense this Court should recognize that due to his young age, he has an increased capacity for reform as he continues to mature, reducing the risk that he presents to public safety upon release. *See Miller,* 567 U.S at 472 (recognizing that "incorrigibility is inconsistent with youth," so that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes") (citing *Graham v. Florida*, 560 U.S. 48, 71-73 (2010); *Roper v. Simmons*, 543 U.S. 551, 571 (2005)).

Furthermore, Mr. Davis completed several self-improvement and vocational training courses during his incarceration while awaiting trial. S. 11-12. During these several years prior to trial, he also had no disciplinary incidents. *Id.* These facts demonstrate that even before sentence was imposed in this case, Mr. Davis had begun to mature out of the behavior which led him to commit the offenses here. This shows his prospect for reform, and reduces the need for consecutive sentences, or a maximum sentence on the murder count. *See, e.g., People v. Fagan*, 155 A.D.3d 524, 525 (1st Dep't 2017) (reducing sentence where, *inter alia*, "[d]efendant accepted responsibility for his crime"); *People v. Crump*, 197 A.D.2d 414, 415 (1st Dep't 1993) (reducing sentence where "defendant freely accepted responsibility for his actions in his statements to police").

Mr. Davis also admitted his conduct to the police when they questioned him. "The first step toward rehabilitation is a sincere admission of the wrongdoing." *In re Umer K.*, 257 A.D.2d 195, 196 (1999). *See People v. Fagan*, 155 A.D.3d 524, 525 (1st Dep't 2017) (reducing sentence where, *inter alia*, "[d]efendant accepted responsibility for his crime"); *People v. Crump*, 197 A.D.2d 414, 415 (1st Dep't 1993) (reducing sentence where "defendant freely accepted responsibility for his actions"). He continually expressed remorse from "day one" until sentencing, S. 10, in his statements to police stating that he deeply regretted shooting Mr. Yang over "a dumb ass [iPhone]," that he could not sleep after the incident because he was thinking about Mr. Yang and hoping that he was okay. Davis Video Statement at 1:29:30:00-

1:29:45:00 (Mr. Davis stating "I'm totally sorry for everything that happened" when asked if he has anything else to say at the end of statement); Davis Written Statement at 2 ("I didn't mean to hurt him. It was a dumb ass I phone [sic] I picked up... I'm sorry I didn't mean for any of this to happen. I wish the night never happened."). He also sincerely apologized at sentencing. S. 13 (Mr. Davis stating that Mr. Yang's family "lost a love[d] one" due to his "senseless act" and that he was "incarcerated by the grace of God.). *See People v. Musa Kuramura*, 148 A.D.2d 331, 331 (1st Dep't 1989) (manslaughter sentence reduced where defendant "continually expressed remorse" over offense).

Also, defense counsel indicated at sentencing that the reason that Mr. Davis had not pled guilty was because the prosecution refused to offer a guilty plea arrangement to any charge other than first degree murder – of which Mr. Davis was acquitted. S. 9-10; T. 1104-05. Thus, Mr. Davis's choice to go to trial did not reflect a failure to accept responsibility but rather that he was not in fact guilty of the charge to which the prosecution insisted that he plead guilty. These facts further demonstrate Mr. Davis's capability of reform, reducing the need for consecutive and maximum sentences.

Moreover, the court took certain statements by Danielle Eddy out of context in concluding that Mr. Davis's offenses were deserving of a heavier sentence. S. 18. Mr. Davis's own statements that he was actually attempting to see if Mr. Yang would survive before he left were consistent with Ms. Eddy's observations that Mr. Davis

was "nudg[ing]" Mr. Yang with his foot, picking up his arm to see if Mr. Yang was moving, and bending over him to get a close view. T. 117-120. According to Ms. Eddy, this was not done "maliciously," T. 117, as the trial court implicitly suggested in its statement that Mr. Davis purposely waited until it was clear Mr. Yang would not live. S. 18. Ms. Eddy estimated that Mr. Davis stayed at the scene for up to two minutes, T. 139 – a course of action that makes no sense if Mr. Davis's primary goal was to evade capture by the police. Indeed, Mr. Davis stated that Mr. Yang was conscious and breathing when he left the scene of the robbery. Davis Video Statement at 1:16:15:00-1:16:50:00. Thus, it was not "clear" that Mr. Davis purposely left Mr. Yang to die. S. 18.

For these reasons, the "minimum amount of confinement necessary" for Mr. Davis's second degree murder should have been less than the maximum, and this sentence should have been concurrent to his weapon possession sentence. This Court should modify his sentence accordingly.

## CONCLUSION

Because Mr. Davis's conviction is the unlawful product of statements derived from a warrantless search and unlawful arrest, and he was deprived of effective assistance of counsel, his conviction should be vacated; alternatively, Mr. Davis's sentences were illegal and excessive, and this Court should vacate or modify them to run concurrently, and impose sentences closer to the minimum terms of imprisonment.

Dated: New York, New York
Nov. 22, 2019

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ADDENDA

Supreme Court of the State of New York
Appellate Division: First Department

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| The People of the State of New York,<br>Respondent,<br><br>— against —<br><br>Dominick Davis,<br>Defendant-Appellant. | Ind. No. 1684-2012 (Bx. Cty.) |

Statement Pursuant to Rule 5531

1. The indictment number in the court below was 1684-2012.
2. The full names of the original parties were "The People of the State of New York" against "Dominick Davis," "Alejandro Campos," and "Richard Williams."
3. This action was commenced in Supreme Court, Bronx County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment rendered on January 12, 2016, by Supreme Court, Bronx County. Dominick Davis was convicted after a trial of one count of Murder in the Second Degree, N.Y. Penal Law § 125.25, and Criminal Possession of a Weapon in the Second Degree, N.Y. Penal Law § 265.03(3). Mr. Davis received 25 years to life in prison on the murder count and ten years in prison with five years of post-release supervision on the weapon possession count, to run consecutively. Justice Ethan Greenberg presided over the trial and sentencing.
6. Mr. Davis has been granted leave to appeal as a poor person on the original record and typewritten briefs.

Supreme Court of the State of New York
Appellate Division: First Department

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|---|---|
| The People of the State of New York,<br>Respondent,<br><br>— against —<br><br>Dominick Davis,<br>Defendant-Appellant. | Ind. No. 1684-2012 (Bx. Cty.) |

Printing Specification Statement

1. The following statement is made in accordance with First Department Rule 600.10.

2. Mr. Davis's brief was prepared with Microsoft Word 2010 with Century Schoolbook typeface 14 point in the body and 12 point in the footnotes.

3. The text of the brief has a word count of 18,106, as calculated by the processing system and is 73 pages.