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August 24, 2015

Clerk of the Court  
Court of Appeals of  
The State of New York  
Att: Clerk of the Court  
20 Eagle Street  
Albany NY 12207

RE: Consideration of Application for Leave  
to Appeal pursuant to CPL Sec. 460.20, People v. Harry  
Dorvilier, Harry's Nurses Registry, Inc., Indictment Number:  
1709/10, Queens County.

Dear Chief Judge Lippman:

The defendant-appellants, Harry Dorvilier, and Harry's Nurses Registry Inc., in this matter, seek leave to appeal an order of the Appellate Division, Second Department, dated July 29, 2015 (Exhibit A), denying defendant-appellants' application for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of the Appellate Division, Second Department, dated November 5, 2014.

Defendants were convicted each of two counts of Grand Larceny in the Third Degree (Penal law 155.35) and eleven counts of Grand Larceny in the Fourth Degree (Penal Law 155.30), upon a jury verdict. On appeal, appellate counsel briefed four claims but did not address the sufficiency of the evidence before the petit jury to establish the elements of the larceny charged. In a decision dated November 5, 2014, the Appellate Division affirmed defendant's conviction. *People v. Dorvilier*, 122 A.D.3d 642 (2<sup>nd</sup> Dept. 2014). Exhibit B.

On January 23, 2015, defendant-appellants then filed an application for writ of error coram nobis because of appellate counsel's failure to raise the sufficiency of the evidence claim on direct appeal. See Exhibit C. Respondents defaulted and the Appellate Division denied their motion to enlarge the time within which they could file a response. See Exhibit D.

On July 29, 2015, the Appellate Division denied defendant-appellants' application for a writ of error coram nobis to vacate. Defendant-appellants now seek leave to appeal the denial of their application for a writ of error coram nobis. No application for

the same relief has been addressed to a justice of the Appellate Division.

On defendant-appellant's original appeal, Appellate counsel failed to raise the dispositive sufficiency of the evidence claim in accordance with this Court's precedent, and thus rendered to defendant-appellants ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and under the New York State Constitution. Exhibit E.

Appellate counsel failed to present the preserved claim that the People did not establish that the accused committed the act of "stealing property by taking, obtaining or withholding it from an owner thereof" and counsel's failure deprived defendants of the reversal of their convictions. New York Penal law 155.05(1), 155.00[5]).

As an "owner" is defined by this Court and by statute as "any person who has a right to possession [of property] superior to that of the taker, obtainer, or withholder" (*People v. Hightower*, 18 N.Y.3d 249 (2011); *People v. Nappo*, 94 N.Y.2d 564 (2000); see also New York Penal law 155.05(1), 155.00[5]), and as the Prosecution failed to establish the alleged victims' superior possessory interest in unsegregated, fungible, monies existing in defendants' own bank account, appellate counsel's failure to raise this issue was ineffective assistance of counsel. Indeed, on appeal the People conceded that the Defense at trial presented a real defense. See Exhibit F., pg. 37 of Peoples' Brief.

Defendant-appellants took unsegregated monies existing in their own bank account, without the People establishing the alleged victims' superior possessory interest in the monies taken. See *Criminal Law, Second Edition, Lafave & Scott*, pg. 732 n.26 citing *Commonwealth v. Mitchneck*, Superior Court of Pennsylvania, 198 A. 463 (Pa. Super. 1938).

As this claim was properly preserved, appellate counsel was ineffective for failing to raise the claim that would have, in accordance with this Court's precedent, resulted in the reversal of defendant-appellants' convictions. *People v. Rutter*, 202 Ad2d 123 (1<sup>st</sup> Dept. 1994), *op'n* adhered to on re-argument, 211 AD2d 605, *app dis'm*, 85 NY2d 866.

Defendant-appellants thus seek leave to appeal the denial of the application for a writ of error coram nobis by the Appellate Division and herein request a telephone conference.

Very truly yours,

  
Edward Irizarry

EI: ki  
Cc: Assistant District Attorney  
Enclosures

### **CORPORATE DISCLOSURE STATEMENT**

Pursuant to New York Court of Appeals Rule of Practice 500.1(f), Harry's Nurses Registry, Inc., states that it is a privately held corporation and that it has no parent, subsidiary or affiliate.