

1-00-1712
1712

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION ; FIRST DEPARTMENT**

**Indictment No
5501-94**

**THE PEOPLE OF THE STATE OF NEW YORK
Plaintiff – appellee,**

- against -

OMAR ALVAREZ

Defendant – Appellant .

**APPEAL FROM A JUDGMENT OF CONVICTION RENDERED
IN THE COUNTY OF NEW YORK , STATE OF NEW YORK
APPELLANT'S BRIEF**

SEP 08 2000

NARDELLI J.P.

MAZZARELLI

LERNER

ANDRIAS

BUCKLEY JJ.

**R. FRANKLIN BROWN
Attorney for Defendant Appellee
401 Broadway Suite 300
New York , New York 10013
(212) 219 - 3950**

TABLE OF CONTENTS

TABLE OF CASES-----(ii)
STATEMENT PURSUANT TO RULE 5531-----(iii)
ISSUES PRESENTED----- (v)
STATEMENT OF FACTS-----1

ARGUMENT
POINT 1

**ONCE THE DEFENDANT IS UNDER POLICE CONTROL
WAS THE SEARCH OF THE IMMEDIATE AREA CONTROLLED
BY THE DEFENDANT , ILLEGAL .**-----6

POINT 2

**DID THE COURT'S DENIAL OF AN ADJOURNMENT VIOLATE
THE DEFENDANT'S 14th AMENDMENT RIGHT OF DUE
PROCESS**-----8

POINT 3

**DID THE COURT'S SEALING OF THE WITNESS LIST DENY
DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.**-----10

POINT 4

**THE VERDICT WAS AGAINST THE WEIGHT OF THE
EVIDENCE**-----11

CONCLUSION-----13

TABLE OF CASES

New York v. Belton , 453 U.S. 454 (1981)	6
People v. Cornelius , 113 AD2d. 666 (1986)	5
People v. Howard , 50N.Y. 2d. 583	5
People v. Norris , 59 N.Y.S2d 866 (1993)	9
People v. O' Neil , 11 N.Y. 2d 148 (1962)	7
People v. Rodriguez , 69 N.Y. 159 (1987)	5
People v. Saglimbeni , 62 N.Y. 2d. 798	6
People v. Spears , 64 N.Y. 2d.698	9
People v. Snyder , 297 N.Y. 81 (1947)	9
People v. Tejada , 81 N.Y.2d. 861 (1993)	4

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEWYORK
Plaintiff- Appellee,

V.

OMAR ALVAREZ
Defendant – Appellant .

1. The index number of the case in the County Court is 5501-94
2. The full names of the original parties are People of the State of New York and Omar Alvarez . there have been no change in the parties .
3. The action was commenced in the Criminal Court, New York County
4. The action was commenced on June 16, 1994 by the arrest and arraignment of the defendant .
5. The defendant was indicted on June 20, 1994 under number 5814-94 and then consolidated with the conspiracy case 5501 – 94 .
6. The defendant was arraigned on the indictment around June 18, 1994 in Part 88 before the Hon. Leslie Crocker Snyder.

7. The nature and object of the action are as follows ;

Count 1. Conspiracy	Count 16 Assault 1%	Count 24 Crim. Sale of a Contrl. Sub. 3%
Count 1 2. Murder 2%	Count 17 Assault 2%	Count 25 Crim. Sale of a Contrl. Sub. 2%
Counts 14 & 15 Att. Murder 2%	Count 18 Crim .Poss. Weapon 2%	Count 26 Crim poss. Weapon 3%

8. This appeal is from a judgment of conviction entered on January 3 0, 1996
against Omar Alvarez The defendant was sentenced by Hon. Leslie Crocker Snyder
to the following terms:.

Ct. 1.	25	to Life	Ct. 16	5	to 15 years
Ct. 2.	25	to Life	Ct. 17	2 1/3	to 7 years
Cts. 14&15	8 1/3	to 25 years	Ct. 18	5	to 15 years

Ct. 24	8 1/3	to 25 years
Ct. 25	8 1/3	to Life
Ct 26	2 1/3	to 7

Counts 1, 12, 14 and 15 are to run consecutively to each other all other counts are
To run concurrently to each other.

The appeal on the original record : leave to prosecute the appeal on the original
record was granted by the court. The appendix method is not being used.

ISSUES PRESENTED

- 1. WHETHER ONCE THE DEFENDANT IS UNDER POLICE CONTROL IS THE SEARCH OF THE IMMEDIATE AREA CONTROLLED BY THE DEFENDANT , ILLEGAL .**
- 2. WHETHER THE COURT'S DENIAL OF AN ADJOURNMENT VIOLATES THE DEFENDANT'S 14TH ADMENDMENT RIGHT OF DUE PROCESS.**
- 3. WHETHER THE COURT'S SEALING OF THE WITNESS LIST DENY THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL**
- 4. WHETHER THEVERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE**

STATEMENT OF FACTS

On June 20, 1994, a Grand Jury returned a 20-count indictment against members of an alleged drug operation headed by Martin Mejias, known as Chango and Jose Rosa known as Tito this group was known as YTC that stood for young talented children or yellow top crew Their operations was started in 1992 and was primarily based on 107th street between Amsterdam Avenue and Central Park West..

Omar Alvarez was seen in the area frequently in the company of various drug dealers but was not involved with YTC until August of 1993 as testified to by one witness .Some time before November 1993 Omar and some of his friends had words with a group on 112 th street after they left the place where they had purchased marijuana. Another time they drove through 112th street and were shot at one bullet striking the automobile in which they were riding. On November 17, 1993 a witness testified that he saw Omar leaving the scene of the shooting . Where Lamont Williams was killed and two of his friends shot .

In December of 1993 the New York City Police Department Homicide Investigation Unit directed their attention to violent drug activity in Manhattan Valley This prompted them to set up an observation post across the street from a drug active building on 107 Th street for over a year. During this time they photographed all the regulars in the area and obtained their names . In May of 1994 they began to videotape the activity. Three undercover police person were assigned to make purchases on the street . The undercover would view photographs of the people in the

area and attempt to make purchases from them and after the purchases they would return to their location and confirm the identification by viewing the photograph of the seller ..

On May 12 , 17 & 19 th of 1994 three under cover police persons said that they made purchases from Omar and identified him from the photograph taken earlier by their investigation unit .

Omar's trial attorney objected to the admissibility of this testimony and a wade hearing was held to suppress the identification. The suppression was denied and The court held that it was a valid tool used in investigation..

On June 16, 1994 Omar and a number of his friends were on the street speaking with a young man known as Ramirez when Ramirez pulled out a shot gun and shot several of the group. Omar and a friend retreated to an apartment in the building on Columbus Avenue known by the police to be used by YTC They both had been shot and the occupants of the house called 911 for an ambulance . The police appeared and were allowed in the apartment and were lead to the room where Omar was lying on a couch in his underwear wounded .The police asked were there any guns in the house and he did not receive an answer he asked the woman to turn up the sofa cushion and she turned up the ends of the sofa . Then he demanded that Omar get up and come toward him then he requested that the mattress be taken off and he saw and recovered a gun. Omar was arrested and when he asked for his clothes the police found \$500.00 and 39 crack vials in his pants . Omar was indicted for possession of a gun and drugs and the indictment was consolidated with the conspiracy indictment which was filed against other members of the YTC .

A Mapp hearing was conducted to suppress the gun and drugs without the Assistant District Attorney questioning Omar's standing as to expectation of privacy. The court held that the search was proper and denied the suppression of the evidence. The case was marked for trial on September 7, 1994, however, Omar's trial attorney indicated by the following letter that he wanted an adjournment to allow Omar to listen to the tapes that were going to be placed in evidence by the Assistant District Attorney.

HALLINAN & CAMICHE

ATTORNEYS AT LAW
440 PARK AVENUE - 80TH FLOOR
NEW YORK, NEW YORK 10022

September 1, 1995

JAMES T. BARRON
C. JOSEPH HOLLANDER, JR.

910-0550
6-0212

980-0650

TELEPHONE
(212) 696-0000
FAX
(212) 696-7474

FAX
593-17157

Hon. Leslie Crocker Snyder
Justice of the Supreme Court
New York County
100 Centre Street
Part 88, 13th Floor, Room 1313
New York, New York 10013

Re: People v. Omar Alvarez
Ind. Nos. 5501, 5814-1994

Dear Judge Snyder:

This is to inform you that Omar Alvarez will not be ready for trial on September 7, 1995 because he has been denied his constitutional rights, Federal and State, to adequately prepare for trial.

I tried to reach your chambers on Tuesday, August 29, 1995 to inform you of this but I was informed that everyone was on vacation until September 6, 1995.

I was first assigned to this case on February 22, 1995. I realized from the very beginning that tapes, video and audio, would be a large part of the case.

I began pering down my case load so that I would be able to devote all my time and efforts to this case. By the middle of May I was in a position to devote much of my time to this matter, although since the date of my assignment I had spent time on it as time permitted.

On May 11, 1995 I delivered to ADA Andrea Sacco 11 blank video tapes and 20 audio tapes for copying. I was notified toward the third week in May that the tapes were ready. On May 24, 1995 I picked up the tapes. I began my review of the tapes on May 26, 1995. I had two extra copies made, one for Omar and one for Omar's mother and father.

Hon. L.C. Snyder

-2-

September 1, 1995

On June 1, 1995 I met with Omar's mother and father in my office and gave them their copies of the tapes with very detailed instructions on what I wanted them to do and how I wished them to proceed. Among other instructions, I told them I wanted them to look for certain things. To do what I wanted them to do involved, among other things, frequent pauses, reversals, replays, etc.

On July 12, 1995 I wrote to the General Counsel of the Department of Correction, Erasmo Morrero, seeking his guidance on how I could get the tapes, video and audio, to Omar so that could begin to view, analyze and study the tapes. He had a lot of time on his hands to do this.

On July 18, 1995 I received a phone call from Linda Lida, Esq., one of Mr. Morrero's assistants. She explained to me how I could get tapes into Rikers. She said I would have to bring over the tapes and a Walkman personally and contact a Captain Castillo. She further explained that the facility would make available a screen for Omar to view the video tapes. She also said that as soon as the tapes were there they would be made available to Omar to review, listen to and study.

On August 1, 1995 I personally went to Rikers with the tapes and the Walkman. When I arrived they accepted the tapes but they wouldn't accept the Walkman because, besides playing, it could also record. This was the first time that I was informed of this fact. I was assured that the videos would be made available immediately for his review and study and that as soon as I delivered the player Walkman Omar would be given access to them for review and study.

On August 9, 1995 I went to Rikers Island to deliver a Walkman with only a player capability. I was once again assured that Omar would have access immediately to the audio tapes.

On August 22, 1995 I received a phone call from Omar's mother requesting an office conference on the evening of August 23, 1995. When they (mother and father) arrived they told me that Omar had not been allowed to view and study the videos or listen to and study the audios. I had instructed

VENDOR: C.R.S., INC.
5301 TACONY STREET 210-3
PHILADELPHIA, PA. 19137
(215) 535-7790 OR FAX (215) 535-7808

MALLINAN & CAMCHE

Hon. L.C. Snyder

-3-

September 1, 1995

Omar to study the tapes carefully and make notes on a pad of certain points. This required much, much more than simply "seeing" the tapes or "listening" to the audios.

On August 23, 1995 I received a phone call informing me that Correction was going to produce all seven defendants in the ADA's office for a group viewing of the video tapes. They planned on doing this on August 30 and 31, 1995. She further informed me that they would be produced very early and watch for approximately ten hours on August 30, 1995 and until they finished on August 31, 1995. I objected strenuously to this procedure. I explained to Ms. Stone that I had made arrangements weeks ago for Omar to view and study the videos and listen to and study the audios. She responded that there was a Court order for their production on August 30 and 31. I asked her to send me a copy of the order. She replied that she didn't have a copy of the order. I asked who prepared the order and she replied, "Mikhail Bodak".

I again objected strenuously to this procedure which essentially denied him adequate access to both types of tapes and was highly coercive. The setting for the viewing is in a group with all other defendants and under the watchful eye of an ADA or a Police Officer. I further explained to the ADA that I had tried many "tape" cases and that it was not sufficient to see a tape. In a tape case, the tape must be studied. This calls for playing, stopping, reversing, fast forwarding, not once, not twice but several times. It requires copious note taking. All this may not be accomplished in marathon sessions over two days. I explained that to bring them over from Rikers to get them there at 8 AM would require getting them up at 2 or 3 AM. After the viewing on August 30, 1995 the defendants would probably be returned very late in the evening only to be awakened in the early hours of August 31, 1995 for another marathon session. I once again objected strenuously to the whole procedure.

Omar, having been requested to do so, called my office while his parents were there. I spoke with him first. He informed me that he had not yet, as of August 23, 1995 been given access to the videos or the audios. He told me that he asked the Captain at C-95 on a daily basis for access and was told on a daily basis that he would be given access.

Hon. L.C. Snyder

-4-

September 1, 1995

In practical terms, this meant that all the time between August 9, 1995 and August 23, 1995 was wasted because Corrections refused to abide by its agreement with me. All of that time could have been spent viewing, studying and analyzing the videos and listening to and studying the audios. When Omar told me he had been denied access I flipped my lid.

On August 24, 1995 I called Linda Lids, the attorney for Corrections, with whom I had made the arrangements for Omar to view and study the tapes and listen and study the audios. I explained to her that as of August 23, 1995 Omar had been denied access to both tapes. She said she would check it out immediately.

On August 25, 1995 I had called the Legal Department of Corrections to request Omar's production on Monday, August 28, 1995 for an attorney interview. As of the end of August 25, 1995 I had not heard from Linda Lids.

On August 28, 1995, as soon as I arrived in the office, I called the 12th floor bridge at 100 Centre Street to see if Omar had been produced. The officer in charge informed me that Omar was on the list of inmates to be produced but that he had not yet been produced. I then called Linda Lids who found out that Omar was being given access at that very moment to the material to review and study for as long as he liked. I explained to her that I had, on August 25, 1995, requested Omar's production on August 28, 1995 and could she kindly confirm that Omar was given access so that I wouldn't make a needless trip down to the 12th floor bridge. She called me right back and told me she had spoken with security at Rikers and it was indeed true what she had told me. She further informed me that Omar had been diverted from the attorney visit so that he could begin the tapes.

It should be recalled here that pursuant to my agreement with Corrections that by this time (August 28, 1995) Corrections had everything necessary for Omar to study the tapes but had been denied access to them.

Hon. L.C. Snyder

-5-

September 1, 1995

On August 28, 1995 I sent a hand written Fax to Millel Bodek objecting strenuously to his action in obtaining a Court order for the production of my client without any notice to me and I also objected to the whole procedure. I told him to cease and desist from taking any further action with respect to my client without notifying me first. I also requested a copy of the Court order. To this date he has not sent me a copy of the order. Had I been served with a copy of the proposed order I would have strongly objected for all of the reasons stated above. I would have stated that to produce Omar in the ADA's office for a marathon viewing of the tapes was not what I had agreed upon and was totally inadequate. I would have told him and the judge who was asked to sign the order all of the above. In my opinion, a defense lawyer would have to be out of his or her mind and derelict in his or her duty to request a one time viewing in the office of the prosecutor.

On September 1, 1995 I spoke with the ADA to confirm how long Omar was in her office on August 31, 1995 and she confirmed that Omar was in the office from 8 AM to 9:30 PM. I asked her again for a copy of the order and she again stated she did not have a copy of the order. I asked her how she found out about it and she said in a conversation with Millel Bodek. She said that I had requested this procedure which statement was a total misstatement of the facts as can clearly be seen from the above.

The denial of adequate access to the tapes pursuant to my agreement with Corrections and Millel Bodek's ex parte obtention of a Court order for the production of Omar, are clear violations of Omar's constitutional rights and render impossible my being ready for trial on September 6, 1995. See *Allen v. Bida*, et al, 2d Cir. Court of Appeals, NY, as reported in *NELJ*, Vol. 214, No. 42, August 30, 1995, at P. 21, 23 and 24.

I can be ready for hearings on September 7, 1995. I can be ready for trial as soon as Omar has had adequate time to view and study the videos and listen to and study the audio.

HALLINAN & CAMCHE

Hon. L.C. Snyder

-6-

September 1, 1995

On August 16, 1995 I called the ADA to make arrangements for Omar and myself to look at photos in the office of the ADA. She said she didn't have time that week to bring Omar over but to call her next week.

On August 25, 1995 I called the ADA again to request that Omar and I be given the opportunity to view the photos. She said she couldn't bring Omar over, but that I could view them in her office on Monday, August 28, 1995.

On August 28, 1995, with the ADA present, I reviewed the photos. There was, of course, no opportunity to study the photos. This would have been possible only if Omar had been supplied copies of the photos so that Omar and I together and separately could "study" the photos. This denial also constitutes a violation of Omar's constitutional rights. I shall not be ready for trial until Omar and I have received copies of the photos and have had adequate time to "study" them.

Respectfully submitted,

Joseph Hallinan, Esq.
Joseph Hallinan, Esq.

CJH:mpg

cc: Ernesto Morrero
ADA Linda Sacco

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 88

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

OMAR ALVAREZ, et. al. :

IND. NO:
5501/94

To: Mr. Joseph Hallinan, Jr. Esq.
The court has reviewed your letter dated September 1, 1995.
Your request for an adjournment is denied.

YOU ARE HEREBY ORDERED to appear and be prepared to proceed
to trial in the above-entitled case on September 6, 1995 at
9:30 a.m. in Part 88.

The jury clerk has arranged a special call of 600 jurors
for this case.

You are not to accept any engagements which could
conflict with this trial under penalty of contempt.

Both the Prosecution and the Defense are ON NOTICE that
this court will take appropriate extraordinary measures if
counsel is not present and ready to begin trial on that
date.

SO ORDERED.
September 5, 1995



Hon. Leslie Crocker Snyder

**ARGUMENT
POINT 1**

**ONCE THE DEFENDANT IS UNDER POLICE CONTROL
WAS THE SEARCH OF THE IMMEDIATE
AREA CONTROLLED BY THE DEFENDANT, ILLEGAL**

There was an illegal search of Omar in the apartment where he was arrested, the search was not a search of the residence but a search of his person and the area in which he had control.

Omar was a wounded person in a prone position in his underwear lying on a couch waiting for an ambulance to transport him to a hospital when he was asked by the policeman if there were any guns in the apartment. He did not respond to this question so he was ordered to walk toward the policeman and a woman in the apartment was ordered to lift the cushion off the couch where a gun was discovered. Omar was searched personally and he had constructive possession of the gun under the cushion on the couch on which he was lying for the area is an extension of his person.

Where a criminal charge is predicated on ordinary constructive possession principles the defendant must demonstrate a personal legitimate expectation of privacy in the premises that was searched. *People v. Tejada*, 81 N.Y.2d.861 (1993).

In this case the people did not object to Omar's right to have a hearing so they had waived the standing objection. however, the defendant maintains that this is a personal search and not a search of the residence.

In a case recently decided a defendant who had been placed in handcuffs (therefor eliminating any safety concerns) the court held that the police could not search his bag without obtaining a search warrant. NYLJ 10/2/97 Col. 1, (1st Dept.).

The police entered the premises in response to a call to 911 for an ambulance therefore the police had permission to be on the premises . Once the officer is there on a mercy mission his function should normally be waiting with the injured for the arrival of the ambulance . Since the injury was the result of a gun shot the interest of the officer would be different , the concern for his safety is paramount therefore he is concerned that there are not any weapons that are accessible to the people in the area. The right to search the individuals on the premises depends upon his right to protect himself . The search is not a search of the residence but of the individual and should be governed by the right to search the individual in the area in which the individual has constructive control. The defendant was requested by the officer to get off the couch and come toward him so he controlled the defendant and had no reason to have the couch cushion removed. This case is different from the Rodriguez case where the defendant was in the apartment to purchase drugs and fell asleep. When the police arrived they saw him on the bed and a bulge next to him they found the bulge to be drugs and arrested the defendant and he was not able to complain about the search for it was held that he had no expectation of privacy . People v. Rodriguez , 69 N.Y.2d 159 (1987) . In this case when the defendant is asked do you have a gun he has a right not to respond and the police had no right to frisk or search him or the area in his immediate control . People v. Cornelius , 113 AD2d. 666 (1986); People v. Howard 50 N.Y.2d. 583 .

A warrantless search is valid if it is conducted with the voluntary consent of the person searched. The voluntariness is not measured by the consentor's state of mind but by an objective evaluation of the following factors ;

1. Whether there was overbearing police pressure and coercion .
2. Whether the individual consenting is in the custody or under arrest .

voluntariness is incompatible with official coercion actual or implied in this case Omar was coerced to get off the couch and walk forward by the police but he did not consent to the search of the couch .

A protective pat down search must be strictly limited to that which is necessary for discovery of weapons which might be used to harm an officer or others nearby. If the search goes beyond what is necessary to determine if the suspect is armed the search is no longer valid and its fruits will be suppressed .

An officer with an arrest warrant may search the area within the possession or control of defendant New York v. Belton, 453U.S.454 (1981) . meaning the area from which the defendant might gain control is construed to mean the area from which the defendant might gain possession of a weapon. People v. Saglimbeni, 62N.Y.2d 798 . Without a warrant the same area is in the control of the defendant and he is protected in this area from unreasonable searches and this was

an unreasonable search.the officer was lawfully on the premises so the search of the defendant was like a street encounter, a consent to enter is not a consent to search People v. O'NEIL 11 N.Y.2d 148 (1962).

**ARGUMENT
POINT 2**

**DID THE COURT'S DENIAL OF AN ADJOURNMENT
VIOLATE THE DEFENDANT'S 14TH AMENDMENT
RIGHT OF DUE PROCES**

There is something inherently wrong with a system that is more concerned with the train running on time than it is about the safety of it's passengers. The court in this matter appeared in the denial of an adjournment to Omar to view the tapes and discuss them with his counsel prior to starting trial as if starting trial on that day was more important than the defendant being properly prepared for trial .The attorney in his letter ,which I included in my statement of the facts had done every thing he could have done to have this interview with his client while the court was on vacation and he needed guidance in how to proceed to get this interview with his client on the reasonable terms that he had requested. The defendant had to proceed to trial without adequately preparing himself with the tapes that were an obstacle he had to traverse in his defense . His attorney now was faced with the problem of preparing his trial at the same time he is trying the case without an opportunity to spend uninterrupted time going over the tapes. The defendant never had the opportunity to listen to the tapes before the trial started alone as his attorney had requested and when he was given an opportunity to look at the tapes he had to spend two ten hour days with the two other defendants one of the days was a day he was scheduled to see his lawyer shortly before the trial was to start . During the time Omar's attorney was having a problem with the

correction department which could have been solved probably with the court's intervention which would have allowed the defendant to prepare properly for trial .

A defendant's request for an adjournment is entirely up to the discretion of the court but the abuse or improvident exercise of discretion may occur where the refusal to grant an adjournment results in a deprivation of defendants fundamental right to confer with counsel *People v. Norris* , 593 N.Y.S.2d. 866 (1993).
McKinney's Constitution Art. 1 sec. 6 .

The court's have held where the protection of fundamental rights are involved in a request for an adjournment the discretionary power has been more narrowly construed. *People v. Spears*, 64 N.Y.2d. 698.

The right to have an adequately prepared counsel for the defendant is such a fundamental right and that there is no reason for haste if the people's case is not prejudiced there is an abuse of discretion for the court not to allow the defendant to consult with counsel. *People v. Snyder*. 297N.Y.81 (1947)

**ARGUMENT
POINT 3**

**DID THE COURT'S SEALING OF
THE WITNESS LIST DENY THE DEFENDANT
EFFECT ASSISTANCE OF COUNSEL**

The defendant was placed at a handicap because he was not aware who was going to testify against him for the records were sealed and the witnesses were not known until they testified . This interfered with the ability to cross exam a witness that you were not aware of until he took the stand . There was not an opportunity to discuss the witnesses with your client before cross examination .An investigator would have been able to provide the defense attorney with background information before the witness took the stand to make his cross examination more effective . The court indicated that the witness records were sealed because there were threats, however there should have been some proof that the threats came from Omar for he should not be denied his rights if the treats came from a co-defendant however there were no indication that treats came from any of the defendants. There should be a hearing before the witness list are sealed to determine whether there is justification for such a drastic action .

**ARGUMENT
POINT 4**

THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE

There is not enough legally sufficient evidence to sustain a conviction on the conspiracy count . There has not been any independent evidence of Omar being involved with the YTC organization except the testimony given by members of the YTC especially those members who were at the top . Chango who testified that he corresponded with members of the YTC during the time he was in jail never contacted Omar but contacted a number of the members who testified against Omar they are the only ones that testified that he had worked as a manager and a seller for YTC and later when he was not seen in the area by the police they said he was cooking crack when there is not any independent evidence that he was in the area. There is no independent evidence that Omar was ever around the area selling drugs for the YTC the investigators in that area had been there for over a year and had seen Omar only a few times , so to account for his absence he was to be in the house cooking crack . The only sales he was connected with are the sales that he made to the undercover police persons . If Omar was part of the YTC he would have been on Chango's correspondence list as the other members were and he would have been indicted at the same time as the other members were indicted The members of the YTC. were indicted for conspiracy prior to Omar's arrest and he was not a part of that indictment when Omar was arrested on June 16, 1994 he was indicted separately

and his indictment was consolidated with the YTC . It appears, had he not been arrested especially in that area , he would have not been indicted on the conspiracy charge .

His arrest provided Chango an opportunity to make a deal for he and the other members of the YTC to testify against him and reduce their exposure .

Chango testified that Omar was not on the scene until around August of 1993 and it was testified that when he was around he spent time hanging out with other drug dealers so I feel that the possibility of YTC setting Omar up to take the fall is very probable since they are the only ones to testify against him in the conspiracy. The verdict is against the weight of the evidence.

CONCLUSION

This case was an inquest because a very capable attorney was not allowed to prepare a defense for his client. First the consolidation of the case set the stage for inflaming the jury who listened to horrible crimes that were committed in furtherance of the conspiracy by YTC members . These crimes were committed before the defendant was alleged to have been a part of this conspiracy and they were performed to build a drug business for the person who testified against him .and the jury assumed that he was involved .in these other crimes .

Then the defendant was denied an opportunity to listen to the tapes alone, to prepare him to discuss the strategy and defense with his attorney in the manner that he should have been prior to trial .This kind of preparation is necessary to develop the defendant's defense . Since this was not done prior to trial the trial attorney spent time during trial with questions about the tapes, and witnesses that could have been resolved prior to trial.

There were also questions of Rosario material that the defense did not receive prior to trial that was an issue of contention during the beginning of the trial .

Then the court sealed the witness list based on the possible threats to the witnesses, however, these threats were not revealed to the

defendant and most of the witnesses were incarcerated so they could have been protected .and the list would have been available to enable the defendant to prepare his defense . Without that list the defendant's attorney did not have an opportunity to have an investigator , investigate the witnesses so he would have information for cross eamination to enable him to test their credibility . Since the witness list was not available the defendant's attorney was without the material to properly perform a cross eamination based on knowledge that will enable him to test the credibility of all the witnesses.

This is a case where the defendant had an opportunity to prepare if he was given the information which was absolutely necessary for his defense at a time prior to the trial .

The defendant , however, was not given this opportunity, he was prevented from preparing a defense because of the lack of cooperation of the Correction Department and the decision of the court to seal the witnesses' identification so there was nothing to prepare before trial. During trial the preparation interfered with concentration thus making it almost impossible to present a defense. The defendant did not have a fair trial and feel the case should be reversed because of the reasons previous given.

Dated 11/3/11