To be argued by:
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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-

JOHANNA VASQUEZ,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT JOHANNA VASQUEZ

Ind. No. 1540-2014 (New York County)

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

The People of the State of New York, Respondent, — against — Johanna Vasquez, Defendant-Appellant.	Ind. No. 1540-2014

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on November 3, 2016, by the Supreme Court, New York County. Johanna Vasquez was convicted after a trial of one count of unlawfully dealing with a child, N.Y. Penal Law § 260.20(1). Ms. Vasquez was sentenced to three years of probation.

Justice Patricia Nunez presided over the trial and sentencing. Timely notice of appeal was filed. No stay of execution has been sought. Ms. Vasquez is currently serving her term of probation.

QUESTION PRESENTED

Where the trial evidence did not allow the jury to determine which of two persons under the age of 18 was the subject of the single count of unlawfully dealing with a child, and where the trial court instructed the jury that either of them could be, was the count of unlawfully dealing with a child rendered duplicitous?

INTRODUCTION

Johanna Vasquez was tried twice on the charge of unlawfully dealing with a child. At her first trial, she faced that charge, as well as charges of criminal facilitation in the second degree and of endangering the welfare of a child. The jury acquitted her of all other charges, but deadlocked on the single charge of unlawfully dealing with a child. At her second trial, she was convicted of that single remaining charge.

Although Ms. Vasquez was charged in a single count of the indictment with unlawfully dealing with a child, that charge involved two children. Neither the indictment nor the bill of particulars, nor the evidence presented at trial, nor the court's instructions to the jury indicated which single child the charged offense involved. Thus, the count was duplicitous.

Allowing two people under the age of 18 on the premises where drug activity is occurring constitutes two separate counts of unlawfully dealing with a child. Ms. Vasquez was charged with only one count. The prosecution presented evidence showing that either of her two children could have been the subject of the count, yet it never argued that the count applied to one or other; it argued that the count applied to both.

Furthermore, the trial court instructed the jury that it could find Ms. Vasquez guilty if it found she committed the charged offense against either of her children. The trial evidence and the court's instructions effectively charged two separate criminal acts in one count.

These facts independently and collectively rendered the count of unlawfully dealing with a child duplicitous. It is impossible to know whether the jury reached a unanimous verdict as to either child. Furthermore, because the evidence was ambiguous as to which child was the subject of the count, Ms. Vasquez is exposed to potential subsequent prosecution for the same conduct in violation of her constitutional protection against double jeopardy. Thus, her conviction must be vacated, and the count dismissed.

STATEMENT OF FACTS

A. Ms. Vasquez was Charged, Tried, and Acquitted of All Charges Relating to a Drug Trafficking Operation, Except Unlawfully Dealing with an Unnamed Child.

On Mar. 28, 2014, Johanna Vasquez was charged with one count of criminal facilitation in the second degree, one count of endangering the welfare of a child and one count of unlawfully dealing with a child. New York Ind. No. 1540-2014 at Counts 12, 20, & 21 (hereinafter, "Indictment."). Ms. Vasquez was one among several other co-defendants alleged to be part of a drug trafficking enterprise operating out of 1499 Rosedale Avenue in the Bronx, where Ms. Vasquez operated the Funworld Daycare center on the second floor. *Id.* at 1-5; T. 563.[1]

The count of unlawfully dealing with a child alleged that "[o]n or about September 11, 2013, [Ms. Vasquez] knowingly permitted a child less than eighteen years old to enter or remain in a place where activity involving the possession and sale of cocaine was conducted and [s]he knew or had reason to know such activity was being conducted," in

[1] Citations to "VD." refer to voir dire and pre-trial proceedings on Oct. 4, 2016. Citations "T." refer to trial proceedings held on Oct. 7-18, 2016. Citations to "S" refer to the sentencing on Nov. 3, 2016. The trial transcript proceeds from page 521 to page 525, apparently skipping pages 522-524, but reads continuously. Appellate counsel for Ms. Vasquez spoke with Crystal Scudder, the court reporter who prepared the transcript, who stated that no pages were missing and that this was a pagination error.

violation of N.Y. Penal Law § 260.20(1). Indictment at Count 21. The indictment did not name any child under the age of 18 as the subject of this count.

The Bill of Particulars provided by the prosecution did not name any specific child with respect to this charge either. *See* Notice, Demand, and Voluntary Disclosure Form, Section A: Bill of Particulars (hereinafter, "Bill of Particulars") at 5. It stated only that the defendants for this count were "Gregorio Hanley and Johanna Vasquez," the date and approximate time of the offense were "9/11/2013" and "11:25 PM," and the place was "1499 Rosedale Avenue, Bronx, New York." *Id.*

On April 25, 2016, Ms. Vasquez was found not guilty after trial of criminal facilitation and endangering the welfare of a child. Affirmation of Gary K. Roos in Support of Motion to Dismiss and Motion in Limine at ¶3. The jury hung on the count of unlawfully dealing with a child. *Id.*

B. Ms. Vasquez was Tried a Second Time for Unlawfully Dealing with a Child, but No Individual Child was Named as the Subject of the Count.

At her second trial, Ms. Vasquez was convicted of the single count of unlawfully dealing with a child. Although numerous references were

made to Ms. Vasquez's children and the children who attended Ms. Vasquez's daycare center throughout the trial, no individual child was ever named as the subject of the single count of unlawfully dealing with a child. During its preliminary instructions to the jury, the court never stated what the charge against Ms. Vasquez was, nor who the subject of the count was. *See* VD. 128-136. In its opening statement, the prosecution stated that it would prove that a months-long investigation revealed that Ms. Vasquez operated a daycare center out of the address where a drug trafficking operation managed in part by her husband, Gregorio Hanley, was also taking place. VD. 137-144.

However, as to the identity of the child who was the subject of the count of unlawfully dealing with a child, the prosecution stated only that investigators executed a search warrant and found Ms. Vasquez's children "Jayden and Javier [Hanley]" sleeping on the first floor. VD. 143. The prosecution told the jury that it would ask the jury to render a verdict of guilty, but did not say as to which of Jayden or Javier the guilty verdict should be rendered. VD. 144. The prosecution made other references to "parents dropping off their children" at the daycare, but no specific child was named. VD. 138.

1. *The Trial Testimony Focused Heavily on Drug Activity Observed at 1499 Rosedale Avenue in Which Ms. Vasquez Did Not Participate.*

Investigators from the New York City Police Department (NYPD) and federal agencies testified that they began surveillance on 1499 Rosedale Avenue in January of 2013 after receiving information that a man named Juan Valdez was shipping drugs from Puerto Rico there through the U.S. Postal Service. T. 90-92; T. 360; T. 425-26. During several months of surveillance, Gregorio Hanley, Mr. Valdez, and others were observed engaging in activity consistent with drug transactions, including placing and retrieving bags into and from garbage cans at 1499 Rosedale Avenue, and transporting items in luggage and bags to a nearby house at 1502 Rosedale Avenue. T. 105-07, 117-18, 457-58. Investigators also caught a relative of Mr. Valdez attempting to transport a large amount of cash in her luggage on a flight from JFK Airport, and found cocaine in a vehicle where Mr. Valdez and an associate were seen to place items they had taken from 1499 Rosedale. T. 184-86, 428-439.

None of this activity, however, involved Ms. Vasquez. Special Agent Cesar Medina testified that "a few times" he observed Ms.

Vasquez "conducting her daily business, her daily routine." T. 408-09. He could not recall whether he saw Ms. Vasquez with children, and he did not know whether any children he did see were Ms. Vasquez's children. T. 409. Inspector James Morrison, who had been conducting surveillance since early 2013, stated that he never saw Ms. Vasquez at all until a search warrant was executed in September 2013. T. 425-26, 439-440. Det. Jugady Rosado testified that during his several months of surveillance, he saw Ms. Vasquez only twice and never saw her during the day, nor did he observe her handing children from the daycare over to their parents. T. 101.

Investigators intercepted numerous communications between Mr. Hanley, Mr. Valdez, and several others discussing drug transactions, using code words to refer to cocaine, oxycodone pills, and proceeds from sales. T. 147; T. 179-81; T. 191-94; T. 485-87; T. 490-501. But Special Agent Medina and Detective Jugady Rosado testified that there was no evidence that Ms. Vasquez ever had any discussions with Mr. Valdez or Juan Bernal, another participant in the drug transactions. T. 332-33, 409. In one intercepted communication Mr. Valdez was later heard to say that he expected that Ms. Vasquez would be released from jail soon

after her arrest because "she has absolutely nothing do with" their drug operation. T. 336; T. 515-16.

Mercedes Rivera, an analytical linguist, was tasked with translating, summarizing, and transcribing intercepted communications. T. 135-38. Part of her job was to determine whether calls were pertinent to the investigation, and to stop listening to conversations that were not pertinent or that were considered privileged. T. 138-42. Ms. Rivera testified that although some conversations with Ms. Vasquez were intercepted, none were retained or transcribed because they were all either privileged or not pertinent. T. 155-56.

Overall, Det. Rosado testified that investigators did not have "any evidence whatsoever that [Ms. Vasquez] engaged in any transactions concerning drugs." T. 339; *see also* T. 333 (Det. Rosado testifying that there was "no evidence whatsoever" Ms. Vasquez visited Puerto Rico or had any connection to 1502 Rosedale Avenue); T. 412 (Special Agent Medina testifying there was no evidence Ms. Vasquez possessed any drugs).

2. *A Search Warrant was Executed on September 11, 2013, During Which Drugs and Money Were Found, and Jayden and Javier Hanley are Found Asleep Together*.

On Sep. 11, 2013, investigators executed a search warrant at 1499 Rosedale Avenue. T. 319. In the basement, they found a plastic bag containing crack-cocaine on a shelf, oxycodone pills, and a quantity of cocaine. T. 373-80. There was also a hotplate, a coffee pot containing crack cocaine and cocaine residue, and additives such as protein powder and baking soda, all of which were believed to be used to cook crack cocaine. T. 376, 380, 398. Other paraphernalia such as a scale and baggies were also found. T. 376. Special Agent Medina testified that he was able to identify a distinctive smell associated with the process of cooking crack cocaine as he approached the basement. T. 414-15. No other drugs were recovered. T. 307, 412. In the kitchen on the first floor, approximately $15,000 in cash and a money counter were found in a cabinet near the sink. T. 255-56, 385. More money and a gun were hidden inside the furniture in the living room. T. 387.

Det. Rosado testified that while police searched 1499 Rosedale Avenue, Ms. Vasquez informed him that her children were in a rear bedroom on the first floor. T. 222. He entered the bedroom and found

that "the kids were sleeping." *Id.* He testified that "[w]e left them alone, we let them sleep." *Id.* The prosecution asked further questions about them, but only in the collective, and Det. Rosado never spoke about either child individually. Both the prosecution and Det. Rosado referred to them only as "the children":

[PROSECUTOR]:	You mentioned the two children inside a bedroom on the first floor, did you look inside that bedroom?
[DET. ROSADO]:	Yes.
[PROSECUTOR]:	Did you have an opportunity to see approximately how old their children were?
[DET. ROSADO]:	They were -- during that time they looked like one was maybe four, and the other one was six.
[PROSECUTOR]:	Did you wake those children?
[DET. ROSADO]:	No.
[PROSECUTOR]:	Did there come a time that you searched the children's bed that evening?
[DET. ROSADO]:	We didn't search the children's room. I didn't search the children's room.

T. 224; *see also* T. 251 (referring to "the children's bedroom"); T.272 ("Q: Where were the children while you were searching 1499 Rosedale

Avenue? A: They were still asleep inside their bedroom."); T. 292 ("…that other bedroom is where the children are sleeping…the children remained sleeping"); T. 307 (referring again to "the children"); T. 333 ("No, I saw children, I don't know if they were her children or not. My first time seeing them was when they were lying in bed…").

In fact, only once during the trial testimony are Jayden and Javier ever referred to by name. T. 573 (witness testifying that a "letter reflects that the onsite provider, Joanna Vasquez, is telling us, the Department of Health, that she would like to add her two children, who are actually… Jayden and [J]avier[2] to be a part of their day care."). Despite much testimony regarding children observed during police surveillance, and the operations of Ms. Vasquez's daycare center, neither Jayden nor Javier is ever referred to individually. *See, e.g.*, T. 100, 101, 117, 450, 455, 471 (investigators describing unnamed children being dropped off at daycare center); T. 538-553 (parent of daycare attendees describing daycare center and drop off and pick up of her own children).

[2] Javier Hanley is alternately spelled throughout the transcript as "Javier," "Xavier" and "Havier." To prevent confusion, the spelling "Javier," which appears first in the trial transcript, is used.

3. *The Prosecution's Arguments Never Identified Which of Jayden or Javier was the Subject of the Count.*

Following the presentation of evidence defense counsel moved to dismiss, arguing that the evidence was legally insufficient because "there is no evidence that [Ms. Vasquez] was ever around these drugs, or that she ever saw any of these transactions." T. 592. In opposing the motion, the prosecution still referred to Jayden and Javier only collectively, as "the children", or as part of "the family." *See*, *e.g.,* T. 594 ("Addressing what Mr. Koos said about whether the defendant let her children, who are both under the age of eighteen, the statute requires that the children be on the premises."); T. 595 ("[T]here was no evidence there were any locks precluding the family from going into the living room of the first floor down to the basement area, where the drugs were being stored.").

In its summation the prosecution made extensive references to the fact that Mr. Hanley had conducted drug activities on the premises where Ms. Vasquez ran a daycare center for children other than her own. T. 623-24, 626-27, 634, 641, 643, 648. The prosecution specifically pointed out that children could be heard in the background of intercepted communications with Mr. Hanley. T. 631, 638. The

prosecution also invited the jury to question "why would she let it happen when she was allowing other peoples' children to come into her home to be cared for; why would she let her own children live among this." T. 646. Yet the prosecution still never argued that any individual child was the basis of the single count. The prosecution again referred to Ms. Vasquez's children only collectively as "the children," "the kids," or "the family" T. 624, 641, 643.

The prosecution concluded by stating that both of Jayden and Javier were the basis of the count of unlawfully dealing with a child because Ms. Vasquez "allowed *her two children*[,] a six year old [J]avier and a three-year-old Jayden" to live in a house where she knew of narcotics activity. T. 650 (emphasis added).

4. *The Court Instructed the Jury That Either of Ms. Vasquez's Children Could Support Conviction for the Single Count of Unlawfully Dealing with a Child.*

The jury was instructed about only a single count of unlawfully dealing with a child. T. 666-67. During its instructions to the jury, the court stated that in order to find Ms. Vasquez guilty, the prosecution had to have proven "that on or about Sep. 11, 2013 in the County of Bronx, [Ms. Vasquez] knowingly permitted [J]avier or Jayden Hanley to

enter or remain in upon [sic] where activity involving cocaine was conducted[.]" T. 666. It also stated the prosecution was required to prove that Ms. Vasquez knew or had reason to know about such activity, and that at the time "the children, [J]avier or Jayden Hanley was less than eighteen years old." *Id.*

C. Verdict and Sentence.

On Oct. 18, 2016, Ms. Vasquez was found guilty. T. 671. On November 3, 2016, she was sentenced to three years' probation. S. 5.

ARGUMENT

THE COUNT OF UNLAWFULLY DEALING WITH A CHILD WAS RENDERED DUPLICITOUS WHERE BOTH THE INDICTMENT AND THE TRIAL EVIDENCE MADE IT IMPOSSIBLE TO DETERMINE WHICH OF MS. VASQUEZ'S CHILDREN WAS THE SUBJECT OF THE COUNT AND THE COURT INSTRUCTED THE JURY THAT IT COULD BE EITHER.

Although Johanna Vasquez was charged with a single count of unlawfully dealing with a child, the evidence at trial gave no way of distinguishing which of Ms. Vasquez's children was the one that supported the count. The court instructed the jury that it must return a guilty verdict if it found that Ms. Vasquez permitted "[J]avier or Jayden Hanley" to enter or remain in a place where activity involving cocaine was occurring, constructively amending the indictment to allow two independent criminal acts to support a single count. T. 666. These facts independently and collectively rendered the count of unlawfully dealing with a child duplicitous, mandating vacatur of Ms. Vasquez's conviction and dismissal of this count. *People v. Keindl*, 68 N.Y.2d 410, 417-18 (1986); N.Y. C.P.L. § 200.30(1).

A. A Count in an Indictment That Charges Multiple Offenses is Duplicitous and Must Be Dismissed.

A defendant may not be charged with a single count alleging conduct that constitutes multiple offenses. C.P.L. § 200.30(1) ("Each count of an indictment may charge one offense only."). Thus, it is well-settled that "acts which separately and individually make out distinct crimes must be charged in separate and distinct counts." *Keindl*, 68 N.Y.2d at 417; *see also People v. MacAfee*, 76 A.D.2d 157, 159-160 (1980) ("Crimes which are independently committed and are separate and distinct from one another must be charged in separate counts…").

This is necessary for two reasons. First, alleging multiple criminal acts in a single count violates the right of a defendant to a unanimous verdict. *Keindl*, 68 N.Y.2d at 418. "If two or more offenses are alleged in one count, individual jurors might vote to convict a defendant of that count on the basis of different offenses; the defendant would thus stand convicted under that count even though the jury may never have reached a unanimous verdict as to any one of the offenses." *Id.*

Second, alleging more than one criminal act in a single count violates a defendant's constitutional right against double jeopardy. *Id.* at 417-18. U.S. Const. Amends. V, XIV; N.Y. Const. Art. I, § 6. If more

than one offense is alleged in a single count, and a defendant is convicted on that count, the defendant may not be able to later raise a constitutional defense of double jeopardy, even though the defendant is being prosecuted for the same conduct that supported a previous prosecution. *Keindl*, 68 N.Y.2d at 417-18. Thus, counts must be individualized to single criminal acts so that the defendant will not be exposed to a subsequent prosecution for the same offense. *Id.* at 418.

Although a count may be valid on its face, it may be rendered duplicitous by the evidence at trial if it is not possible to identify individual criminal acts with single counts. In *Keindl*, the defendant was charged with many counts of sexual acts against children. *Id.* at 418. But the testimony at trial by the victims showed that multiple distinct acts of sexual abuse occurred during the time periods alleged in the bill of particulars for at least four of the counts. *Id.* The Court vacated the defendant's conviction on each of these counts and dismissed them.[3] *Id.* at 423.

[3] The court also dismissed several other counts for which the alleged time period of occurrence was unreasonably broad. *Id.* at 418.

Following *Keindl*, this Court has repeatedly done the same when the language of the count or the evidence at trial does not allow an individual offense to be identified with a single count. *See People v. Villalon*, 161 A.D.3d 486, 486-67 (1st Dep't 2018) ("[t]he criminal contempt count was duplicitous because defendant's acts of violating an order of protection by regularly but briefly showing up at the victim's apartment…constituted distinct crimes that were required to be alleged in separate counts," requiring vacatur and dismissal); *People v. Jones*, 165 A.D.2d 103, 108-09 (1st Dep't 1991) (vacating and dismissing because "despite a validly drafted indictment, the trial testimony provides evidence of repeated acts that cannot be individually related to specific counts in the indictment, [thus] the prohibition against duplicitousness has been violated."); *People v. Algarin*, 166 A.D.2d 287, 288 (1st Dep't 1990) (language of indictment, trial testimony, and prosecutor's summation "render[ed] it impossible to determine which of the multiple acts alleged actually was the basis of defendant's conviction of any given count."); *People v. Beauchamp*, 143 A.D.2d 13, 16 (1st Dep't 1988) ("[W]e are constrained by virtue of the decision in *People [v.] Keindl* … to agree that a reversal is mandated on the ground

of duplicitousness in light of the trial testimony as to repeated acts which could not be individually related to specific counts in the indictment."); *People v. Romero*, 147 A.D.2d 358, 361-362 (1st Dep't 1989) (reversing in the interest of justice because "the District Attorney's affirmation… and complainant's trial testimony alleged that both rape and sexual abuse occurred on more than one occasion during the five-month period designated in the indictment" constituting "separate, distinct offenses…[that] must be included under a separate count and proven individually.").

The other New York appellate courts have also adhered to this well-established rule. *See*, *e.g., People v. Gerardi,* 165 A.D.3d 1281, 1282 (2d Dep't 2018) (vacating and dismissing numerous counts because "the complainant's testimony demonstrated that each of those counts was premised upon multiple acts of rape and criminal sexual act, and they are, therefore, void for duplicitousness."); *People v. Estella*, 107 A.D.3d 1029, 1032 (3d Dep't 2013) ("[T]here is simply no way to match each count of the indictment with the specific underlying conduct of defendant that would insure that the jury had reached a unanimous verdict with regard to each count and, therefore, the reckless

endangerment counts must be dismissed as duplicitous."); *People v. Dukes*, 122 A.D.3d 1370, 1372 (4th Dep't 2014) (vacating and dismissing where "the victim's testimony that numerous such acts [of sexual conduct] occurred during the summer of 2010" and there was "only testimony of a general nature that several incidents occurred during the alleged time frame" rendered two counts duplicitous, since it was not possible to determine whether jury reached unanimous verdict or whether double jeopardy violation would occur on subsequent prosecution.).[4]

[4] *See also People v. Singh*, 128 A.D.3d 860, 861 (2d Dep't 2015) ("Accordingly, the complainant's trial testimony demonstrates that these counts are premised upon multiple acts of rape, and are therefore void as duplicitous."); *People v. Black*, 65 A.D.3d 811, 813 (3d Dep't 2009) (reversing and dismissing because "[c]ounts 11 and 14 both alleged that defendant had engaged in sexual intercourse with the victim between September 1, 2003 and December 31, 2003. However, the testimony revealed that all but one of the instances of sexual intercourse occurred during that time frame; thus, it is impossible to match specific acts with specific counts of the indictment."); *People v. Dalton*, 27 A.D.3d 779, 781 (3d Dep't 2006) ("Considering this testimony, it is impossible to verify that each member of the jury convicted defendant for the same criminal act, rather than any one of 500 separate sexual acts, rendering several of the counts duplicitous."); *People v. Foote*, 251 A.D.2d 346, 346 (2d Dep't 1998) ("During the jury charge, the court did not link the testimony of vaginal intercourse sequentially or otherwise to the different counts of the indictment. Therefore … the counts of the indictment were duplicitous.")

B. The Count of Unlawfully Dealing With a Child Was Duplicitous Because There Was No Way to Determine Which of Jayden or Javier Hanley the Count Referred To.

Here, the trial testimony also rendered the count of unlawfully dealing with a child duplicitous because it was not possible to determine which child was the basis of this count, thus there were multiple offenses that could have been the basis of the count. A defendant is criminally liable for an individual count for *each* person under the age of 18 who is allowed to enter or remain on premises where the defendant knows or has reason to know drug activity is being conducted. *See* N.Y. Penal Law § 260.20(1). For example, in *People v. Berry*, 27 N.Y.3d 591, 593-94 (2016), the defendant was charged with three counts of unlawfully dealing with a child, one for each of three children on the premises on the day that a search pursuant to a warrant recovered crack cocaine.[5] Likewise, Det. Rosado testified that when the police executed the search warrant of Ms. Vasquez's home on Sep. 11, 2013, he simultaneously found *both* Jayden and Javier Hanley asleep in a bedroom (along with drugs and a large amount of cash

[5] The defendant's convictions were reversed because the evidence was found to be legally insufficient to establish that he had the authority to allow the children to enter or remain on the premises, since they were not his children. *Id.*

elsewhere on the premises). T. 224, 272, 292, 333. Thus, Ms. Vasquez could have been charged with two counts of unlawfully dealing with a child – one for allowing Jayden to enter or remain on the premises, and another count for Javier.

However, Ms. Vasquez was charged with only a *single* count of unlawfully dealing with a child, alleging that on Sep. 11, 2013 a singular, unnamed person under the age of 18 was permitted to be on the premises where drug activity was conducted. Indictment at Count 21. Nothing in the record indicates which child was the basis of this count. Although the bill of particulars states that the offense occurred on "9/11/2013" – the date of the search warrant – the bill of particulars also fails to state what person under the age of 18 is alleged to support this count. Bill of Particulars at 5. The only testimony regarding Jayden or Javier's presence on the premises on Sep. 11, 2013 simply states that both were found in a bedroom asleep simultaneously. T. 224, 272, 292, 333. Neither Jayden nor Javier is ever spoken of by any witness, the court, or the prosecution as an individual – they are only referred to by both of their names together, or simply as "the children," "kids," or as

part of "the family." *See*, *e.g.,* T. 222, 224, 272, 292, 333, 573, 624, 641, 643.

Although either Jayden or Javier could have been the singular unnamed person under age 18 alleged in the indictment, given the above, it was simply impossible for the jury to know which one the count was referring to. Thus, there were multiple distinct offenses that could have supported this single count, and no way to know which she now stands convicted of. This rendered the count duplicitous. *Keindl*, 68 N.Y.2d at 417-18.

C. The Trial Court Also Rendered the Count Duplicitous When It Instructed the Jury That It Could Use Either Jayden or Javier Hanley to Support a Verdict Of Guilty.

A count is also rendered duplicitous when a judge's instructions do not indicate to the jury that they must distinguish between multiple acts that individually constitute criminal offenses to arrive at a unanimous verdict with respect to each act. In *People v. Madsen*, 168 A.D.3d 1134, 1138 (3d Dep't 2019) "the indictment contain[ed] multiple counts that charge the same crimes against the same victims during the same time periods, and the victims' testimony about defendant's actions during these periods could not be individually matched to the respective

counts." In reversing the defendant's conviction, the Court noted that "the jury was given no instructions that distinguished between the counts pertaining to any of the time periods in a way that would have permitted it to relate each of the counts to a specific act," nor was the jury instructed "that it must arrive at unanimous verdict with respect to each alleged act…" *Id.* at 1138-39; *see also People v. Jiminez,* 239 A.D.2d 360, 360 (2d Dep't 1997) ("…[T]he court instructed the jury that the first count referred to a rape which allegedly occurred in the morning … [h]owever, the complainant's trial testimony rendered the first count of the indictment duplicitous because she testified that the defendant raped her on more than one occasion before 10:00 A.M. on June 10, 1992."); *People v. Payne*, 241 A.D.2d 466, 466-67 (2d Dep't 1997) ("During deliberations, in response to the jury's question, the court instructed that all three injuries were part of the charges without differentiating between any of the three counts submitted to the jury" rendering the assault counts duplicitous and requiring vacatur and dismissal in the interest of justice.)

Here, the court explicitly told the jury that either of two people under age 18, each of whom could support a separate and distinct

offense of unlawfully dealing with a child, could be the basis of a single count. The court instructed the jury that it must return a verdict of guilty if it found that Ms. Vasquez allowed "Jayden *or* [J]avier" to enter or remain on the premises, and if "the children, [J]avier or Jayden Hanley was [sic] less than eighteen." T. 666 (emphasis added). This was effectively an instruction that the jury *need not* identify which individual, distinct act supported conviction. Although the court stated that "Your verdict must be unanimous," T. 668, there was no instruction that the jury must reach a unanimous verdict as to Jayden, or as to Javier. There is no question that this rendered the count duplicitous. *Madsen*, 168 A.D.3d at 1138-39; *Jiminez,* 239 A.D.2d at 360; *Payne*, 241 A.D.2d at 466-67.

In total, Ms. Vasquez's right to protection against double jeopardy and her right to a unanimous verdict have been violated. Nothing in this record can reveal whether Ms. Vasquez was convicted of allowing Javier Hanley to enter or remain on the premises where she knew or should have known drug activity was occurring, or whether she was convicted of allowing Jayden, or, given the trial court's instructions, both.

D. Defense Counsel Failed to Provide Effective Assistance of Counsel By Not Raising An Objection to the Duplicitous Count or the Judge's Instructions To The Jury.

Although defense counsel did not object to the duplicitous count, this Court should nevertheless reverse Ms. Vasquez's conviction and dismiss, because defense counsel's failure constituted ineffective assistance of counsel. The count was clearly rendered duplicitous by the evidence, and even more so after the court's instructions. The remedy should have been equally clear – either limit the count to the single child that supported the count, or dismiss the count altogether. Yet defense counsel failed to object. Defense counsel was also ineffective for not objecting to the trial court's instruction that either of Jayden or Javier could support the conviction.

The standard for evaluating an ineffective assistance of counsel claim under the United States Constitution is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). This occurs when defense counsel renders deficient performance, meaning that his representation fell "below an objective standard of reasonableness," *id.* at 688, and the defendant is prejudiced as a result, meaning "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

New York's standard for evaluating ineffective assistance of counsel also involves a determination of whether "[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)). Instead of applying Strickland's prejudice analysis, New York considers whether the attorney provided "meaningful representation." *Benevento*, 91 N.Y.2d at 712. This is "a flexible approach that takes into account the fairness of the trial process as a whole and the totality of the representation." *People v. Ennis*, 11 N.Y.3d 403, 411–12 (2008). Actions by counsel that are "inexplicably prejudicial" deprive a defendant of constitutionally meaningful representation. *Benevento*, 91 N.Y.2d at 713.

The only remedy for this duplicitous count would have been for trial counsel to move for the court to instruct the jury to consider *only* the single "person under the age of 18" referred to in the indictment, or alternatively, to dismiss the count. Indictment at Count 21. Neither the

bill of particulars nor the indictment named the person under 18. Thus, only an inspection of the grand jury minutes could reveal who this person was, and if it did not, the court would be required to dismiss the count as duplicitous.[6] When the court instructed the jury that it could consider either Jayden or Javier as the basis of the count, this effectively allowed the jury to consider two offenses when it was allowed to consider only one. This failed to insure jury unanimity since it cannot be determined if all of the jurors found the offense to have been committed against the same person.

Defense counsel's failure to take these actions was objectively unreasonable. Had defense counsel done so, it would have protected Ms. Vasquez against a potential subsequent prosecution by ensuring that the record was clear as to which child was the basis of the conviction

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[6] The court would not have been permitted to add or amend any count for an offense relating to a person under 18 other than the unnamed one indicated in the indictment. Although a trial court may amend an indictment following the presentation of evidence, the law is clear that an indictment may not under any circumstances be amended by the court "for the purpose of curing a failure … to charge or state an offense." C.P.L. § 200.70(1); *People v. Perez*, 83 N.Y.2d 269, 275-77 (1994) (C.P.L. 200.70(1) prohibits a trial court to amend indictment at trial to add a count, even to add a count that was mistakenly left out of indictment due to clerical error); *People v. Jones*, 267 A.D.2d 89, 90 (1st Dep't 1999) (court cannot amend indictment at trial to add count "regardless of whether the Grand Jury considered [the added count] with respect to defendant, or whether the failure to include defendant's name in the second count of the indictment was merely an oversight.").

and that the verdict as to the child was unanimous, or it would have resulted in dismissal of the only count she was facing, thereby preventing her conviction. Thus, there was no reasonable strategic basis for trial counsel's failure to protect Ms. Vasquez's fundamental rights or avoid conviction. *Strickland*, 466 U.S. at 688; *Clark*, 28 N.Y.3d at 563.

Further, because Ms. Vasquez is now potentially exposed to double jeopardy and was convicted by a jury verdict which may not have been unanimous, she has been "inexplicably prejudiced" by defense counsel's repeated inaction, which had no strategic basis. *Benevento*, 91 N.Y.2d at 713. The "result of the proceeding would have been different" if Ms. Vasquez had never been convicted at all, or if the record was clear as to which child was the basis of the conviction, because Ms. Vasquez would not now be exposed to subsequent prosecution for the same conduct. *Strickland*, 466 U.S. 668 at 694.

E. Alternatively, This Court Should Vacate Ms. Vasquez's Conviction and Dismiss the Count in the Interest of Justice.

Because these issues affect Ms. Vasquez's fundamental constitutional rights and there was no reason why they could not have been protected, this Court should reach the issue in the interest of

justice, as New York appellate courts have done in numerous cases of duplicitous counts. *See*, *e.g.*, *Romero*, 147 A.D.2d at 361-362 (reversing in the interest of justice); *People v. Russell*, 116 A.D.3d 1090, 1090-1091 (3d Dep't 2014) (vacating and dismissing in the interest of justice where "[t]he jury was instructed to convict defendant on count 7 if it found that he committed rape in the first degree against the victim between September 1, 2010 and March 2, 2011" but victim's testimony alleged multiple acts of rape during this time period); *People v. Kirk*, 96 A.D.3d 1354, 1357 (4th Dep't 2012) (vacating and dismissing in the interest of justice where 12 counts of endangering the welfare of a child were "rendered duplicitous by the trial evidence tending to establish the commission of [multiple] criminal acts during the time period[s] specified [with respect to those counts]") (internal quotation omitted); *People v. Bennett*, 52 A.D.3d 1185, 1186 (4th Dep't 2008) (vacating and dismissing in the interest of justice where two counts of sexual abuse in the first degree were "rendered duplicitous by the trial evidence tending to establish the commission of two criminal acts during the time period specified in the indictment"); *Jiminez,* 239 A.D.2d at 360 (vacating and dismissing in the interest of justice); *Payne*, 241 A.D.2d at 467 (same).

Ms. Vasquez's conviction was unjust because the grand jury accused Ms. Vasquez of unlawfully dealing with *one* person under the age of 18. But she was never given notice of who exactly this person was, and the prosecution never decided which one. Instead, the prosecuted elicited general testimony about happenings at the daycare center and whether children in general were observed at times far removed from Sep. 11, 2013, the date of the offense. T. 101, 117, 450, 454, 471 (investigators observing parents dropping off unnamed children at daycare center, often without observing Ms. Vasquez, before Sep. 11, 2013); T. 538-553 (parent of daycare attendees describing daycare center); Indictment at Count 21, Bill of Particulars at 5 (alleging Sep. 11, 2013 as date of offense). Since the Bill of Particulars and Indictment alleged the crime to occur on the date of the search warrant, and Det. Rosado testified that he saw Jayden and Javier on the premises on that date, any testimony about whether any other children were previously observed was irrelevant. *See* T. 222, 224; Bill of Particulars at 5; Indictment at 16.

The only purpose such testimony could serve would be to help the prosecution subtly misdirect the jury during summation and sidestep

the need to identify a single child by effectively by accusing Ms. Vasquez of generalized irresponsibility in dealing with children. *See*, *e.g.,* T. 623 ("She maintained a business[,] today she wants you to believe that she didn't know that every time she let *those children* inside that house not to mention her own children she was putting them in danger …") (emphasis added); T. 626 (" …and of course we have all the witnesses from the law enforcement they conducted surveillance on multiple childcare, they say parents dropping off their kids, picking them up…so all of this evidence shows that Miss Vasquez and Mr. Hanley were generally inside of the daycare in *August*, September 2013.") (emphasis added); T. 627-28 ("I want to start with *September 3rd*… that is what book ends this day, the Suarez kids are being dropped off[,] the Suarez kids are being picked up.") (emphasis added); T. 631, 638 (prosecution pointing out that general sounds from children can be heard in the background of intercepted communications); T. 646 ("…why would she let it happen when she was allowing other peoples' children to come into her home to be cared for…"). There is no other reason for such extensive argument regarding children who were not found on the premises at the date and time alleged in the bill of

particulars of approximately 11:25 PM on Sep. 11, 2013. Bill of Particulars at 5.

Only at the very end of its summation did the prosecution argue that it was Jayden and Javier that Ms. Vasquez unlawfully dealt with, and even this was not specific enough to identify a single offense to the count. T. 650. The prosecution therefore got away with convicting Ms. Vasquez of a nebulous, non-specific course of wrongdoing that was broader than what the indictment alleged. The court then effectively allowed each individual jury member to pick whichever of Ms. Vasquez children they liked to support the conviction.

All of this was done in clear and needless contravention of Ms. Vasquez's constitutional rights to fair notice of the charges against her, protection against double jeopardy, and a unanimous verdict. U.S. Const. Amends. V, XIV; N.Y. Const. Art. I, § 6; *Keindl*, 68 N.Y.2d at 417-18. There was no reason why the prosecution could not have named and focused on a single person under the age of 18 in the Bill of Particulars, or in its opening statements, direct examination, or summation, and thus no excuse for the prosecution's failure to do this after not one but two trials on this charge. For these reasons, allowing

Ms. Vasquez's conviction to stand is fundamentally unfair. Thus, this Court should vacate her conviction and dismiss the count in the interest of justice.

CONCLUSION

For the foregoing reasons, this Court should vacate Ms. Vasquez's conviction for unlawfully dealing with a child and dismiss that Count of the Indictment as duplicitous.

Dated: New York, New York
March 14, 2019

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ADDENDA

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

The People of the State of New York, Respondent, — against — Johanna Vasquez, Defendant-Appellant.	Ind. No. 1540-2014

Statement Pursuant to Rule 5531

1. The indictment number in the court below was 1540-2014.
2. The full names of the original parties were "The People of the State of New York" against "Juan Valdez aka Moreno," "Juan Bernal aka 98," "Gregorio Hanley aka G", "Ada Padilla" and "Johanna Vasquez," along with defendants whose names have been redacted.
3. This action was commenced in Supreme Court, New York County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment rendered on November 3, 2016, by Supreme Court, New York County. Johanna Vasquez was convicted after a trial of one count of unlawfully dealing with a child, N.Y. Penal Law § 260.20(1). Ms. Vasquez was sentenced to three years' probation. Justice Patricia Nunez presided over the trial and sentencing.
6. Ms. Vasquez has been granted leave to appeal as a poor person on the original record and reproduced briefs.

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

The People of the State of New York, Respondent, — against — Johanna Vasquez, Defendant-Appellant.	Ind. No. 1540-2014

Printing Specification Statement

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

2. Ms. Vasquez's brief was prepared with Microsoft Word 2010 with Garamond typeface 14 point in the body and 12 point in the footnotes.

3. The text of the brief has a word count of 6,923, as calculated by the processing system and is 36 pages.