No. 18-

IN THE

Supreme Court of the United States

MICHAEL FELIX,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court of original jurisdiction denied petitioner due process under the United States Constitution's Fourteenth Amendment? Whether a court of original jurisdiction is constitutionally required to state the bases of its determination. Without such a statement, it is impossible to determine what the court decided or why?

   a. Whether the court of original jurisdiction violates a petitioner's due process right to adequate notice and an opportunity to be heard in opposition by issuing an unexplained decision and order making meaningful appellate review impossible?

   b. Whether the court of original jurisdiction violated petitioner's due process rights by committing egregious errors of law in not citing cases or precedent in their decisions?

II. Whether the state appellate process for a Writ of Error Coram Nobis for ineffective assistance of appellate counsel violates the petitioner's state constitutional right to an appeal and petitioner's federal due process right under the 14th Amendment?

III. Whether appellate counsel for petitioner committed ineffective assistance of counsel by not raising strong and meritorious claims of ineffective assistance of counsel based on numerous prejudicial failures and omissions by trial counsel?

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OPINIONS BELOW

The opinion of the New York State Appellate Division of the Fourth Department as a court of original jurisdiction on March 16, 2018 denied the Petitioner's Writ of Error Coram Nobis urging that Petitioner was denied his right to the effective assistance of appellate counsel with a nine (9) word order citing no laws or cases and this original order is unreported. Leave to appeal the holding of the court of original jurisdiction was denied by the Court of Appeals on July 12, 2018.

JURISDICTIONAL STATEMENT

Petitioner was found guilty in New York State Supreme Court, Erie County on January 25, 2005. On September 22, 2006, the appellate court rejected Michael Felix's arguments. People v. Felix, 32 A.D.3d 1177 (4th Dept. 2006). On October 27, 2006 petitioner requested leave to appeal to the Court of Appeals.

On December 19, 2006, the Court of Appeals denied the leave to appeal. People v. Felix, 7 N.Y.3d 925 (2006).

On December 7, 2017 defendant filed a Writ of Error Coram Nobis with the Fourth Department of New York State, as a court of original jurisdiction. On January 3, 2018 the people filed an opposing affidavit. On March 16, 2018 the court of original jurisdiction (NYS Fourth Department) denied petitioner's Writ of Error Coram Nobis Motion with an unexplained nine word decision and order. On April 13, 2018 defendant filed a Leave to File an Appeal Motion with the New York State Court of Appeals. On July 12, 2018, the appellate court (New

York State Court of Appeals) summarily affirmed the unexplained decision and order of the court of original jurisdiction and denied the Leave to Appeal. The Order of the Court of Appeals denying leave to appeal constitutes a final determination of the case by the highest level court in New York State.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (a) and Supreme Court of the United States Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part, that "No State shall . . . deprive any person of life, liberty, or property without due process of law . . .".

STATEMENT OF THE CASE

On March 18, 2004 Erie County Grand Jury Indicted Michael Felix on the charges of Sodomy in the First Degree, Attempted Rape in the First Degree and Sexual Abuse in the First Degree. (Record on Appeal pg-23).

On January 12 to 25, 2005 a trial was conducted. (Record on Appeal 503-1530).

On January 25, 2005 Michael Felix was convicted by a jury of Attempted Rape First Degree, Sexual Abuse in the First Degree and Assault in the Second Degree. (Record on Appeal pg 5).

On March 30, 2005, Mr. Felix was sentenced to fifteen years in prison.

On September 22, 2006, the appellate court rejected Michael Felix's arguments. People v. Felix, 32 A.D.3d 1177 (4th Dept. 2006).

On October 27, 2006 petitioner requested leave to appeal to the Court of Appeals.

On December 19, 2006, the Court of Appeals denied the leave to appeal. People v. Felix, 7 N.Y.3d 925 (2006).

On June 19, 2008 defendant filed a federal habeas corpus petition. On February 4, 2011 the petition was denied.

On December 7, 2017 defendant filed a Writ of Error Coram Nobis with the Fourth Department of New York State, court of original jurisdiction, urging that he was denied effective assistance of appellate counsel. On January 3, 2018 the people filed an opposing affidavit.

On March 16, 2018 the court of original jurisdiction (Appellate Division, Fourth Department) denied Michael Felix's Writ of Error Coram Nobis Motion with an unexplained nine word decision and order.

On April 13, 2018 defendant filed a Leave to File an Appeal Motion with the New York State Court of Appeals. On May 18, 2018, the People relied on their opposing affidavit of January 3, 2018.

On July 12, 2018, the appellate court (New York State Court of Appeals) summarily affirmed the unexplained decision and order of the court of original jurisdiction and denied the Leave to Appeal.

REASONS FOR GRANTING PETITION

I. Due process as required by the Fourteenth Amendment to the Constitution, requires a court of original jurisdiction to state the bases for its determination. Without such a statement it is impossible to determine what the court decided.

The New York Court of Appeals, recognizing the need to find a procedure and a forum in which to address claims of ineffective assistance of appellate counsel allegedly occurring in the intermediate appellate court, and the absence of such a provision in New York's Criminal Procedure Law, has held that in New York claims of ineffective assistance of appellate counsel are to be brought and determined at the intermediate appellate court itself by the invocation of a writ of error coram nobis (People v. Bachert, 69 N.Y.2d 593, 594 ([1987]).

Appeals from the intermediate appellate court's denials of such relief are heard at the discretion of the Court of Appeals. Thus, the intermediate appellate court is the court of original jurisdiction for determining such writs. The issue raised here is whether, as a court of original jurisdiction, the intermediate appellate court is constitutionally required to state the bases of its determination. Without such a statement, it is impossible to determine what the court decided or why.

a. The court of original jurisdiction violated petitioner's due process right to adequate notice and an opportunity to be heard in opposition by issuing an unexplained decision and order making meaningful appellate review impossible.

In denying petitioner's motion for a writ of coram nobis, urging that he was denied his constitutional right to the effective assistance of appellate counsel, the Appellate Division, Fourth Department as a court of original jurisdiction issued an unexplained decision and order. The term "unexplained" is defined as "an order whose text or accompanying opinion does not disclose the reason for the judgment." Ylst v. Nunnemaker, 501 U.S. 797, 802, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). "The essence of unexplained orders is that they say nothing." Ylst v. Nunnemaker, 501 U.S. 797, 804, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

The judgment by the Fourth Department as a court of original jurisdiction states nothing. Petitioner cannot adequately respond to the grounds that the court bases its decision and order because nothing is stated by the court. Nor can an appellate court discern the bases for the decision and order, rendering meaningful appellate review impossible.

"It is axiomatic that if sufficient evidence supports a jury verdict on one ground but not another and it is impossible to ascertain which ground was relied upon in reaching the verdict, that verdict must be set aside. Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957); United States v. Garcia, 907 F.2d

380, 381 (2d Cir.1990)." Bradley v. Meachum, 918 F.2d 338, 344 (2ND Cir. 1990). Here, it is impossible to ascertain what ground the court of original jurisdiction relied upon in reaching its nine (9) word decision and order without citing law. This violates petitioner's right to meaningful appellate review and to be heard in opposition when there is inadequate notice of the grounds of the decision and order.

With respect to verdicts: "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." Hedgpeth v. Pulido, 555 U.S. 57, 58, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008)." United States v. Martoma, 894 F.3d 64, 71-72 (2017)

Here, there were numerous theories of constitutional law violations raised in the Writ of Error Coram Nobis and the court of original jurisdiction issued a general denial. Consequently, neither the petitioner nor the appellate court can know whether the court of original jurisdiction may have relied on an invalid reasoning that no constitutional law violation occurred. This resultant uncertainty violates due process.

"Some issues related to the indictment can give rise to constitutional claims. The indictment must provide the defendant with fair notice of the accusations against him, so that he will be able to prepare a defense." Swail v. Hunt, 742 F.Supp.2d 352, 363 (2010). In Western District of New York - Swail v. Hunt, 742 F.Supp.2d 352 (2010), the court explained that the defendant is entitled to fair notice of the charges so he will be able to prepare a defense. This implicates due process. Here, petitioner is not being given

adequate notice of the law and reasoning that the court of original jurisdiction based its decision and order on, as a result he is unable to prepare an adequate Application for Leave to Appeal.

Here, an unexplained order amounts to essentially a court saying nothing and not reasoning whatsoever denying the petitioner his right to be heard in opposition in disputing the assertions of the court.

The functions of Writ of Habeas Corpus during custody and Writ of Error Coram Nobis after custody are the same, only they are applied in different contexts. Both writs are meant as invaluable tools for protecting – and admittedly also elaborating – constitutional rights. Sloane, Robert D., "AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalsim, and Comity," 78 St. John's Law Review 615, 628 (2012).

In the Habeas Corpus context one writer explained, "[i]n Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001), the Second Circuit held that a state court adjudicates a federal claim on the merits by reducing its disposition to a judgment "with res judicata effect, that is based on the substance of the claim advanced, rather than on . . . procedural, or other, ground[s]." Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001). Every other federal circuit, with the possible exception of the First Circuit, has adopted some permutation of this view. See Chadwick v. Janecka, 312 F.3d 597, 605-06 (3d Cir. 2002); accord Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254-55 (11th Cir. 2002); Neal v. Puckett, 239 F.3d 683, 686-87 (5th Cir. 2001); Bell v. Jarvis, 236 F.3d 149, 163 (4th Cir. 2000) (en banc); Harris v. Stovall, 212 F.3d 940, 943 (6th Cir. 2000); Aycox

v. Lytle, 196 F.3d 1174, 1177-78 (10th Cir. 1999); James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999); Delgado v. Lewis, 181 F.3d 1087, 1093 (9th Cir. 1999); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).

The federal constitutional claims for ineffective assistance of appellate counsel asserted by petitioner in his Writ of Error Coram Nobis were summarily dismissed by the state court of original jurisdiction. The superior court (Court of Appeals) must review de novo the unexplained decision of the court of original jurisdiction. Prior to AEDPA statute, federal courts entertaining a habeas petition reviewed state court determinations of federal law de novo. See, e.g., Schiro v. Farley, 510 U.S. 222, 232 (1994) ("The preclusive effect of the jury's verdict, however, is a question of federal law which we must review de novo."); Miller v. Fenton, 474 U.S. 104, 111-12 (1985) (asserting that questions of law are subject to plenary and independent review). Here, the writ of error coram nobis is not governed by the ADEPA statute, the standards prior to its enactment would apply to this case – the federal court should review this matter de novo.

The Supreme Court in Wiggins v Smith, 539 U.S. 510, 527-31, 534 (2003) ruled that a federal habeas court could not "look through" appellate court silence to a lower state court decision and should examine a Strickland prejudice prong de novo. Subsequently the Supreme Court decided Harrington v. Richter, 562 U.S. 86, 92 (2011), the Supreme Court decided that the state appellate court is entitled to deference and the decision should not be reviewed de novo. This has created uncertainty which the Supreme Court alone can clear up. Here, to allow the intermediate appellate court deference would be allowing the appellate

court to rely upon or base its decision on nothing, as a result de novo review, where no reasoned opinion exists, is required. It is important to have de novo review because it tends to unify precedent and stabilize the law. Ornelas v. U.S., 517 U.S. 690, 697-98 (1996). In New York an appeal may be remitted for de novo consideration when the appellate court has affirmed the judgment on erroneous grounds. People v. Latine, 72 N.Y.2d 823, 530 N.Y.S.2d 547, 526 N.E.2d 38 (1988). Here, denial of due process by making meaningful appellate review impossible is erroneous grounds.

"Recently, courts have agreed that if a lower state court decision does discuss the merits of a prisoner's claim, the federal habeas court can "look through" a summary denial—complete silence on a claim—to the last reasoned opinion on the claim, See, e.g., Hittson v. Chatman, 135 S. Ct. 2126, 2127 (2015), as the court instructed in its pre-Richter decision, Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

The Seventh Circuit held that federal courts are to examine only the last reasoned opinion on the claim, and therefore review an unexamined Strickland prong de novo, Thomas v. Clements, 789 F.3d 760, 767 (7th Cir. 2015), reh'g denied, 797 F.3d 445 (7th Cir. 2015). The Sixth and Eleventh Circuits join the Seventh in refusing to "look through" silence on a prong, See, e.g., Rayner v. Mills, 685 F.3d 631, 638 (6th Cir. 2012) ("When a state court relied only on one Strickland prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the Strickland prong not relied upon by the state court. The unadjudicated prong is reviewed de novo."); Johnson v. Sec'y, DOC, 643 F.3d 907, 929–30

(11th Cir. 2011) (explaining that "[a]s a result of the Florida Supreme Court's decision on the performance prong and non-decision on the prejudice prong, we review the holding that counsel's performance was not deficient with AEDPA deference, but we must conduct a plenary review of whether Johnson was prejudiced" even though the post-conviction court "found a lack of prejudice"), but the Third, Fifth, and Ninth Circuits "look through" appellate court silence on a prong to a lower state court decision. See, e.g., Sessoms v. Grounds, 776 F.3d 615, 620 n.4 (9th Cir. 2015); Woodfox v. Cain, 772 F.3d 358, 369 (5th Cir. 2014); Simmons v. Beard, 590 F.3d 223, 231–32 (3d Cir. 2009)." Eliza Beeney, Why Silence Shouldn't Speak So Loudly: Wiggins in a Post-Richter World, 101 Cornell L. Rev. 1321, 1324-25 (2016).

Here, a meaningful appellate review is impossible because there is no bases on which to appeal the decision and order of the court of original jurisdiction. No reasoned opinion is being relied upon nor can be looked through to, the court of original jurisdiction's order requires de novo review.

b. The court of original jurisdiction violated petitioner's due process rights by committing egregious errors of law in not citing law in its decision and order.

One of the rules that the court is bounded by is the duty to state what the law is. Marbury v. Madison, 5 U.S. 137, 177 (1803) explains, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." Merriam

Webster's Dictionary defines expound as, "to explain by setting forth in careful and often elaborate detail." https://www.merriam-webster.com/dictionary/expound Here, no law was stated by the court of original jurisdiction and no law was cited. The Fourth Department breached its duty to expound or explain and say what the law is.

Black's Law Dictionary at page 841 (Sixth Edition 1990) defines judgment as, "The formation of an opinion or notion concerning something by exercising the mind upon it. Cleveland Clinic Foundation v. Humphrys, C.C.A. Ohio, 97 F.2d 849, 857 (6th Cir. 1938)." Here, the Fourth Department as a court of original jurisdiction is essentially doing away with the law by not citing the law nor exercising their mind or reason to adjudicate the case.

"Courts are the mere instruments of the law, and can will nothing. [Courts must] discern the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. "Osborn v. Bank of the United States, (1824, U. S.) 9 Wheat. 738, 866. Here, the court of original jurisdiction arbitrarily renders its judgment because no law is cited. This is the will of the judge not the will of the law.

"A single instance of serious legal error, particularly one involving the denial to individuals of their basic fundamental rights, like due process, may amount to judicial misconduct." In re Quirk, 705 So.2d 172, 178 (La. 1997). The Judiciary Commission found judicial misconduct constituted egregious legal error, concluding that the judge had "failed to comply with the law and disregarded the right of the accused to present a defense,

as well as the basic tenets of due process." In re Aucoin 767 So. 2d 30, 33 (La. 2000). Petitioner was denied the right to present a defense or be on notice of the law violated and the ability to dispute the charges. This amounts to a serious or egregious legal error which denied petitioner his fundamental right to due process.

Petitioner is also entitled to a decision on the merits. In Northwest Forest Resource Council v. Dombeck 107 F.3d 897, 898 (D.C. Cir. 1997), "The D.C. Circuit held that stare decisis did not apply because a district court is not bound by the decisions from another district, and the rejection of the plaintiffs' claims on this ground violated their 'right to be heard on the merits of their claims.'" Here, the court gave no authority whatsoever for its decision, this exceeds its scope of powers violating petitioner's due process rights. Petitioner was denied his right to be heard on the merits of his writ of error coram nobis.

Petitioner is entitled to an independent analysis. In Colby v. J.C. Penney Co., 811 F.2d 1119 (7th Cir. 1987), the Seventh Circuit reversed a district court because the district court treated persuasive authority as authoritative, by stating that "within reason, the parties to cases before [this court and district courts of this circuit] are entitled to our independent judgment." Here, the Fourth Department as a court of original jurisdiction did not give an independent judgment based on authoritative or binding precedent.

The Supreme Court has established a line of cases concerning the egregious misapplication of settled law. "[T]he [Supreme] Court has not shied away from summarily deciding fact-intensive cases where, as here,

lower courts have egregiously misapplied settled law." Wearry v. Cain, 136 S.Ct. 1002, 1007, 194 L.Ed. 2d 78 (2016). Here, neither court applied settled law or any law. This is an egregious non-application of law itself because precedent exists for numerus issues in the writ of error coram nobis but no precedent was applied by the court of original jurisdiction.

The Fourth Department as a court of original jurisdiction committed an egregious error of law by: not discharging its duty to say what the law is; issuing a decision and order that did not cite any precedent whatsoever; not making an independent judgment or analysis of the issues raised in the writ of error coram nobis and not deciding the case before it based on settled law or precedent.

II. The state appellate process for a Writ of Error Coram Nobis for ineffective assistance of appellate counsel does not provide for appellate review and violates the petitioner's state constitutional right to an appeal and petitioner's federal due process right under the 14th Amendment.

The Supreme Court has never had the opportunity to decide whether state prisoners [in custody or out of custody] have a constitutional right to post-conviction proceedings in state court. Cf. Case v. Nebraska, 381 U.S. 336 (1965)

Criminal actions and/or proceedings under the CPL do not include "quasi-criminal" proceedings (writ of error coram nobis), which are governed by the civil appeal provisions of the CPLR. https://www.nycourts.gov/ctapps/

forms/claoutline.pdf - PAGE 4 A proceeding for a writ of error coram nobis or its statutory equivalent is in the nature of a new action and it is generally considered to be independent and civil in nature, Heflin v. U.S., 358 U.S. 415, 418 N. 7, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959; U.S. v Morgan, 346 U.S. 502, 517 (1954)(Dissent), even though it seeks relief from a criminal conviction. Williams v. State, 658 S.W.2d 506 (Mo. Ct. App. E.D. 1983). Also, because a writ of error coram nobis affords the same general relief as a writ of habeas corpus, the court of appeals proceeds as it would in a habeas case and reviews the case de novo. Chaidez v. U.S., 655 F.3d 684 (7th Cir. 2011), judgment aff'd, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). Here, the writ of error coram nobis is guaranteed an intermediate appeal as of right in New York State.

The Appellate process is constitutionally defective and violates petitioner's due process rights under the NYS Constitution and the United States Constitution. The New York State Constitution under "N.Y. CONST. art. VI, § 3(b) 2, states in part, "b. Appeals to the court of appeals may be taken . . . (2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

Also, CPLR § 5601 (b) 1. "Appeals to the court of appeals as of right. . . . (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right: 1 from an order of the appellate division which finally

determines an action where there is directly involved the constitution of the state or the United States."

Where a state constitution provides for a right to review by an appellate court, the failure to provide for this review by judge made or common law proceeding is part of due process law under the Fourteenth Amendment of the United States Constitution. Frank v. Mangum, 237 U.S. 309, 327 (1915). The lack of appellate review as guaranteed by the NYS Constitution is a deprivation of the legal process of the Fourteenth Amendment of the United States Constitution. Frank v. Mangum, 237 U.S. 309, 327 (1915).

Here, the State of New York is not providing adequate post-conviction process or relief. "Fundamental due process also is violated by any state not providing adequate post-conviction procedures for a convicted defendant to challenge his conviction on the ground of a fundamental lack of fairness in the prosecution and conviction, even though remedies normally given for that purpose, as motion for a new trial, or right to appeal, have long since expired. Mooney v. Holohan, 294 U.S. 103, 55 Sup. Ct. 340, 79 L.Ed. 791 (1934)." Edwin W. Briggs, "Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?, 17 Mont. L. Rev 160, 160-61 (1955). Here, the post-conviction procedure is inadequate because Petitioner's constitutional right to intermediate appellate review under the NYS Constitution is being denied.

The Court of Appeals has anticipated this constitutional problem in People v. Bachert, "'[W]e are also obliged to take this opportunity to express our discomfiture' with

the absence of a comprehensive statutory mechanism to address collateral claims of ineffective assistance of counsel. . . . We invite the Legislature's prompt attention to this problem." People v. Bachert, 69 N.Y.2d 593, 600, 509 N.E.2d 318, 516 N.Y.S.2d 623 (1987).

Here, no statute exists at the state level to "provide genuine opportunity for testing constitutional issues" dealing with ineffective assistance of appellate counsel as of right. Case v. Nebraska, 381 U.S. 336, 339 (1965). The post-conviction process allows for unexplained decisions to be issued by a court of original jurisdiction and not allow review of the unexplained decision as of right by an intermediate appellate court. As a former prisoner Michael Felix is precluded from direct access to the courts Case v. Nebraska, 381 U.S. 336, 339 (1965) in the form of a direct appeal.

Here, there was no appeal to an intermediate appellate court, the appellate process is discretionary with no appellate review as of right for due process violations.

Today there is comprehensive research into whether the right to an appeal existed in the Founding Era of the United States. The sources below give detailed histories of the right to appeal under the English Common law including: Mary Sarah Bilder. "The Origin of the Appeal in America." Hastings Law Journal 48, (1997): 913, 923-24; Marc M. Arkin, "Rethinking the Constitutional Right to A Criminal Appeal," 39 UCLA L. Rev. 503 (1991-1992); Robertson, Cassandra Burke, "The Right to Appeal" (2013). Faculty Publications. Paper 58. http://scholarlycommons.law.case.edu/faculty_publications/58

Given the conclusions and research of these experts it is difficult to understand how Justice Harlan in McKane v. Durston, 153 U.S. 684, 687 (1894), states without citing any law in 1894 that the right to an appeal does not exist in the common law.

Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 452 (1996) states, "At common law, review of judgments was had only on writ of error, limited to questions of law." This essentially was a right to an appeal. This argument has rested on the fact that the 'writ of error,' which facilitated the correction of legal error by the highest court, was allowed 'as a matter of right' under English common law. David Rossman, "Were There No Appeal": The History of Review in American Criminal Courts, 81 J. CRIM. L. & CRIMINOLOGY 518, 541 (1990).

In 1928, Congress abolished the writ of error "in cases, civil and criminal," and provided that relief "which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal." 45 Stat. 54, as amended by 45 Stat. 465 (1928). See F. Frankfurter and J. Landis, The Supreme Court under the Judiciary Act of 1925, 42 Harv. L. Rev. 1, 27-29 (1928).

The writ of error as a matter of right was therefore changed to the word - appeal. The right to an appeal in the United States existed under a different name – writ of error. Michael Felix has a right to an appeal under the common law and the United States Constitution.

III. Whether appellate counsel for petitioner committed ineffective assistance of counsel by not raising strong and meritorious claims of ineffective assistance of counsel based on numerous prejudicial failures and omissions by trial counsel?

Mr. Felix filed a writ of error coram nobis claiming that he was denied his constitutional right to the effective assistance of counsel (People v. Bachert, 69 NY2d 593, 625 [1987]; Evitts v. Lucey, 469 U.S. 387 (1985)). As detailed in the motion, the brief by appellate counsel raised issues that clearly lacked merit and misstated and ignored law to the contrary. (Motion pages 19-30: prejudicial Molineux and prompt outcry; pages 30-40 improper bolstering of the complainant's testimony, lineup tainted by illegal photograph, stop and photograph illegal). Further proof of the meritless issues raised is the Fourth Department's Memorandum Order of September 22, 2006, which rejected the contentions that the testimony of two witnesses was improperly admitted under prompt outcry, that the former girlfriend should not have been allowed to testify and that the issue concerning two police officers testimony with regard to a police lineup was not preserved for review. While raising these meritless issues, as detailed in the motion and summarized below, appellate counsel failed to raise a strong and meritorious claim of ineffective assistance of counsel based on numerous prejudicial failures and omissions by trial counsel.

It is urged that granting review will enable this Court to provide much needed guidance as to when a series of omissions and failures to object by defense counsel so deprives a defendant of a fair trial, that the failure of appellate counsel to raise a claim of ineffective assistance of trial counsel on direct appeal constitute ineffective assistance of appellate counsel.

In this case, as detailed in Mr. Felix's coram nobis motion denied by the Appellate Division, Fourth Department, among other omissions, trial counsel failed to make meritorious motions to: (1) suppress prejudicial evidence obtained as a consequence of an unconstitutional detention of Mr. Felix, (2) seek relief for the prosecutor's Brady and Rosario violations.

Despite these numerous, prejudicial failures by trial counsel, no claim of ineffective assistance of counsel was raised on appeal.

On August 5, 2003 the complainant Sandra Handel alleges that a man named 'Chad' sodomized, assaulted and attempted to rape her in her apartment. (Record on Appeal pg-1568-1572). On August 18, 2003 the police began an overzealous pursuit to convict Michael Felix of these sex crimes. As detailed in the motion, the police and prosecutors violated Michael Felix's constitutional rights repeatedly and on an ongoing basis. When Michael Felix looked to his trial counsel and appellate counsel for protection he received ineffective assistance from both. Among these violations were the following:

(1) Mr. Felix's trial counsel was ineffective in failing to move to suppress a police photograph taken on the roadside on the ground that evidence was the product of Mr. Felix's unlawful detention.

On August 21, 2003 a uniformed officer pulled Michael Felix over to the side of the road. Michael Felix was not free to go until a photograph was taken by Lieutenant Zack. That seizure was a de facto arrest (People v. Yukl, 25 N.Y.2d 585[1969]). New York law is cited and relied upon because the Supreme Court has not yet defined arrest. Under federal law, "[t]o constitute an arrest, there must

be an actual or constructive seizure or detention of the person, performed with the intention to affect an arrest and so understood by the person detained." Jenkins v. United States, 161 F.2d 99, 101 (10th Cir. 1947); *accord,* Fisher v. United States, 324 F.2d 775 (8th Cir. 1963), cert. denied, 377 U.S. 999, 84 S.Ct. 1935, 12 L.Ed.2d 1049 (1964). The thought processes of both the police and Michael Felix, to the extent they can be discerned, are considerations, but the test must be not what Michael Felix or a defendant * * * thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes." United States v. McKethan, 247 F.Supp. 324, 328 (D.D.C.1965) (Youngdahl, J.), aff'd by order, No. 20,059 (D.C.Cir., Oct. 6, 1966). A defendant's subjective beliefs are a factor but they must be considered by the trier along with evidence of his conduct and all the surrounding circumstances." Hicks v. United States, 382 F.2d 158, 161 (D.C. Cir. 1967). A total of three policemen stopped and questioned Michael Felix at length. The photograph is evidence of a restraint on freedom normally associated with arrest. In fact, in New York, the police are under a duty to take a photograph a person that has been arrested under CPL 160.10. An arrest of Michael Felix had taken place on August 21, 2003.

The seizure of a person occurs if "in the view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," United States v. Mendenhall, 446 U.S. 544, 554 (1980). Claiming seizure of a person requires a showing that an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." California v. Hodari, 499 U.S. 621, 625 (1991).

Applying this rule to the facts, one uniformed officer (uniform is indicia of a seizure) and two detectives stopped and asked Michael Felix numerous questions about his presence at Woodrow Wilson School then would not let Michael Felix leave until the officers obtained a photograph of Michael Felix in discharge of their statutory duties under CPL 160.10. Michael Felix asked to speak to an attorney twice evidencing a lack of consent and belief that he was the target of a criminal investigation. Treatment of this sort can be fairly characterized as the functional equivalent of a formal arrest.

At the time of Mr. Felix's seizure by the Cheektowaga Police the police lacked the requisite probable cause. Sandra Handel had stated her assailant drove a blue/black Explorer/Bronco. The complainant knew her assailant on a first name basis, 'Chad,' from conversations with him at Gold's Gym, 1402 French Road, Depew, New York. All information provided prior to the arrest on August 21, 2003 alleges that a man named 'Chad" committed the attempted, rape, sodomy and assault 2nd. Despite this description of the name and vehicle of the perpetrator, on August 21, 2003 the police stopped Michael Felix while he is driving a grey pickup truck. The police lacked the requisite probable cause to believe that Mr. Felix was the perpetrator.

The Cheektowaga Police had followed Michael Felix from his home on 55 Bellwood in West Seneca, New York to Woodrow Wilson where the Cheektowaga Police observed Michael Felix parked in the parking lot for ten to fifteen minutes. Michael Felix's conduct was equally susceptible of innocent behavior of waiting for a child to pick up while school was in session does not give rise to probable

cause. Indeed Lieutenant Zack thought Michael Felix was innocently waiting to pick up his nieces or nephews when he stated, "I thought maybe he was picking up children, picking up nieces or nephews, something of that nature but he never got in his vehicle -- or never got out of his vehicle and no one ever got in his vehicle." (Record on Appeal pg 180). Lieutenant Zack suspected that Michael Felix, while sitting in his car in a school parking lot when children were on the school grounds, was "possibly" committing the crime of criminal trespass. (Record On Appeal pg 180-181). The supposed violation for Criminal Trespass happened in front of Lieutenant Zack and Detective Martz while they were watching Michael Felix. (Record on Appeal pg -180-181).

No one with authority from Woodrow Wilson Middle School came out to tell Michael Felix to leave the parking lot, indeed no one at all approached Michael Felix while he waited in his grey pickup truck in the parking lot. A prosecution for criminal trespass in the third degree may be maintained against a person who "knowingly enters or remains unlawfully in a building or upon real property" (Penal Law, §140.10). Generally, a person will be deemed to "[e]nter or remain unlawfully" on property when he or she does so without license or privilege (Penal Law, § 140.00, subd 5). When the property is "open to the public" at the time of the alleged trespass, however, the accused is presumed to have a license and privilege to be present (Id.). In such a case, the People have the burden of proving that a lawful order excluding the defendant from the premises issued, that the order was communicated to the defendant by a person with authority to make the order, and that the defendant defied that order (id.; see People v Brown, 25 N.Y.2d 374, 377 (1969) the accused is

presumed to have a license and privilege to be present" (People v Leonard, 62 NY2d 404, 408 [1984]. Thus, the police did not have probable cause to seize Mr. Felix for the crime of criminal trespass.

When Mr. Felix drove from the Woodrow Wilson Elementary School grounds by car Lieutenant Zack called the Cheektowaga Police dispatch center and requested that a marked patrol unit respond to the area in order to affect a traffic stop. (Cheektowaga Police Department Police Report 03-330770 – FOIL'd by Michael Felix – pgs 5, 19(EXHIBIT D)). Patrolman Wachowiak responded to the request. (Record on Appeal pg-182) Patrolman Wachowiak pulled Michael Felix over on Reiman Road near Harlem NOT for a traffic violation, but to determine Michael Felix's purpose for being at Woodrow Wilson Elementary School. (Record on Appeal pg-182-183). Patrolman Wachowiak did not issue a traffic summons to Michael Felix for violation of the NYS traffic laws. And the police lacked probable cause to believe that Mr. Felix was guilty of any crime against Ms. Handel or criminal trespass.

Trial counsel for Mr. Felix did raise the issue that the probable cause and reasonable suspicion issues with respect to the traffic stop and probable cause needed to be thoroughly vetted at a separate hearing. (Record on Appeal pgs 243-245). Defense attorney LaTona states, "I think the Ingle Hearing (traffic stop) . . . . It was this gentleman that basically controlled the stop. And what was in his mind with respect to reason, it goes to reasonable suspicion, some element of probable cause are number of factors to it and ultimately you (the Judge) got to decide why the stop was made." (Record on Appeal pgs 244-245).

Defense attorney LaTona's request to question Lieutenant Zack as the person or fellow officer who called in the Criminal Trespass was a specific challenge to Lieutenant Zack's reliability and his information for making the radio call which properly challenged the Police and People's right to a presumption of probable cause.

In the alternative, if Defense attorney LaTona did not make a specific objection that preserves the issue for appeal, this constitutes ineffective assistance of counsel.

Under either scenario, however, Appellate Counsel Villardo committed ineffective assistance of counsel by failing to either raise the issue of unlawful stop as a preserved issue or to raise a claim of ineffective assistance of counsel for the failure to properly raise this issue.

Also, Defense Attorney LaTona failed to ask for a missing witness charge because of the absence of Officer Wachowiak. Under People v. Donovan, 184 A.D.2d 654, 655-56 (2nd Dept. 1992), Defense attorney LaTona should have asked for a missing witness inference that the People's failure to call Officer Wachowiak permitted an inference that this testimony could have corroborated the testimony of the defense witnesses (1 CJI[NY] 8.53; see, People v Wright, 41 N.Y.2d 172 (1976); People v Brown, 34 N.Y.2d 658 (1974)). The defense counsel, however, failed to even recognize the existence of this possible remedy (cf., People v Cruz, 165 A.D.2d 205 (1st Dept. 1991)). This failure is further evidence of counsel's ineffectiveness (see, People v Gladden, 180 A.D.2d 747 (2nd Dept. 1992)). The cumulative effect of these omissions by the defense counsel caused the defendant's defense to be doomed to fail (see, People v Kilstein, 174 A.D.2d 756 (2nd Dept. 1991); People v Worthy, 112 A.D.2d 454 (2nd Dept. 1985)).

Mr. Felix's trial counsel was ineffective in not moving for adverse inferences concerning the failure of the people to make Officer Wachowiak available at the Ingle Hearing.

(2) Defense attorney Latona failed to make a motion to dismiss the indictment for the following Brady nondisclosures by the prosecutor. The prosecutor failed to disclose – 1) Chris Chojnacki's disciplinary files nor internal affairs investigations of police officers of May 24, 2003 Incident; 2) Provided no NYSIS Reports; 3) John Garbo redactions of police reports; 4) Jeanette Carr Steger Police Report Case Synopsis redactions includes the completely redacted interview, the partially redacted interview and the entirely deleted page; 5) Sex Offense Unit (or Evidence unit) Report; 6) Request for notes regarding officer Wachowiak, the officer who pulled over Michael Felix in the grey pick-up truck; 7) Lieutenant Zack's 'Case File.'

THE BRADY OBLIGATION – ROSARIO VIOLATION

"The prosecution's *Brady* obligation is '[t]o the extent that [a] prosecutor knows of material evidence favorable to the defendant in a criminal prosecution, the government has a due process obligation [grounded in the 14th Amendment] to disclose that evidence to the defendant" (*DiSimone v. Phillips*. 461 F.3d 181, 192 [2d Cir. 2006] Thus, evidence that is helpful to a defendant may constitute *Brady* material even if it is not admissible at trial (*Spence v. Johnson*, 80 F.3d 989, 1005 n.14 [5th Cir. 1996], cert. denied 519 U.S. 1012 [1996]). To satisfy their *Brady* obligation, "the People must disclose to the

defense any material exculpatory information which is in their possession" (*People v. Diaz*, 134 A.D.2d 445,446 [2d Dept. 1987], *Iv. denied* 71 N.Y.2d 895 [1988]).

"[Brady] rule encompasses evidence 'known only to police investigators and not to the prosecutor" (*Strickler v. Greene*, 527 U.S. 263, 280-281 [1999] [internal citation omitted]). The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" (*Kyles v. Whitley*, 514 U.S. 419,437 [1995]), and must "promptly disclose any such material evidence to the defendant" (*People v. Santorelli*, 95 N.Y.2d 412, 421 (2000).

Here, prosecutor Riordan, as detailed in the coram nobis motion, failed to:

1) investigate the disciplinary files of Chris Chojnacki. Here, requests were made concerning this information and it was not provided to the defense. Specifically, in the Defense Discovery Demand under CPL Article 240, dated March 25, 2004, Michael Felix sought specific Brady material. In particular, Michael Felix asked the Trial Court to order the People to produce, inter alia "(18) Any evidence, information and/or documentation tending to establish any confrontation and/or altercation occurring between Mr. Felix and Cheektowaga Police Officer Chris Chojnacki." (Record on Appeal 33-34). Brady evidence concerning Chris Chojnacki and the incident at page's Bar was specifically requested by Defense Attorney LaTona. In short, a showing was made of a reasonable possibility that the failure to disclose the exculpatory [evidence] contributed to the verdict" People v. Vilardi, 76 N.Y.2d 67, 77 (1990).

2) Prosecutor Riordan also failed to provide the NYSIS Reports of Jeanette Carr Steger, who was arrested for at least one DWI. Mr. Riordan in fact argued that he was under no legal obligation to provide NYSIS reports. In paragraph fifteen (15) of his response to Defendant's Demand to Produce, Mr. Riordan states that rap sheets of prospective prosecution witnesses are not Brady material nor are they discoverable citing People v. Sigl, 124 A.D.2d 1053 (4th Dept. 1986) and Mr Riordan also states that defendant is not entitled to prosecution witness rap sheets or NYSIIS' presumably citing, Matter of Williams v Erie County 255 A.D.2d 863 (4th Dept. 1998). General impeaching evidence under Brady includes a witnesses's past criminal record. Nucklos v. Gibson, 233 F.3d 12 61 (2nd Cir. 2000); Perkins v. Le Fevre, 691 F.2d 616 (2d Cir. 1982).

3) Prosecutor Riordan provided entirely redacted police reports for John Garbo and Jeanette Carr Steger, In *Exoneration Initiative v. NYPD*, 2013 N.Y. Slip Op. 30546(U) (N.Y. Cty.. Sup. Ct. Mar. 15, 2013), "The court held that the NYPD must produce all of the requested documents without any redactions. The NYPD's concern about the chilling effect disclosure would have on future witness's willingness to cooperate would expand the invasion of privacy exception beyond what the legislature intended." The prohibition of using the un-redacted police reports unduly circumscribed Michael Felix's constitutional right to cross-examine witnesses, John Garbo and Jeanette Carr Steger, in order to present a defense. People v. Jovanovic, 263 A.D.2d 182, 195, 700 N.Y.S.2d 156 (1st Dept. 1999). Also with respect to John Garbo's redacted police report, the Jury was denied the opportunity to see this evidence and make

inferences that there was a reasonable possibility that the failure to disclose the exculpatory evidence contributed to the verdict, People v. Vilardi, 76 N.Y.2d 67, 77 (1990), in that Chris Chojnacki the former boyfriend was Sandra Handel's attacker. Also, that in a September 10, 2003 interview, John Garbo stated that Chris Chojnacki looked like the person who was at Sandra Handel's apartment on the night of August 5, 2003.

4) Defense Attorney LaTona stated regarding the copy of Jeanette Carr Steger's Police Report which he received in court – "It's a copy minus a few things." People's Exhibit 8. An entirely redacted exhibit was entered into evidence as Defendant's Exhibit B. (Record on Appeal pg. 149) LaTona never entered the People's Exhibit 8 with a few things missing into evidence. Jeanette Carr Steger's interview evidence in the police reports could have been used to show that she sought favorable treatment for her DWI arrest. It could also have been used to show the reason for her interview was pre-textual in that it did not constitute an investigation of the Page's Bar incident, but was rather the police seeking a photograph of Michael Felix for a photo array to be placed in front of Sandra Handel. This was information that was determinative of Michael Felix's guilt or innocence.

5) The Sex Offense Unit (or Evidence Unit) Report was never provided to the defense or to the court. Detective Wentland of sex offense unit and Lieutenant Zack went to Sandra Handel's apartment on August 18, 2003. Evidence was collected, the police dusted for fingerprints and this report was not provided. No body fluids were found. (Record on Appeal pg -1240). The evidence was favorable to Michael Felix. Here, the Sex Offense Unit (or Evidence

unit) Report was never provided by Prosecutor Riordan, a report which could have established who the perpetrator was or is strongly suggestive of the possibility of another perpetrator, Scurr v. Niccum, 620 F.2d 186 (8th Cir. 1980) is evidence that was essential to undermining the veracity of the People's witnesses. Neither the Sex Offense Unit Report nor the Evidence Team Report was requested by Defense Attorney LaTona. Also, Defense attorney Latona failed to ask for a missing witness charge because of the absence of Detective Wentland. Defense Attorney Latona failed to adequately develop the record, failed to ask for a missing witness or document charge as well as adverse inferences and failed to move for dismissal of the indictment for these Brady violations. Trial counsel committed ineffective assistance of counsel. The written report constitutes Rosario material which was not provided to the defense. Failure to present Rosario violations in the appeal - Mayo v. Henderson, 13 F.3d 528, 535 (2nd Cir. 1994) constituted ineffective assistance of appellate counsel. Appellate attorney Villardo also failed to raise this issue on appeal and committed ineffective assistance of counsel as well.

6) As detailed in the coram nobis motion a request for Officer Wachowiak's (the officer who pulled Michael Felix over on Reiman Road) notes was made. (Record on Appeal pg 316-17) Defense Attorney LaTona requested these notes but prosecutor Riordan did not provide them. Here, prosecutor Riordan breached this duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police, Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) and did not provide Officer Wachowiak's notes. The notes are essential to a determination of probable cause to stop Michael Felix

and obtain the photo array photo and lineup and were essential. The evidence was favorable to Michael Felix. The evidence was requested but it was actively suppressed by Prosecutor Riordan in that it was never provided to the defense. The tests for reasonable possibility and probability are both met the prosecution was under a duty to provide these notes.

The written report constitutes Rosario material which was not provided to the defense. Failure to present Rosario violations in the appeal - Mayo v. Henderson, 13 F.3d 528, 535 (2nd Cir. 1994) constituted ineffective assistance of appellate counsel. Appellate attorney Villardo also failed to raise this issue on appeal and committed ineffective assistance of counsel as well.

7) Lieutenant Zack's 'Case File' - At trial Lieutenant Zack testified that he had an extensive "Case File" on this criminal case. Lieutenant Zack provided only summation or synopsis of some other notes or records in a case file. He states, "This is a synopsis I generalized this in a report." (Record on Appeal 249). There is a case file which Lieutenant Zack stated was 47 pages long (Record on Appeal - 249). A recording was downloaded and attached to the case file. (Record on Appeal - 849). Lieutenant Zack stated that he kept a photograph locked in a case file in a compartment above his desk and only Zack has the key. (Record on Appeal 273). Prosecutor Riordan states that he is not aware of any notes by Lieutenant Zack. (Record on Appeal 319). Defense attorney did ask for disclosure of the file. Judge Forma denied defense attorney's request for the case file. (Record on Appeal 250).

In Jones v. City of Chicago, 856 F.2d 985, 989 (7th Cir. 1988) (which involved a mistaken identification of an innocent party in a then overzealous investigation by the police for a rape and murder) there was a practice of placing police reports and memoranda of police officers investigating a case in two separate files; the police department's regular files and "street files" (here – "case files") or files that the police did not turn over to the state's attorney's office as they did with their regular investigative files. As a result, the contents of the street files were not available to defense counsel even if they contained exculpatory material. Jones v. City of Chicago, 856 F.2d at 989. Although the lawfulness of the street-files practice was never adjudicated, the jury found that it denied criminal defendants in the Chicago area due process of law. Jones v. City of Chicago, 856 F.2d at 995. Given the facts above, Michael Felix was denied due process of law and this issue should have been raised by appellate counsel Villardo on direct appeal, this failure constituted ineffective assistance of counsel.

Whether the District Attorney acted in good or bad faith is without relevance (*People v. Bryce*, 88 N.Y.2d 124, 129 [1996]), except with regard to the issue of the relief to which the defendant is entitled (see e.g. *People v. Williams*, 7 N.Y.3d 15 [2006]). Here, where the sole reason that defendant was denied this favorable evidence was the People's suppression of it, and that suppression, in turn, deprived him of the opportunity to present a defense premised on police misconduct, "the undisclosed evidence ... [is] material ... [because] it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (see *U.S. v. Payne*, 63 F.3d 1200, 1209 [2d Cir. 1995], cert. denied 516

U.S. 1165 [1996] [internal citation omitted]). Thus, the confidence in the outcome of defendant's trial has been sufficiently undermined so as to find that he has satisfied the "reasonable probability" standard (see ibid.). On that basis, this Court must find that defendant's Federal and State rights to Due Process of Law have been violated, and must set aside the guilty verdict rendered by the jury (*cf. People v. Hunter*, 11 N.Y.3d 1 [2008]).

A prosecutor is ethically obliged to make available to the defense evidence that tends to negate the guilt of the accused. 22 NYCRR § 1200.30 (b). Further, the prosecutor is in breach of a professional conduct rule. The Supreme Court has assumed Rule 3.8 (d) of the ABA Model Rules of Professional Conduct is more demanding than the Brady constitutional obligation. In Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) the Supreme Court states, "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under the prosecutor's ethical or statutory obligations." Even if the above Brady evidence were presumed not material there is a broader ethical obligation to disclose this evidence.

"The trial of a criminal case is not a chess game" (*People v. Alamo,* 89 Misc.2d 246, 250 (1977)). "The question is not whether the defendant more likely than not would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. " Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995). The prosecutor's duty is not that he should win a case but that justice should be done. Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629 (1935).

Here, the prosecutor's active suppression of the *Brady* material to which defendant was entitled went beyond cynical game-playing. It constituted nothing less than prosecutorial misconduct reflecting on his ethics as an attorney (cf. Rules of Professional Conduct, Rule 3.8[b], effective 4/1/09 ["A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant ... of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal."]). If the *Brady* rule is to constitute anything more than a mere suggestion to prosecutors, in this egregious case the remedy of dismissal must be granted (*cf. People v. Adames* (83 N.Y.2d 89 [1993]).

Defense attorney LaTona did not make a motion to sanction Prosecutor Riordan for prosecutorial misconduct and seven Brady violations, this constituted ineffective assistance of counsel. Appellate attorney Villardo also failed to raise this issue on appeal and committed ineffective assistance of counsel as well.

Granting this Petition would allow this Court to address and determine when, if ever, there can be a strategic justification for an appellate attorney's failure to raise potentially meritorious issues when the raised issues are not supported by the law or facts. Second, it would enable this Court to set forth the required showing, and the means to make such a showing, by appellate counsel to meet the burden of demonstrating the lack of strategic explanation for the failure to raise a meritorious issue, when no such strategy is readily apparent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT, DATED MARCH 16, 2018

SUPREME COURT OF THE STATE
OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

Indictment No: 04723-2003

KA 06-00506

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

MIKE FELIX,

Defendant-Appellant.

MOTION NO. 986/06

PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, DEJOSEPH, JJ.

Appellant having moved for a writ of error *coram nobis* vacating the order of this Court entered September 22, 2006 affirming a judgment of Supreme Court, Erie County, rendered March 30, 2005,

Appendix A

Now, upon reading and filing the affirmation of William B. Licata, Esq. dated December 7, 2017, the notice of motion with proof of service thereof, the affidavit of Michael J. Hillery, Esq. sworn to January 3, 2018, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is denied.

Entered: March 16, 2018

Mark W. Bennett, Clerk

APPENDIX B — ORDER DENYING LEAVE OF THE STATE OF NEW YORK COURT OF APPEALS, DATED JULY 12, 2018

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MIKE FELIX,

Appellant.

ORDER DENYING LEAVE

BEFORE: HON. ROWAN D. WILSON, Associate Judge

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

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* Description of Order: Order of the Supreme Court, Appellate Division, Fourth Department, entered March 16, 2018, denying appellant's application for a writ of error *coram nobis*.

Appendix B

Dated: July 12, 2018

/s/_____
Associate Judge