No. 19-8331

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE A. RODRIGUEZ- PETITIONER

VS.

THOMAS GRIFFIN-RESPONDENT

ORIGINAL

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSE A. RODRIGUEZ, #11B3913

GREEN HAVEN CORRECTIONAL FACILITY

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QUESTION(S) PRESENTED FOR REVIEW

1. Whether the State Court constructively amended the indictment which charged petitioner on September 1, 2009 through September 1, 2010, before the New York State Penal Law § 220.77 (1), Operating as a Major Trafficker statue, went into effect and the instructions altered an essential element of that crime by refusing to re-submit indictment to the Grand Jury?

2. Whether petitioner enjoyed the Right to Counsel at the initial arraignment proceeding during a critical stage, haven been charged of the highest felony offence in New York State, an A-1 felony and is appellate counsel ineffective for failing to raise such colorable claim?

3. Whether the lower federal courts legally and factually circumvented and debased committing structural U.S. Constitutional error in failing to follow Supreme Court precedent by ruling that petitioner has not exhausted his federal claims in State court?

LIST OF PARTIES

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

[ ] All parties do not appear in the caption of the case on the cover page. A list of all Parties to the proceeding in the court whose judgment is the subject of this Petition is as follow:

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U.S. v. Young 470 U.S. 1 (1985);

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People V. Taylor, 156 AD3d 86 (3rd Dept. 2017).

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STATUES AND RULES

New York State Penal § 220.77 (1)

New York State Penal § 220.00 (19)

Criminal Procedure Law 470.05

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

See Appendix A-F

JURISDICTION

This court has jurisdiction to hear this matter. Certificate of Appealability to the Second Circuit (#19-79) was not issued and denied on 8/14/2019 . An En Banc to the Second Circuit, Court of Appeals was denied on 12/17/2010.

RELEVANT CONSTITUTIONAL PROVISION

- The Fifth Amendment to the United States Provides in relevant part that "no person shall be held to answer of a capitol, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury..."
- The Sixth Amendment to the United States Provides in relevant part that "In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation... and to have the Assistance Counsel for his defense.
- The Fourteen Amendment to the United States Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law"

THE STATEMENT OF FACTS

In 2009 and 2010, two police officer conducted controlled drug buy operations targeting local dealers. Each were arrested and charged with felony drug offences in New York State. In turn, the arrestees cooperated to testify that they were being supplied by or working for petitioner. The wholesale lack of investigation is stunning. Petitioner never possessed any drugs, not a single attempt by police to conduct a controlled drug buy operating against petitioner; no eavesdropping warrant to any recordings; nor any video or audios surveillance conducted; no subpoena of records from any money-wiring services as to the herculean amount of money testified was never recovered and no drugs were recovered.

It is the above reason that is appropriate to surmise the lack of interest from the US Attorney General, Department of Justice, and the Drug Enforcement Administration. Those arrestees became accomplice at trial and one confidential informant, who never met petitioner, also testified. On December 17, 2010, Rodriguez was arraigned in Otsego County Court. There was no counsel present during this critical stage. Without hearing from the court or any counsel within almost a month, Rodriguez family retained counsel. Before the jury started to deliberate at trial defense counsel noticed, then protested, that the indictment charges petitioner from September 1, 2009 through September 1. 2010, before the operating a major trafficker went into effect. Upon the jury conclusion during

deliberation, petitioner at the age of 27 was sentence for the non-violent drug crime to 40 years in New York State prison.

At the state level appeal, petitioner requested permission to submit a supplemental brief asserting US Constitutional grounds but denied by the New York State Appellate Court, third department and State Court of Appeals. Petitioner also submitted a post-conviction motion pursuant to criminal procedure law 440.20, but the continuous constitutional claim was not heard. The Northern Federal District stated that the petitioner did not exhaust his remedy. The Second Circuit Court of appeal denied Certificate of Appealability. This petition issued.

REASON FOR GRANTING THE WRIT

POINT I

THE QUESTION PRESENTED ARE WHETHER THE LOWER FEDERAL COURT IGNORED THE STATE JUDGE CONSTITUTIONAL VIOLATION IN CONSTRUCTIVELY AMENDING THE INDICTMENT SUBSEQUENTLY ALTERING AN ESSENTIAL ELEMENT OF THE CRIME.

Petitioner was the first defendant convicted at trial of Operating as Major Trafficker in New York State. It was only before jury deliberation, trial counsel notice that the indictment charged petitioner under New York State Penal Law 220.77 as follow:

> **"That the defendant, Jose A. Rodriguez, between the 1st day of September, 2009 and the 1st day, in the city of Oneonta and state of New York, did act as a director of controlled substance organization**

during which period the organization sold on or more controlled substances, and the proceeds collected or due from such sales had a total aggregate value of seventy-five thousand dollars ($75,000) or more. See Indictment at SR 296.

The time "period twelve months or less" is an essential element to the statue in question. See New York State Penal Law §220.77 (1). Nevertheless, November 1st, 2009 is the enactment of penal law 220.77, not September 1st, 2009 as assumed by the State and noted in the indictment. See Indictment and Bill of Particular as Appendix H. It is incontrovertible that the indictment charged petitioner from September 1st, 2009 through September 1st, 2010, before the statue went into effect. It is also undisputed that the time "period" twelve months or less, an essential element, was altered by the jury instructions affecting the core criminality of the trial. Moreover, the evidence solicited (as charged in the indictment as lesser counts) from the witnesses are from events that happened before November 1st, 2009, the effective date of the crime in question. After the Indictment changed it was no longer the indictment presented to the Grand Jury.

The constitutional per-se violation, which so infected the trial outcome, became a protest in the state trial court and was fairly exhausted, and clearly preserve pursuant to the state criminal procedure law C.P.L. 405.15 for federal review. Thus the claim should not have been barred. Faced with this scenario, the state court denied the prosecutor from doing as suppose: What the Fifth Amendment to the United States Constitution requires. Instead, the State court decided to disregard the prosecutor and simply instruct the jury that it could not

consider any evidence or testimony related to the time period of September 1st, 2009 to October 31st, 2009 during their deliberation on the charges of Operating as a Major Trafficker. This was a no no. It was like telling the jurors to disregard the pink elephant that just ran across the court room. See trial transcripts 1254-1256, 1327-1329 at Appendix – I.

In **Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781 (1887),** overruled on other grds., **United States v. Miller, 471 U.S. 130**, 105 S.Ct. 1811 and **Untied States v. Cotton, 535 U.S. 625, 122 S.Ct 1781 (2002),** the Supreme Court cautioned on the danger of the grand jury and individual rights protected thereby becoming feckless through the amendment of an indictment:

> **If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a [defendant's] trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.**

Id. at 10, 7 S.Ct 781. Then, in addressing the ultimate issue of the impact of when an indictment is amended, the Supreme Court in ***Bain*** proceeded to hold:

> **that after the indictment was changed it was no longer the indictment of the grand jury indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision at the mercy or control of the court or prosecuting attorney, for if it be once held that changes can be made by the consent or**

> **order of the court in the body of the indictment as presented by the grand jury, and the [defendant] can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court in regard to the prerequisite of an indictment in reality no longer exist.**

Id. at 13, 7 S.Ct. 781

While *Bain* dealt with an amendment of an indictment so as to narrow the criminal charges, supra, in **Stirone v. United States**, 361 U.S. 212, 80 S.Ct. 270 (1961) and its progeny, Supreme Court directly addressed the situation when the scope of the charges are broadened by amendment:

[A]fter an indictment has been returned and criminal proceedings are underway, the indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself...

The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.

Id. at 215-16 & 218, 80 S.Ct. 270.

While the indictment in *Stirone* identified the article impacted as being sand, at trial the government offered evidence that steel shipments were also affected. By the trial court allowing the admittance of evidence going to the impact on steel shipment (which were not identified in the indictment), the Supreme Court rejected the contention that it was simply a variance between allegation and proof:

> **Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same... While there was a variance between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a**

> **basic right is far too serious to be treated as nothing more than a variance, and then dismissed as harmless error.**

Id. at 217, 70 S.Ct. 270. Thus, because the indictment in *Stirone* charged a specific type of commodity was impacted, the defendant could not be tried (and convicted) upon proof of a different commodity also being impacted:

> **when only one particular kind of commerce is charged to have been burdened, a conviction must rest on that charge, and not another, even though it be assumed that, under and indictment drawn in general terms, a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment.**

Id. at 218-19, 80 S.Ct. 270.

In a nutshell, constructively amending an indictment is a per-se violation which was certainly overlooked by the lower state and federal courts. Thus a petitioner raising a constructive amendment violation claim must establish that "the presentation of evidence [or] jury instructions... so modify[ied] essential elements of the offense other than that charged in the indictment" **United States v. Vilar,** 729 F.3d 61. 82 (2nd Cir. 2013). As seen in the beginning of this claim, a constitutional claim occurred. Mr. Rodriguez unquestionably could have been indicted on different charges such as a B-Felony, conspiracy, instead of the A-1 Felony as convicted if the state court would have adhered to the US Const. Fifth Amendment and resubmit to the Grand Jury.

Alternative variance occurring due to adding a new time period to the indictment, broaden the offense, and because of it, Rodriguez was certainly prejudice due to the State court denying the prosecutor the right to resubmit to the grand jury, leaving the indictment defective. A "variance occurs when the charging terms of the indictment is left unaltered, but the evidence in the trial proves facts materially different from those alleged in the indictment" **United States v. Salmones** 352 F.2d at 621. The state trial records are clear as day, for example:

Jessica Gaston testified to giving rides for the purpose of transporting drugs before the operating as major trafficker charge went into effect from April 2009 to September 2009. T. 844. 872.[1] Another witness, Jordan Krone testified that he started working for Mr. Rodriguez in 2008. T.1154-1159 Another witness, Rebecca Kennedy, testified that she sold to a confidential informant on September 2, 2009 SCR 329. Also see indictment More evidence of variance took place at trial. See Bill of Particular. The witnesses were part of the element "four or more" under the controlled substance organization statue within operating as a major trafficker. New York Penal Law 220.00 (19).

In any event, without first re-submitting to the Grand Jury, Mr. Rodriguez asserts that the deviation between the text in the indictment and jury instructions to the jurors affected the 'core of criminality' at the trial and modified an 'essential element' of the crime. When an essential element of the charges has been altered without resubmission to the grand jury, depravation of such right is far to serious to

[1] T. are trial transcripts found at Appendix I

be treated as nothing more than a variance and then dismissed petitioner constitutional claim without first correcting it. *Stirone* supra at 7.

POINT II

THE QUESTION PRESENTED IS WHETHER PETITIONER ENJOYED THE SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO COUNSEL AT A CRITICAL STAGE DURING ITS INITIAL ARRAIGNMENT

It is well settled that every State Criminal defendant has a due process right to effective assistance of counsel on direct appeal. This requires appellate counsel to act as an advocate, not merely as a amicus curie, and to marshal legal arguments on appellant behalf in order that he may have a full and fair resolution and consideration on his appeal. **Evitts v. Lucey, 469 U.S. 387 (1985); Anders v. California, 386 U.S. 738, 7430758 (1967).** As recently mentioned by the U.S. Supreme Court in **Davlla v. Davis;** "**In most cases, and unpreserved trial error would not be a plainly stronger ground for appeal then preserved errors.**" 137 S.Ct 2058, at 2067 (2017). Three out four grounds were unpreserved at petitioner direct appeals. There is a reasonable probability that had appellate counsel raised the ground below, which were ripe for review due to trial ineffectiveness and/or because those issues were on the record, appellant State direct appeal result would have been different. **Strickland V. Washington** at 694-695.

Actually or Constructively denied counsel at arraignment

The Sixth Amendment of the United States provides that: "In all criminal prosecution, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." **Gideon v. Wainwright**, 372 U.S. 335 (1963). Also see, **United Sates v. Cronic,** 466 U.S. 335 (1963) ["the court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding"]. Arraignment is so critical of a stage. **Hamilton v. Alabama**, 368 U.S. 52, 54 (1961)

The Northern Federal District Court stated that: "Petitioner was able to have the benefit of counsel's advice and advocacy at that critical stage in his trial" and cited State common law in **People v. Young**, 35 Ad.3d 958, 960 (3rd Dept. 2006), stating that the "error had no impact on the case as a whole". **Rodriguez v. Griffin** 2018 WL 6505808 *27. Not true, the record show that there was no counsel in attendance to benefit of any advice or advocacy at that "critical [arraignment] stage" **(See Arraignment Transcripts at Appendix G)**. Second, it relied on a State common law case instead of the US Constitution in which *Young* allege that he was not "represented by counsel at this second arraignment" after a felony complaint while Mr. Rodriguez declares a U.S. Constitutional Violation because he did not have the right to Counsel representation at his *initial* arraignment after a sealed indictment.

In New York, arraignment is, as a general matter, such a critical stage. Serious questions have, however, arisen in many jurisdictions in the United States

as to whether *Gideon's* mandate is being met in practice. **Hurrell-Harring v. State of New York**, 15 N.Y. 3d 8, 20 (May 6th, 2010) citing *Gideon v Wainwright.* As erroneously stated by the District Court, is not what happened at the second arraignment, but the need for counsel that without, harm appellant at his first arraignment. See Mr. Rodriguez would have copped out to a favorable plea like he had done in the past at arrangement. For example, in 2007 appellant was before that very same New York State, Otsego County Court under indictment 2007-032 in which he was initially arranged on April 27th, 2007, facing a sentence of 18 years, but accepted a favorable plea bargain of 2 years on the day of that initial arraignment back then and sentenced within 28 days (May 25th, 2007). The difference between that 2007 indictment and indictment at hand (2010) is that Mr. Rodriguez had counsel representation at that initial arraignment and counsel was capable of negotiating a favorable plea right there & then with the State. But here in the 2010 indictment there was no Counsel available to negotiate any plea offers with anyone. Coincidentally, the 28 days that appellant was without counsel in the indictment at hand was the same amount of days (28) that it took appellant to dispose and get sentence in the 2007 indictment. A counsel presence made the difference.

The United States Supreme Court has already identified pre-trial negotiations to be a "critical stage" for purposes of the sixth amendment. **Missouri v. Frye**, 132 S.ct at 1399 1405; **Lafler v. Cooper**, 132 S.ct 1376, s1384. It is not uncommon that pretrial negotiations would involve multiple separate offenses and

that separated offenses, like the one at hand would have then been package into one global plea. This gap of without Counsel in petitioner case culminated to a 40 years sentence instead of 12 to 24 years sentence range if counsel would have been available at arraignment: Mr. Rodriguez would have certainly taken a plea of 12 years as offered. People v. Rodriguez, 121 ad3d 1435 (3rd Dept. 2014).

POINT III

THE QUESTION PRESENTED IS WHETHER PETITIONER EXHAUSTED THE US CONSTITUTIONAL VIOLATION IN STATE COURT BEFORE SEEKING RELIEF IN THE FEDERAL COURTS.

This Court has emphasize in **O' Suvillan v. Boerckel, 526 U.S. 838 (1999)** that petitioner (as did) must present their federal claims for one complete round of review in State Court in order for those claims to be deemed exhausted for federal review. To satisfy the exhaustion requirement, the claim raised in the state court must be the "substantial equivalent" of the claim raised in the Federal Petition. As noted below the lower Federal system has precluded reviewing Mr. Rodriguez claim unpreserved. **Picard v. Connor, 404 U.S. 279 (1971).**

a) According to State Court Records, subsequently raised in Federal Court, Mr. Rodriguez filed a Motion to file a Pro-Se brief to the Appellate Division, Third Department asserting U.S. Constitutional Violations on December 19th, 2013:

> **"The Defendant-Appellant was deprived of His Fundamental Right to A Fair Trial, Due to Prosecutor's Misconduct throughout trial by**

Violating Pre-trial Ruling and Improper comments during summation In Violation of U.S. Const., Amend.5,14; N.Y.Art. I §6"

"The Defendant-Appellant was Seriously Prejudiced by trial court's Failure to Provide Jury's Requested Read Back of Relevant testimony. The court Also Committed "mode of proceeding Error" And Violated C.P.L § 310.30, U.S. Const. Amend. 5,6,14; N.Y. const I §6.

Both State Appellate division and Court of appeal affirm **SCR 024-027,200,203.**[2] Also See Appendix B. But the Northern Federal District Court stated the following: that the "PROSECUTORIAL MISCONDUCT & THE JURY'S NOTE" claim, was "never asserted an independent claim for relief on these grounds in state court during his *direct appeal*...Accordingly, the claim are unexhausted."See **Rodriguez v. Griffin** *2018 WL 6505808* at *23. Contrary to the above ruling, appellant fairly presented those claims and are indeed exhausted. The Second Circuit did not correct what the Northern District fail to notice.

Later, Mr. Rodriguez filed a Post-Judgment motion to set-aside his sentence under New York State Criminal Procedural Law 440.20, among other things, based on Double Jeopardy Clause (**SCR** 250-252). Claiming that Penal Law 220.77 (1), Operating as Major Trafficker, is a continuous crime which requires proof of several additional elements and statues such as Penal Law 220.39 (1) to make out the crime. Requiring a 20 years sentence, instead of the 40 year consecutive sentence imposed. Rodriguez did cite the following U.S. Constitutional Federal Law in the New Your Post Conviction CPL 440.20 motion: **Blockburger V. United**

[2] SCR to the State Court Record as reference by the Respondent in the Lower Federal Court.

States 284 U.S. 299 (1932); **Jeffers V. United States** 423 U.S. 137 (1977); **In re Snow** 120 U.S. 274 (1887). However, hereto the federal lower court totally overlooked the above sub-claim in its decision (**SCR** 385) and the Federal Court has failed to adjudicate appellant claim on the merits. See Motion to set aside the sentence (CPL 440.20) as Appendix M. No court has heard this claim.

c). Concerning the Prosecutional Misconduct claims overlooked by the Lower Federal court, State Appellate Court and appellate counsel, Mr. Rodriguez trial counsel submitted an Omnibus Motion relating to the introduction of recorded conversation. The State was "prohibited from so doing". **SCR** 138,142,153. The aggravating blunted impact of such conduct cannot be overestimated; improper conduct that might merit judicial rebuke but affirmance of a conviction often becomes prejudicial error requiring reversal, especially after repeated warnings. No "look through" was done by the lower federal courts although the breach of not referring to the recorded conversation was violated. **SCR 473-474. Wilson v. Seller**, 138s.ct 118 (2018); See **People v. Rosenfeld** 11 N.Y.2d 290, 297 (1962); **People v. Heckstall 90 A.D.2d 835** (2nd Dept. 1982); **People v. Calabria, 94 A.D. 519, 522** (2000).

For example, in **United States v. Jackson 621 F.2d 220**, the Court held an "Omnibus hearing" after which the prosecutor agreed that he would **not,** unless subsequent development disclosed use prior acts and convictions of a similar nature to prove guilt. At trial, however, the prosecutor violated pre-trial agreement by introducing considerable evidence of prior similar acts and offences. Two factors

usually are cited. First, the Court should inquire whether the defendant had reasonable notice and, second, whether the reason for the release outweighs the potential for prejudice. **U.S. v. Seeright 978 f.2d 842**, 36 Fed. R. Evid. Serv. 1399 (4th Cir. 1992). The Second Circuit Court of Appeal should have adopted the above standard.

The questions of importance here are whether the witness "can testify as to what he heard over that telephone call during the course of a criminal transaction" although the lower Court stated it couldn't at the pre-trial stage. Second, whether the officer's testimony of allegedly speaking to appellant was from another uncharged crime, was erroneously accepted. Third, whether "there is a difference between a person testifying as to what they heard and playing (the actual recording) in Court"? **T.** 782-791; substantial prejudice not mentioned **T.** 815-833; **SCR.** 563-581. See **Bruton v. U.S. 392 U.S. 123 (1968)**. Even with the State having committed the sin, it is doubtful if any instructions had the desired effect in the matter as a hole, especially after failing to strike the first part of the answer – it would have been like telling the Jurors to disregard the pink elephant that just ran across the Courtroom.

d). Further, concerning the violation during summation not raised by appellate counsel, the Second Circuit has articulated the following:

> **"The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, But rather of a federal Official duty-bound to see that justice is done. The jury knows that he has**

> **prepared and presented the case and that he has completed access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be. Personal expression of opinion are especially improper if phrased to leave the impression that the prosecutor opinion is based on matters in the investigate file and not in the trial evidence"**

U.S. v. Modica,663 f.2d 1173 (2nd Cir. 1981). Compare **U.S. v. Young 470 U.S. 1 (1985);U.S. v. Murphy 768 f.2d 1518,1534 (7th Cir. 1985).** *Young* and *Murphy* also condemned prosecutors, but did not reverse the convictions because there was no objection and found no "plain error. Similarly criticized in **U.S v. Wallace 848 f2d. 1464, 1473 (9th Cir. 1988)**, but again there was no reversal because trial counsel had not objected and the appellate Court again held that it was not a "plain error". Moreover, prosecutor has "a special duty not to mislead" **U.S. v. Myerson, 18 f.3d 153,** 40 **Fed. R. Evid.** 601 (2nd Cir 1994) or become an unsworn witness. There is a conflict among circuits on this matter.

Timely objections were made here. For example, *characterizing* Mr. Rodriguez as a "criminal master mind" **SCR**. 585-586. *Reversing the burdened of proof and vouching*: "their testimony is consistent with each other... and Mr. Slovis would have you believe it's one lie corroborating another" **SCR** 588. "Conspiracy Theory" **SCR** 589. *Demeaning counsel*: as "mislead" in impeaching the State witness. Again, *reversing the burden of proof*: "You're being asked to view the evidence as it is **NOT**, as is **NOT** in the record. The defendant wants to believe".

The appellant did not take stand. SCR 591. *Further vouching*: "the witness are telling the truth for him, but not for the defendant?...Because he's Flip, because they're telling the truth" **SCR** 592. *Matters not in evidence and personal opinions*: "trail they traced"(**SCR** 593),"I guaranteed you back in to Bronx he had [drug] records of what was going on", "I submit to you that someone who is this careful would have kept records" (**SCR** 594-595). *Preparation of defense witness:* "Even without the defense conceding he had and knew the defendant, how would he know to call him as a witness if he did know"? (**SCR** 596). *Reasonable Doubt*: "There is no doubt" that defendant sold a mostly $ 75, 000 between", but the actual sales charges appellant was convicted did not exceed $400 dollars.

No curative instructions were given after. Counsel did not have to go further and request a curative instruction since such instruction was clearly called for after the objections. ***US v. Roberts***, 618 f2d 530, 534 (9th Cir. 1980). ***Trial counsel was thereby damned by his valid and proper objections.*** Case after case criticizes trial counsel for not objecting to Prosecutorial Misconduct and affirming based on the "plain error" doctrine. **US v. Wilkins 754 f2d 1427, 1435 (2nd Cir. 1985);** Criteria to consider, **US v. Pena 793 f2d 486 (2nd Cir. 1986).** The State motion court, the State Appellate Court, the Federal Court, and the Second Circuit Court of Appeals have abortive to reach the merit of appellants exhausted claims as unpreserved.

Concerning petitioners *Brady* Claim, **Rose v. Lundy 455 U.S. 509, 515 (1982)** and **Zarvela v. Artuz 245 F.3d 374, 379-382 (2nd Cir. 2001)** has told

the federal district court that they must dismiss State prisoners habeas corpus 'mixed petition' containing both unexhausted and exhausted claims. It should have done so for the issues mentioned above and the *Brady* claim mentioned here. Materiality and exculpatory are a question of exceptional importance and Mr. Rodriguez had requested for the unexhausted ***Brady*** claim to be reviewed *de novo* in his federal habeas corpus, although the sub claim was raised in Mr. Rodriguez Amended Petition at 13 as prosecutorial misconduct but not raised independently in the State Courts. **Rodriguez v. Griffin, 2018 WL 6505808** at *23. Reason for not bringing such claim in the lower court is because appellant made a FOIL request to the District Attorney's (DA) office on 3/18/15. It was revealed that the DA did not turn over certain material related to a testifying witness, Mark Rathbun, relating to the events of what happened *after* his arrests not documented in the initial police report and the same reason why appellant submitted a motion to compel. **See.** (FOIL #45, 46, 48, 98 at Appendix K). In any event, Respondent did not expressly waived appellant claim, but heard it on its merits so should have the Federal Court.

Federal Court had a lot of different options but to relinquish Mr. Rodriguez *Brady* claim. The petition could have been held in abeyance pursuant to **Rhines v.Weber 544 US 269 (2005)** or dismiss pursuant to ***Rose v. Lundy*** *supra.* What's extra, Mr. Rodriguez has not filed **CPL** 440.10 motion in the State Court containing on and off the records allegations, as he still had the remedy to do so. **People V. Taylor, 156 AD3d 86 (3rd Dept. 2017).**

Furthermore, the search warrant application, consent statement by Rathbun, search warrant, and premise records of the crime scene are exculpatory and impeachment by nature. **SCR** 469-474. Evenly importantly, Rodriguez did not receive any documents concerning Foil request #98 in which the DA responded that it "would disclose the identity of confidential sources". Mr. Rodriguez was not aware that there were any confidential sources relating to Mark Rathbun which was another reason why appellant submitted the Motion to Compel to the District Court and this court should consolidate the matter. Mr. Rodriguez is entitled to this unknown information about confidential sources, especially since he was never charged for that Rathbun crime, but used to enhance elements (four or more) in the Operating as major trafficker. **SCR** 561. See Police Report at Appendix L. **Roviaro v. U.S. 353 U.S. 53**, 60-61; **Pennsylvania v. Rithie 480 U.S. 39-60 (1987).**

Further attestation, there is nothing in the initial police report of 256 bags of heroin seized at the apartment, aside from the "fifty –six packets of heroin [that] were seized from the vehicle", nor was there any mention of a search warrant application, Statements or any other withheld information of the events ***after*** Rathbun arrest, *not before the arrest as asserted by the respondent* in the lower federal court (**See. SCR** 550-554, 557, 559-560). Something is not right here.

Conclusion

For the foregoing reasons this honorable court should grant petitioner the Writ of Certiorari and rule in the totality of all the circumstances found in this petition. Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Dated: March 6th, 2020

Respectfully Submitted,

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