No. 19-6160

Original

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

REGGIE D. CASWELL,

Petitioner.

vs.

NEW YORK STATE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT
50 EAST AVENUE
ROCHESTER, NEW YORK 14604

(LAST COURT TO RULE ON CASE)

PETITION FOR WRIT OF CERTIORARI

REGGIE D. CASWELL # 06B1117
SING SING CORRECTIONAL FACILITY
354 HUNTER STREET
OSSINING, NEW YORK 10562

QUESTIONS PRESENTED

POINT I

WAS APPELLANT DEPRIVED OF THE RIGHT TO APPELLATE COUNSEL WHEN THERE WAS NO KNOWINGLY, INTELLIGENTLY AND VOLUNTARY WAIVER OF THE RIGHT TO ASSIGNED APPELLATE COUNSEL, see, JOHNSON V ZERBST 304 U.S. 458 (1938), EVITTS V LUCEY 469 U.S. 387 (1988), N.Y.S. CONST. 1 § 6, 1 § 11, U.S.C. 5th, 6th, 14th?

POINT II

DOES THE DUE PROCESS CLAUSE MANDATE THAT AN APPELLANT PROCEEDING PRO SE ON DIRECT APPEAL BE PROVIDED WITH A SUFFICIENT APPEAL RECORD, PEOPLE V MEALER 57 N.Y.2d 214, 219 (1982), CERT. DENIED 460 U.S. 1024 (1983), DRAPER V WASHINGTON 372 U.S. 487, 499 (1963), MARTINEZ V COURT OF APPEALS OF CALIFORNIA, FOURTH APPELLATE DIST. 528 U.S. 152, 163 (2000), N.Y.S. CONST. 1 § 6, 1 § 11, U.S.C. 1st. 5th, 14th?

POINT III

IS THERE A NEW YORK STATE STATUTORY RIGHT OR A CONSTITUTIONAL RIGHT TO PROCEED PRO SE ON DIRECT APPEAL AFTER A JURY TRIAL, MARTINEZ V COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DIST. 528 U.S. 152, 163 (2000); C.P.L. § 450.10, N.Y.S. CONST. 1 § 6, 1 § 11?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNTIED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

State Courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is:

a) has been designated for publication but is not yet reported.

The opinion of the state highest court deny discretionary review appears at Appendix B to the petition and is:

a) has been designated for publication but is not yet reported.

JURISDICTION

State Courts:

The date on which the highest state court denied discretionary review of my case was the New York State Court of Appeals on **July 15th. 2019**. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. ß 1257(a).

As such, the instant petition is timely submitted within 90 days from July 15th. 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Your Petitioner hereby asserts a brief and concise statement of this case in which this Honorable Court's intervention is prayed for. In adition, Petitioner respectfully request that said **Writ of Error Coram Nobis** and said **Leave to Appeal Application** (attached hereto as as **Appendix C and F** respectively) be also reviewed in conjunction with this pleading where said facts are more-fully developed (emphasis added).

Relevant History:

Maintaining his innocence (and still does), your Petitioner proceed to trial pro se and was convicted of robbery 2nd. and burglary 2nd. (inter alia). Thereafter, the trial court declared Petitioner to be a persistent violent felony offender at which point in time, Petitioner was given an indeterminate life sentence of imprisonment.

Thereafter, Petitioner timely filed a notice of appeal and sent a letter to the New York State Supreme Court Appellate Division Fourth Department requesting permission to appeal the conviction as a poor preson and **pro se** (emphasis supplied)! This request was **granted** and the Monore County Clerk's Office was order to provide your Petitioner with a copy of the trial record for appeal.

Although Petitioner was provided with a copy of the transcripts Petitioner **was not** provided with a copy of the relevant trial and sentencing exhibits submitted and maintained by the Respondent's. It was and is Petitioner's contentions that he needed copies of the those exhibits in order to demonstrate that he was/is **Actually Innocent** of all charges and that each sentence imposed was/is illegal and unlawful.

Accordingly, Petitioner promptly submitted a motion to the trial court seeking to settle the appeal (as mandated by N.Y.S. law). The Respondent's opposed the motion and refused to provide copies of their exhibits and Petitioner's motion was denied.

Here it should be noted that the exhibits that your Petitioner sought for his pro se direct appeal were:

a) Respondent's Trial Exhibits #9 and #22 Surveillance Videos/D.V.D.'s (depicting the alleged attempt robbery of store, Respondent's Exhibit #22 demonstrates the time that Petitioner was taken into custody after leaving the store. This D.V.D. was **never** shown to the jury or any State/Federal Court). It was/is Petitioner's contentions that he needed copies of the Respondent's exhibits in order to demonstrate on direct appeal that there was insufficient evidence to support the conviction and that the verdict was against the weight of the evidence and that Petitioner was/is Actually Innocent.

b) Respondent's Sentencing Exhibits #1-#7 which your Petitioner asserted that the entire sentence imposed was in fact illegal and unlawful. To be clear, the Respondent's sought to use two prior alleged convictions. The first conviction was an alleged 1988 burglary conviction from Onondaga County New York. The second alleged conviction was in 1993 for robbery in Peoria County Illinois. In so doing, the Respondent's submitted into evidence at the sentencing hearing all relevant documents from both alleged convictions. It was Petitioner's contentions that he needed copies of those documents in order to demonstrate on direct appeal that the alleged 1988 conviction was unconstitutional and could not be used to enhance the sentence and that the alleged 1993 conviction did not have all the elements of a violent crime in New York (inter alia).

Once the trial court denied Petitioner's motion to settle the appeal record. Petitioner promptly filed an appeal (from that decision) seeking intervention by the Appellate Division Fourth Department. However, the Fourth Department denied Petitioner's appeal, see, **People v Caswell A.D.# KA-07-1165 (4th. Dept.)** citing **People v Gibson 266 A.D.2d 837 (4th. Dept. 1999)**(holding: "...Defendant's appeal from an order settling the record on appeal must be dismissed. There

is no statutory authorization for a defendant in a criminal action to appeal from such an order..."). Your Petitioner's appeal (from that decision) to the New York State Court of Appeals was also dismissed, see, **People v Caswell 9 N.Y.3d 960 (2007).**

Thereafter, Petitioner submitted a second motion to the trial court stressing the need to be provided with copies of the Respondent's exhibits for said pro se direct appeal. After the Respondent's opposed the motion, the trial court denied the same for a second time (Petitioner did not appeal that decision for the reasons stated in **People v Caswell A.D.# KA-07-1165** (supra).

Then Petitioner filed a motion in the Appellate Division Fourth Department pursuant to 22 N.Y.C.R.R. ßß 1000.13(a) and 1000.4(g)(3) seeking a **"Subpoena deces tecum"** to compel the Respondent's to provide copies of their trial and sentencing exhibits. Hereto the Respondent's opposed the "Subpoena" application that the Appellate Division Fourth Department denied (a decision which is not appealable).

After spending two years (from 2006-2008) filing repeated motions, appeals, applications seeking copies of the Respondent's trial and sentencing exhibits (supra) crucial to Petitioner's pro se direct appeal. Petitioner submitted a motion rescinding the request to proceed pro se on direct appeal and further requested the assignment of appellate counsel.

Having not heard anything on said motion submitted to the Appellate Courts requesting the assignment of appellate counsel, and fearful that the Respondent's would move to dismiss the appeal as untimely, Petitioner complied an Appeal Appendix and pro se Appeal Brief and submitted the same to the Appellate Division Fourth Department.

Without copies of the relevant trial and sentencing exhibits held hostage by the Respondent's, Petitioner's conviction and

sentence was affirmed on direct appeal, see, **People v Caswell** 56 A.D. 3d 1300 (4 Dept. 2008), lv. denied 11 N.Y.3d 923 (2009), recon. denied 12 N.Y.3d 781 (2009) cert. denied **Caswell v New York** 556 U.S. 1286 (2009).

Thereafter, your Petitioner promptly filed a C.P.L. ß 440.10 and ß 440.20 motion asserting (inter alia) that Petitioner was deprived of a sufficient appeal record and that each sentence imposed on the four count indictment was/is illegal and unlawful.

The trial court denied Petitioner's C.P.L. ß 440.10 motion without mentioning Petitioner's argument that he was deprived of a sufficient appeal record (Point III). In regards to your Petitioner's C.P.L. ß 440.20 motion, the trial court refused to vacate the illegal life sentences asserting that, "First, the Defendant's conentions are not supported by adequate documentation. Second, the Fourth Department has already ruled that the People demonstrated the Defendant's persistent felony status by presenting admissible evidence at the hearing..." Here it should be noted, by the Respondent's own admission, that the relevant sentencing exhibits were not before the Appellate Courts (emphasis supplied).

Left with no other option, your Petitioner filed a 42 U.S.C. ß 1983 complaint in the Western District Court of New York seeking a **Preliminary Injunction** against the Respondent's in order to compel the production of copies of their relevant trial and sentence exhibits. The complaint was dismissed without prejudice by the District Court, see, **Caswell v Green et. al. W.D.N.Y. Doc. #10-CV-166 (Telesca, J.).**

That while Petitioner's appeal was pending in **Caswell v Green et. al.** (supra). The District Court denied Petitioner's Habeas Corpus petition (and motion for discovery) erroneously holding in relevant part that:

"...the sentencing exhibits are contained in the appeal appendix submitted by Petitioner's **'Appellate Counsel'** on appeal, see, Resp.t Ex. E at R333-60..." quoting **Caswell v Racetti** 2012WL1029457 **(W.D.N.Y.)**(at note 5).

In regard to the Respondent's Trial Exhibits #9 and #22, the DVD's. The District Court declined to review the DVD's (and rejected Petitioner's motion for Discovery requesting that the Respondent's produce said DVD's for review). Instead, the District Court decided to accept the entire argument from the Respondent's that said DVD's did not demonstrate that Petitioner was innocent.. Thus, completely disregarding your Petitioner's contentions that said DVD's does in fact prove that your Petitioner is **Actually Innocent** of all charges (see, detailed argument asserted in Writ of Error Coram Nobis Memorandum of Law at pg. 2 attached hereto as **Appendix C**).

While the habeas corpus petition was pending in the District Court, the United States Court of Appeals for the Second Circuit of New York issued it's mandate in **Caswell v Green et. al. 424 Fed. Appx. 44 (2 Cir. 2011)** holding in relevant part that:

> **"...Caswell seek's access to certain exhibits admitted at his trial and sentencing for future proceedings, and disputes the District Attorney's failure to provide such evidence during his direct appeal. Moreover, Caswell seeks this evidence so that he may: 1) challenge the sufficency of the evidence for his conviction; and 2) argue that he had insufficient notice of documents that would be used in his sentencing proceeding...Caswell, in a subsequent proceeding may eventually be able to make a showing that his conviction [and sentence] w[ere] unlawful..."**
>
> quoting, **Caswell v Green** (supra) at 46

Motion to Renew C.P.L. ß 440.20 Motion

Now, Petitioner with copies of the Respondent's sentencing exhibits in hand; Petitioner promptly filed a Motion to Renew said C.P.L. ß 440.20 motion given the fact that the trial court denied the original motion asserting that: **"Defendant's contentions are not support by adequate documentation..."** (i.e. the very same sentencing exhibits held hostage by the Respondent's for approximately seven years).

Nevertheless, despite the fact that you Petitioner **clearly** demonstrated that each sentence imposed on the four count indictment was/is illegal and unlawful, the trial court denied the motion to renew asserting that the **"Appellate Division Fourth Department affirmed"** the illegal sentences on direct appeal.

Writ of Error Coram Nobis Application

That based upon a status conference held at the Second Circuit in **Caswell v Green et. al. 424 Fed. Appx. 44 (2 Cir. 2011)(prior to remand).** Petitioner's assigned Appellate Counsel **Professor Jon Romberg Esq. (Seton Hall University School of Law)** noted that even if the Second Circuit remanded the case back to the District Court and Petitioner was **finally provided** with copies of the relevant trial and sentencing exhibits maintained by the Respondent's, what **remedy** would Petitioner have given the fact that Petitioner's direct appeal was already affirmed? see, **Memorandum of Status Conference** attached to Writ of Error Coram Nobis as **Exhibit D.**

Accordingly, based upon the holdings of this Honorable Court, Petitioner submitted a Writ of Error Coram Nobis seeking a new appeal (with the assignment of appellate counsel) with particular attention

to this Court's decision in **Martinez v Court of Appeal of California, Fourth Appellate Dist**. 528 U.S. 152, 163 (2000)(holding that there is no federal right to proceed pro se on direct appeal, but leaving to the state appellate courts to decide if there is a State Right to proceed pro se, **"...keeping the best interest of both the prisoner and the government in mind..."** quoting **Martinez** at 163).

In the case at bar, not only was there no **"knowingly, intelligently and voluntary"** waiver of the right to assigned appellate counsel, your Petitioner was **deprived** of copies of the relevant trial and sentencing exhibits maintained by the Respondent's for said pro se direct appeal in clear violation of the **United States Constitutional Due Process and Equal Protection Clauses** (emphasis added).

Accordingly, your Petitioner hereby re-asserts the following "Points" for this Honorable Court's intervention which are further developed in **Appendix** C, E, F, attached hereto respectively.

POINT I

"WAS APPELLANT DEPRIVED OF THE RIGHT TO APPELLATE COUNSEL WHEN THERE WAS NO KNOWINGLY, INTELLIGENTLY VOLUNTARY WAIVER OF THE RIGHT TO ASSIGNED APPELLATE COUNSEL, JOHNSON V ZERBST 304 U.S. 458 (1938), EVITTS V LUCEY 469 U.S. 387 (1985), N.Y.S. CONST. 1 ß 6, 1 ß 11; U.S.C. 5th, 6th, 14th?"

As argued in said **Writ of Error Coram Nobis** (attached hereto as Appendix C), Petitioner demonstrated that his request to proceed pro se on direct appeal was not made "knowingly, intelligently and voluntary" based in part upon the following facts:

1) Petitioner was not advised **prior** to his written request to proceed pro se on direct appeal that the Respondent's could withhold copies of their Trial and Sentencing Exhibits relevant to said direct appeal and that Petitioner would have no New York State remedy to compel the production of said exhibits.

2) Petitioner was not advised **prior** to his written request to proceed pro se on direct appeal that he could not argue his appeal over the phone pursuant to an unwritten rule of the Appellate Division Fourth Department (but could do so if granted leave to appeal to the New York State Court of Appeals).

3) Petitioner was not advised **prior** to his written request to proceed pro se on direct appeal that he could not rescind his request to proceed pro se (made after spending two years filing numerous motions, appeals, applications seeking copies of relevant trial and sentencing exhibits maintained by the Respondent's).

To further illustrate the point, in the States that do allow a defendant to proceed pro se on direct appeal, a hearing is held in the trial court to ensure that a wavier of the right to assigned appellate counsel is made "knowingly, intelligently and voluntary" see, **Ex. Parte Scudder** 798 So. 2d 837 (2001)(Alabama Supreme Court), **Coleman v Johson** 235 Ariz. 195, 198 (2014)(Arizona Supreme Court), **Merriweather v Chatman** 285 Ga. 765 (2009)(Georgia Supreme Court), **Commonwealth v Staton** 608 Pa. 404 (2010)(Pennsylvania Supreme Court), **State v Rafay** 167 Wash. 2d 644, 653 (2009)(Washington Supreme Court).

Indeed, in **Gomez v Collins** 993 F. 2d 96 (5th. Cir. 1993), the Fifth Circuit recognized that there was **"no clearly defined standard regarding a state criminal appellate's right to waive court-appointed counsel and to proceed pro se at the appellate level"** **Gomez** at 97-98. As such, the **Gomez** Court suggested that the inquiry outlined in **Faretta v California** 422 U.S. 806 (1975) "...should logically apply to self-representation on appeal..." quoting **Gomez** at 98.

In the case at bar, there was no "inquiry" whatsoever. Stated differently, your Petitioner would have **never** sent the letter to the Appellate Division Fourth Department requesting to proceed pro se

on direct appeal had he had **"known"** (emphasis supplied) that the Respondent's could repeatedly refuse to provide copies of their relevant trial and sentencing exhibits for said pro se direct appeal with impunity and that Petitioner would have no judicial remedy under N.Y.S. law to compel the production of said exhibits (inter alia).

Despite the fact that in New York State, the right to appeal a criminal conviction is a "statutory right" see, **People v West** 100 **N.Y.2d 23, 26 (2003)**. This Honorable Court has held that such a right guarantees the assignment of appellate counsel unless that right (to assignment of appellate counsel) is "knowingly, intelligently and voluntarily" waived, cf. **Johnson v Zerbst** 304 U.S. 458 (1938), **Douglas v California** 372 U.S. 353 (1963), **Evitts v Lucey** 469 U.S. 387 (1985)(appeal not adjudicated in accord with due process of law upon unlawful deprivation of counsel to prefect appeal).

POINT II

"DOES THE DUE PROCESS CLAUSE MANDATE THAT AN APPELLANT PROCEEDING PRO SE ON DIRECT APPEAL BE PROVIDED WITH A SUFFICIENT APPEAL RECORD, PEOPLE V MEALER 57 N.Y.2d 214, 219 (1982) CERT. DENIED 460 U.S. 1024 (1983), DRAPER WASHINGTON 372 U.S. 487, 499 (1963), MARTINEZ V COURT OF APPEALS OF CALIFORNIA, FOURTH APPELLATE DIST. 528 U.S. 152, 163 (2000), N.Y.S. CONST. 1 ß 6, 1 ß 11; U.S.C. 1st. 5th. 14th?"

The Respondent's trial theory and the Defense to the charges and the importance of the **Respondent's Trial Exhibits #9 and #22 DVD's** (i.e. **Surveillance Video Tapes**) is clearly reflected in the attached **Writ of Error Coram Nobis memorandum of Law at page 2**, attached hereto as **Appendix C** (also reflecting Petitioner's contentions that he was/is **"Actually Innocent"** of all charges).

The **Respondent's Sentencing Exhibits #1-#7** are attached to said Writ of Error Coram Nobis and the importance of said exhibits which clearly demonstrates that each sentence imposed was/is illegal and

unlawful, see, **Writ of Error Coram Nobis Memorandum of Law at page 12**, attached hereto as **Appendix C**.

Respondent's Trial Exhibits #9 and #22

At trial, the Respondent's **rushed** into evidence (without objection) two DVD's depicting what they thought was an attempt robbery of a store (noting that Petitioner had no shirt, no hat, no gloves, no weapon, and made no attempt to take any property from the store).

Respondent's Trial Exhibit #9 (DVD) was a condense version of Respondent's Trial Exhibit #22 (DVD). Here it should be noted that Exhibit #22 was an alleged copy of the original VHS (Video) taken from the Store Surveillance System (it should be further noted that the video is a time-lapse recording). At trial, **only** Respondent's Trial Exhibit #9 was played for the jury (over objection).

Respondent's Trial Exhibit #9 **only** showed the second that Petitioner entered the store, the brief scuffle Petitioner has with the co-owner of the store, and the second Petitioner left the store (nothing more, and nothing less).

After that, according to the Respondent's trial theory, they claimed that Petitioner leaves the store (with co-owner approximately 50 yards behind Petitioner) runs approximately 200 yards, breaks into a residence (bleeding profusely from the injuries sustained at the store), finds the occupants (a 35/36 male and female), robs "him and or her" then escorts them outside and into a detached garage. Once everyone is inside the car and the vehicle is backing-out, the Respondent's claimed that Petitioner jumped out of the car and runs back to the store where he is taken into custody.

The Defense:

At trial, Petitioner proceeding pro se asserted that he and the co-owner of the store were speaking to each other outside of the store moments **before** the altercation inside the store. Moreover, Petitioner asserted that his actions inside the store were in fact "Justified"!

Petitioner further asserted that after he left the store, he did in fact run down to 1341 Park Avenue and was leaning-up against a car trying to catch his breath when Brian Eckman appeared and asked Petitioner "what the hell are you doing?" At this juncture, the co-onwer also appeared. Your Petitioner, having heard the Police responding to the store (the panic alarm was activated during the scuffle) ran back to the store (in order to tell his side of the story) and was taken into custody **Three (3) Minutes after leaving the store**, see, Writ of Error Coram Nobis Memorandum of Law at page 2 for a full detailed account of the allegations and evidence (which the Respondent's have not disputed), attached hereto as **Appendix C**.

Respondent's Trial Exhibit #9

As asserted above, **only** Trial Exhibit #9 (DVD) was played for the jury. That DVD **only** shows the second Petitioner enters the store, the brief scuffle, and the second Petitioner leaves the store.

Respondent's Trial Exhibit #22

Respondent's Trial Exhibit #22 is the very heart of Petitioner's defense to all charges (emphasis added). Here it should be noted that the jury **never** seen Respondent's Trial Exhibit #22 (over Petitioner's objections). Stated differently, no State or Federal Court has viewed Respondent's Trial Exhibit #22 despite Petitioner's pleads.

Indeed, Respondent's Trial Exhibit #22 shows the following **evidence never** seen by the jury or any State/Federal Court:

1) Trial Exhibit #22 shows that Petitioner and the co-owner of the store enter the store together. Thus given credit to Petitioner's contentions that he and the co-owner were outside of the store speaking to each other **prior** to the altercation (a contention that he denied).

2) Trial Exhibit #22 shows that after Petitioner and the co-owner leave the store, store employee Scott Schell **immediately** locks the door and calls 911. The video shows that Mr. Schell was on the phone speaking to the 911 operator for approximately one minute (here it should be noted that the Respondent's claimed that all 911 **calls** were destroyed). The video further shows (as supported by Mr. Schell's trial testimony) that during the his 911 call, he sees Petitioner being taken into custody at which point in time he runs outside to observe the arrest.

3) Trial Exhibit #22 further shows the responding Police Officers inside the store as well. In other words, the first three responding Police Officers testified that they were present at the store within two to three minutes after receiving the dispatch (noting that during the altercation inside the store, the panic alarm was activated). They further testified that Petitioner was already in custody within three minutes of their arrival (emphasis added).

Your Petitioner has been asserting for the last 15 years that (he is Actually Innocent) it is humanly impossible to have committed the alleged robbery/burglary at Park Avenue within three minutes after leaving the store (according to the testimony and lack of evidence).

As reflected below, your Petitioner had the right secured pursuant to the United States Constitution to present Respondent's Trial Exhibit

#9 and #22 (DVD's) to the state appellate courts on his pro se direct appeal.

Respondent's Sentencing Exhibits #1-#7

Although your Petitioner did in fact include some of the Respondent's Sentencing Exhibits/Documents in the Appeal Appendix. The Respondent's repeatedly refused to provide copies of the following Sentencing Exhibits submitted at the sentencing hearing and maintained by them:

1) Copies of the 1988 Bruglary Plea/Sentencing Transcripts, Waiver of Indictment, Superior Court Information, (inter alia), all of which clearly demonstrated that the alleged conviction was unconstitutional and could not be used to enhance Petitioner's sentence.

2) Copies of the 1993 robbery conviction alleged to have been obtained in the State of Illinois. In particular, the Respondent's refused to provide a copy of the Illinois Bill of Indictment, Respondent sentencing exhibit #4. Without a copy of this exhibit, Petitioner could not demonstrate a per se mandatory violation of N.Y.S. law. Not to mention the fact that said alleged out-of-state conviction did not have "all the essential elements" of a violent crime in N.Y.S., see, infra.

Respondent's Affirmation to C.P.L. ß 440.20 Motion

In response to Petitioner's C.P.L. ß 440.20 motion seeking to vacate all illegal and unlawful sentences imposed. The Respondent's present two positions. First they asserted that the Appellate Division Fourth Department already affirmed the illegal sentences (hence Petitioner's motion should be denied). Secondly, the Respondent's

acknowledged the fact that copies of their relevant sentencing exhibits were **not** included in the pro se appeal record. However, the Respondent's blamed your Petitioner for not including said exhibits in the appeal appendix. Thus, completely ignoring their unjustifiable refusal to provide copies of said exhibits, see, Respondent's Affirmation to C.P.L. ß 440.20 motion attached to Writ of Error Coram Nobis as **Exhibit C**.

Petitioner's Federal Habeas Corpus Petition Caswell v Racetti 2012WL1029457 (W.D.N.Y.)

Attached to Petitioner's Habeas Corpus petition was Petitioner motion for Discover seeking the production of the Respondent's Trial and Sentencing Exhibits (reflected herein) in order demonstrate that Petitioner was deprived of a sufficient appeal record and also deprived of the right to demonstrate that he was/is Actually Innocent of all crimes (inter alia).

In denying said motion for Discovery, as well as the habeas corpus petition itself, the District Court declined to order that the Respondent's produce said **DVDS** for review. Instead, the District Court adopted the entire argument of the Respondent's that said **DVDS** played no role in Petitioner's guilt or innocence. If that was the case, as the Respondent's claim, it begs the question, why have the Respondent's **repeatedly** refuse to provide your Petitioner of copies of said trial exhibits for direct appeal?

In response to the Respondent's Sentencing Exhibits, the District Court erroneously concluded that: "...the sentencing exhibits are contained in the appeal appendix submitted by Petitioner's 'Appellate Counsel' on appeal, see, Resp't Ex. E at R333-60..." quoting Habeas Decision note 5 page 17.

Clearly, your Petitioner did not have "Appellate Counsel" on his pro se direct appeal. In regard to that part of the appeal appendix that Petitioner created and assembled himself, Petitioner attached that part of the appeal appendix to said Writ of Error Cormm Nobis Application as **Exhibit H**. Thus proving beyond all doubt that the relevant sentencing exhibits **were not** (emphasis) "contained" in the appeal appendix (a contention that even the Respondent's did not refute in the pleadings opposing the Writ of Error Coram Nobis, see, **Appendix C**.

WRIT OF ERROR CORAM NOBIS

That based upon the Second Circuit decision in **Caswell v Green et. al. 424 Fed. Appx. 44 (2 Cir. 2011)** at which point in time your Petitioner was finally given copies of the relevant Trial and Sentencing Exhibits maintained by the Respondent's. Petitioner submitted the attached Writ of Error Coram Nobis demonstrating (inter alia):

1) That without copies of the Respondent's Trial Exhibits #9 and #22 (DVD's) Petitioner was unable to demonstrates on his pro se direct appeal that there was "insufficient evidence to support the conviction and that there verdict was against the weight of the evidence" (Point II of Direct Appeal Brief) in violation of the C.P.L. ßß 470.15(3)(c)(5), C.P.L. ß 470.20(3) also citing **People v Bleakley 69 N.Y.2d 490 (1987), Jackson v Virginia 443 U.S. 307 (1979), People v Romero 7 N.Y.3d 633 (2006), Tibbs v Florida 457 U.S.31 (1982).**

a) Petitioner further noted that in 2007, the Appellate Division Fourth Department granted a writ of error coram nobis and vacated a conviction finding that the "verdict was against the weight of the evidence" see, **People v Johnson 43** A.D.3d 3d 1453 (4 Dept. 2007) (there was no indication that Mr. Johnson was deprived of the evidence needed to demonstrate this issue).

b) Petitioner further noted that **no** court State/Federal has **ever** seen (including the jury) **Respondent's Trial Exhibit #22 (DVD)** supporting Petitioner's contentions that he was/is **Actually Innocent** of **all** charges, see, **Writ of Error Coram Nobis Memorandum of Law at page 2,** attache hereto as **Appendix C.**

2) That with copies of the Respondent's Sentencing Exhibits #1-#7 your Petitioner **clearly** demonstrated that each sentence imposed was/is illegal and unlawful:

a) First the alleged 1988 Burglary conviction was in fact unconstitutional in that: (1) Petitioner's purported waiver of indictment was in violation of the C.P.L. ß 195. Hence, the alleged conviction was indeed unconstitutional and could not be used to enhance yout Petitioner's sentence, see, C.P.L. ß 400.20(6), also cf. **People v Johnson 187 A.D.2d 990 (4 Dept. 1992), People v Sanders 89 A.D.3d 106 (4 Dept. 2011).**

b) Second, the alleged 1993 robbery conviction in Illinois State could not be used to enhance Petitioner's sentence in that: (1) The sentencing court allowed into evidence the Illinois Bill of Indictment (**Resp. Sen. Ex. #4**) which under New York State law mandated automatic reversal, see, **People v Muniz 74 N.Y.2d 464 (1989). However,** in order for this issue to be demonstrated on direct appeal, a copy of this exhibit had to be included in the appeal record, see, **People v Samms 95 N.Y.2d 52, 57 (2000).**

c) That the alleged 1993 Illinois robbery statute in question is a "general intent" crime unlike New York State's "specific intent" robbery statute, see, **People v Banks 75 Ill. 2d 383 (1979),** cf. **People v Smith 79 N.Y.2d 309 (1992)** also see, **People v Jurgins 26 N.Y.3d 607 (2015)("strict equivalency standard").**

3) Without question, by repeatedly refusing to provide copies of their Sentencing Exhibits #1-#7, the Respondent's have unlawfully

maintained the illegal indeterminate life sentences imposed upon your Petitioner, cf. **Warney v Monroe County** 587 F. 3d 113 (2 Cir. 2009) (same prosecutor as in Petitioner's case, found to have willfully refused to turn over exculpatory DNA evidence).

Indeed, the Respondent's deliberate refusal to provide your Petitioner with copies of their relevant trial and sentencing exhibits for said pro se direct appeal, coupled with the State Appellate Court's denial/dismissal of said pleadings seeking their production for the pro se appeal, not only deprived Petitioner of "meaningful access to the courts," but also deprived Petitioner of a "record of sufficient completeness to permit proper consideration of an indigent's claims" in clear violation of the holdings of this Honorable Court, see, **Lewis v Casey** 518 U.S. 343 (1996), **Draper v Wasington** 372 U.S. 487 499 (1963)(quoting **Coppedge v United States** 369 U.S. 438, 446 (1962)), also cf. **Ross v Moffitt** 417 U.S. 600, 616 (1974)(once a state provides a right to appeal by statute, it must "**assure the indigent defendant an adequate opportunity to present his claims fairly...**").

This Honorable Court has "**consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts**" quoting **Bounds v Smith** 430 U.S. 817, 824 (1977). Stated differently, the States can allow a defendant to proceed pro se on direct appeal, "**keeping the best interest of both the prisoner and government in mind**" quoting **Martinez** (supra) at 163.

To add insult to injury, the Appellate Division Fourth Dept. affirmed Petitioner's conviction and sentence holding: ",,,that there was sufficient evidence to support the conviction and that the verdict was not against the weight of the evidence...and that the People established defendant's status as a persistent violent felony offender by presenting admissible evidence at a hearing..." quoting **Peopl v Caswell** 56 A.D.3d 1300 (4 Dept. 2008).

In other words, the Appellate Division Fourth Department rendered it's decision **without** (emphasis) the very **evidence** (emphasis added) that the Respondent's used at trial and sentencing when it affirmed the conviction and sentence on direct appeal. Thus, the denial of said Writ of Error Coram Nobis was contrary to this Honorable Court's decision in **Christopher v Harbury** 536 U.S. 403, 413 (2002)(holding in part: **"...the object of the denial-of-access suit, and the justification for recognizing that claim, is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed..."**).

In the case at bar, your Petitioner submitted said Writ of Error Coram Nobis (with copies of the relevant trial and sentencing exhibits in hand) **after** Petitioner's direct appeal was affirmed and said habeas corpus petition was denied, see **People v Caswell** 56 A.D.3d 1300 (4th. Dept. 2008) lv. denied 11 N.Y.3d 923 (2009) cert. denied **Caswell v New York** 556 U.S. 1286 (2009), **Caswell v Racetti** 2012WL1029457 (W.D. N.Y.) cert. denied sub nom. **Caswell v LaValley** 568 U.S. 985 (2012).

To be clear, the attached Writ of Error Coram Nobis **clearly** demonstrated (with said sentencing exhibits) that each life sentence was/is illegal and unlawful (a contention that the Respondent's did not refute). In regard to Respondent's Trial Exhibits #9 and #22 (DVD's), the lower courts declined to take (3) minutes to review the trial exhibits that supports Petitioner's contentions that the DVD's demonstrates that Petitioner is **"Actually Innocent"** of **all** alleged crimes (inter alia).

Indeed, there was/is no justifiable reason or excuse given by the Respondent's for their repeated refusal to provide copies of their relevant trial and sentencing exhibits for said pro se direct appeal; except for the fact that Petitioner was proceeding pro se, cf. **People v Haggray** 162 A.D.3d 1106 (3 Dept. 2018)(**granting appellate counsel motion ordering prosecutor to provide trial exhibits for direct appeal**).

As such, the deprivation of the relevant trial and sentencing exhibits for said pro se direct appeal was in clear violation of the holdings of this Honorable Court, see, **Griffin v Illinois** 351 U.S. 12, 24 (1956)("...state may not bolt the door to equal justice...") also see, **Draper v Washington** 372 U.S. 487, 495 (1963)("...constitution requires an indigent prisoner to be given access to parts of the trial record that are 'germane to consideration of the appeal'..."), **Evitts v Lucey** 469 U.S. 387, 405 (1985)("...Due Process emphasizes fairness between the State and the individual dealing with the State..."), also see, **Martinez v Court of Appeal of California, Fourth Appellate** 528 152, 163 (2000)(States can allow a defendant to proceed pro se on direct appeal, "...keeping the best interest of both the prisoner and the government in mind...").

In the case at bar, the Respondent's withheld copies of their relevant trial and sentencing exhibits hostage until Petitioner's pro se direct appeal (and habeas corpus petition) was affirmed/denied. Thus, forcing your Petitioner to "make bricks with no straw" quoting Holy Bible Exodus 5-18, also see, **Caswell v Green** 424 Fed. Appx. 44 (2 Cir. 2011).

POINT III

"IS THERE A NEW YORK STATE STATUTORY RIGHT OR A CONSTITUTIONAL RIGHT TO PROCEED PRO SE ON DIRECT APPEAL AFTER A JURY TRIAL, MARTINEZ V COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DIST. 528 U.S. 152, 163 (2000); C.P.L. ß 450.10, N.Y.S. CONST. 1 ß 6, 1 ß 11?"

In Petitioner's Writ of Error Coram Nobis, your Petitioner asked the New York State Supreme Court Appellate Division Fourth Department and the New York State Court of Appeals to declare if there was/is a New York State Statutory Right (C.P.L. ß 450.10) or a Constitutional Right (N.Y.S. Const. 1 ß 6, 1 ß 11) for a defendant in a criminal proceeding to proceed pro se on direct appeal mindful of this Court's decision in **Martinez v Court of Appeal of California, Fourth Appellate**

Dist. 528 U.S. 152, 163 (2000). Both State Appellate Court's declined to answer the question (inter alia).

To further illustrate the point, and, "keeping the best interest of both the prisoner and government in mind..." quoting **Martinez** (supra) at 163. Your Petitioner asked:

1) When does the right to proceed pro se on direct appeal must be asserted?

2) What must the would-be pro se appellant be advised of prior to the waiver of the right to assigned appellate counsel?

a) In the States that do allow defendant's to proceed pro se on direct appeal, a **"Faretta"** type hearing is conducted in the trial court to ensure that the defendant is advised of said rights, and to ensure that the waiver is made "knowingly, intelligently and voluntary" see, **Ex Parte Scudder** 798 So. 2d 837 (2001)(Alabama Supreme Court), **Coleman v Johnson** 235 Ariz. 195, 198 (2014)(Arizona Supreme Court), **Merriweather v Chatman** 285 Ga. 765 (2009)("...a defendant cannot be allowed to proceed pro se on appeal unless he is advised before hand of dangers of self-representation...in the absence of a showing in the trial court record, the defendant has not validly waived his right to appellate counsel..." at 767, Georgia Supreme Court), **Commonwealth v Staton** 608 Pa. 404 (2010)(Pennsylvania Supreme Court), **State v Rafay** 167 Wash. 2d 644, 653 (2009)(Washington Supreme Court), also see, **Gomez v Collins** 993 F. 2d 96 (5th Cir. 1993)(holding that: "Faretta inquiry should logically apply to self-representation on appeal..." at 98).

3) Does the pro se appellant have the right to be provided with a sufficient appeal record that the Respondent's must provide (noting that the pro se appellant is granted poor person stauts).

a) Petitioner's repeated motions, appeals and applications seeking copies of the Respondent's relevant trial and sentencing exhibits made prior to the submission of said pro se direct appeal; were repeatedly opposed and denied, see, **People v Caswell** A.D.# KA-07-1165 (4th. Dept. 2007)(citing **People v Gibson** 266 A.D.2d 837 (4th. Dept. 1999) lv. dismissed **People v Caswell** 9 N.Y.3d 960 (2007).

b) In denying Petitioner's copies of the relevant trial and sentencing exhibits submitted and maintained by the Respondent's, the State Appellate Court's disregarded it's own decisions and ignored the holdings of this Honorable Court, see, **People v Hall** 32 N.Y.2d 546, 551 (1973), **People v Mealer** 57 N.Y.2d 214, 219 (1982) also cf. **Griffin v Illinois** 351 U.S. 12 (1956), **Draper v Washington** 371 U.S.487 (1963).

4) Once a request to proceed pro se on direct appeal is made, can the request be rescinded?

a) After your Petitioner discovered that he could not obtained copies of the Respondent's trial and sentencing exhibits, and Petitioner could not argued the appeal over the phone (inter alia), Petitioner's application rescinding the request to proceed pro se was rejected.

5) Here it should be noted, that the common-law Writ of Error Coram Nobis was/is the proper vehicle to correct errors taking place at the State Appellate Court(s) level, see, **People v Syville** 15 N.Y.3d 391, 400 (2010) citing **People v Bachert** 69 N.Y.2d 593 (1987).

REASONS FOR GRANTING THE WRIT

Without this Honorable Court's intervention, Defendant's proceeding pro se on direct appeal (pursuant to a State Statute or State Constitution) will do so at their own peril in **violation** of both

the Due Process and Equal Protection Clause of the United States Constitution (U.S.C. 5th. 14th.) in that:

1) In the States that do allow defendant's to appeal their convictions pro se, there is no minimal "inquiry" to ensure that any waiver of the right to assigned appellate counsel (see, **Douglas v California** 372 U.S. 353 (1963)), is made "**knowingly, intelligently and voluntary**" in clear violation of **Johnson v Zerbst** 304 U.S.458 (1938) also cf. **Gomez v Collins** 993 F. 2d 96, 98 (5th. Cir. 1993)(holding that a "**Faretta**" inquiry should apply to self-representation on appeal).

a) In the case at bar, there was no inquiry whatsoever as to defendant's appellate rights, advantages/disadvantages and more importantly, defendant's responsibilities at the State Appellate levels cf. **Halbert v Michigan** 545 U.S. 605, 622 (2005).

2) In the States that do allow defendant's to appeal their convictions pro se, the State should be required to order the Respondent to provide copies of their relevant trial and sentencing exhibits critical to the outcome of the pro se direct appeal, see, **Draper v Washington** 371 U.S. 487 (1963), **Griffin v Illinois** 351 U.S. 12 (1956).

a) In the case at bar, your Petitioner spent two years filing repeated motions, appeals and application seeking copies of Respondent's Trial Exhibits (DVD's) and Sentencing Exhibits #1-#7 which the Respondent's opposed and said appeals were denied/dismissed, see, **People v Caswell** A.D. #KA-07-1165 (4 Dept. 2007)(citing **People v Gibson** 266 A.D.2d 837 (4 Dept. 1999) lv. dismissed **People v Caswell** 9 N.Y.3d 960 (2007).

b) It wasn't until after Petitioner's pro se direct appeal was affirmed, and after Petitioner's federal habeas corpus was denied, that Petitioner **finally** recieved copies of said exhibits **Caswell v Green et. al**. 424 Fed. Appx. 44 (2 Cir. 2011).

c) That with copies of the respondent's trial and sentencing exhibits, your Petitioner clearly demonstrated that each sentence imposed was/is illegal and that the conviction should have been reversed, see, Writ (passim) attached hereto as Appendix C. Nevertheless, the lower state appellate courts denied relief.

3) That after spending two years (2006-2008) filing motions, appeals, applications seeking copies of the Respondent's trial and sentencing exhibits were denied.

a) Petitioner's application rescinding pro se status should have been granted and appellate counsel assigned to perfect the appeal, see Douglas v. California, 372 U.S. 353 (1963); Evitts v. Lucey, 469 U.S. 387 (1985).

CONCLUSION

In conclusion, without this Honorable Court's INTERVENTION, the states that do allow defendants to appeal their convictions pro se will have no requirement that any waiver of the right to assigned appellate counsel be made knowingly, intelligently and voluntarily (as in the case at bar).

In addition, state appellate courts could decline to order that the respondents provide copies of their trial and sentencing exhibits relevant to the pro se direct appeal. Thus depriving the pro se appellant of a sufficient appeal record (as in the case at bar).

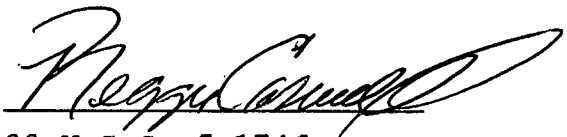
Accordingly, this Honorable Court should decree the Due Process and Equal Protection standards to state appellate courts that do permit defendants to proceed pro se on direct appeal.

Indeed, these issues directly impact the habeas corpus statute (see, 28 U.S.C. § 2254) and should be decided by this Honorable Court, "keeping the best interest of both the prisoner and the government in mind," quoting Martinez v. Court

of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 163 (2000).

Dated: Sept. 27, 2019

Respectfully submitted,



28 U.S.C. § 1746
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