

INDEX TO APPENDICES

STATE OF NEW YORK
COURT OF APPEALS

The People &c. ex rel. Miguel DeFreitas,

Appellant,

v.

Jaifa Callado, &c.,

Respondent.

NOTICE OF ENTRY


Mo. No. 2019-1026

PLEASE TAKE NOTICE that the within is a true and complete copy of the Order duly entered in the above-entitled matter in the Court of Appeals on February 18, 2020.

Dated: Albany, New York
February 27, 2020

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

By:


MARTIN A. HOTVET
Assistant Solicitor General
Telephone (518) 776-2048
OAG No. 18-011475

TO: Miguel DeFreitas, #92-A-5961
Shawangunk Correctional Facility
200 Quick Road, P.O. Box 700
Wallkill, New York 12589

AI

State of New York Court of Appeals

Decided and Entered on the
thirteenth day of February, 2020

2020 FEB 18 AM 11:36

ALBANY COUNTY
RECORDING

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2019-1026

The People &c. ex rel. Miguel DeFreitas,
Appellant,

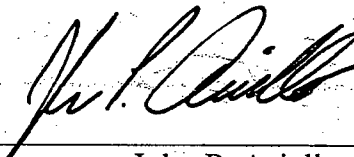
v.

Jaifa Callado, &c.,
Respondent.

Appellant having moved for leave to appeal to the Court of Appeals in the
above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.



John P. Asiello
Clerk of the Court

A2

H. J. vet
18-011475

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: October 25, 2019

527771

THE PEOPLE OF THE STATE OF NEW
YORK ex rel. MIGUEL DeFREITAS,
Appellant,

v

DECISION AND ORDER
ON MOTION

JAIFA CALLADO, as Superintendent of
Shawangunk Correctional Facility,
Respondent.

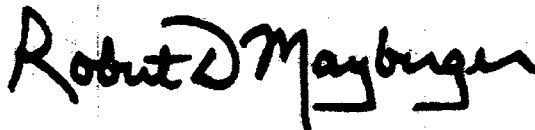
Motion for reargument or, in the alternative, for permission to appeal to the
Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition
thereto, it is

ORDERED that the motion is denied, without costs.

Garry, P.J., Egan Jr., Clark and Devine, JJ., concur.

ENTER:



Robert D. Mayberger
Clerk of the Court

A3

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 23, 2019

527771

THE PEOPLE OF THE STATE OF
NEW YORK ex rel. MIGUEL
DeFREITAS,
Appellant,

v

MEMORANDUM AND ORDER

JAIFA CALLADO, as
Superintendent of
Shawangunk Correctional
Facility,
Respondent.

Calendar Date: April 19, 2019

Before: Garry, P.J., Egan Jr., Clark, Devine and Rumsey, JJ.

Miguel DeFreitas, Wallkill, appellant pro se.

Letitia James, Attorney General, Albany (Martin A. Hotvet
of counsel), for respondent.

Appeal from a judgment of the Supreme Court (Cahill, J.),
entered October 3, 2018 in Ulster County, which dismissed
petitioner's application, in a proceeding pursuant to CPLR
article 70, without a hearing.

Petitioner was convicted in 1992 of, among other crimes,
attempted murder in the first degree and two counts of robbery
in the first degree, for which he is serving an aggregate prison
term of 52½ years to life in prison, and his convictions were
affirmed on his direct appeal (People v DeFreitas, 213 AD2d 96

2A

A4

[1995], lv denied 86 NY2d 872 [1995]). In 2018, petitioner commenced this CPLR article 70 proceeding seeking a writ of habeas corpus contending, among other things, that the indictment under which he was convicted was defective due to improper joinder of charges under repealed statutory provisions. Supreme Court dismissed the petition, and this appeal ensued.

It is well settled that "habeas corpus is not the appropriate remedy for raising claims that could have been raised on direct appeal or in the context of a CPL article 440 motion" (People ex rel. McCray v LaClair, 161 AD3d 1490, 1491 [2018] [internal quotation marks, brackets and citation omitted], lv dismissed and denied 32 NY2d 1143 [2019]; see People ex rel. Nailor v Kirkpatrick, 156 AD3d 1100, 1100 [2017]). Petitioner's contentions with regard to improper joinder and the validity of the indictment concern matters that could have been raised on direct appeal, but were admittedly not so raised and, thus, habeas corpus relief is not available (see People v LaValley, 102 AD3d 1038, 1039 [2013]). To the extent that petitioner argues that appellate counsel was ineffective for failing to raise this challenge on his direct appeal, an application for a writ of error coram nobis is the appropriate vehicle by which to raise such a claim (see People ex rel. Williams v Griffin, 114 AD3d 976, 976 [2014]), an avenue that he has pursued, unsuccessfully, four times (People v DeFreitas, 262 AD2d 499 [1999]; People v DeFreitas, 60 AD3d 1080 [2009], lv denied 12 NY3d 914 [2009]; People v DeFreitas, 95 AD3d 902 [2012], lv denied 19 NY3d 1025 [2012]; People v DeFreitas, 156 AD3d 718 [2017], lv denied 30 NY3d 1115 [2018]).

Notably, petitioner raised similar claims in a prior motion to vacate the judgment of conviction pursuant to CPL article 440, which was denied in 2011 on the ground that the claims are based on matters in the record and could have been raised on direct appeal (see CPL 440.10 [2] [c]; People v Cuadrado, 9 NY3d 362, 364-365 [2007]; People ex rel. Chapman v LaClair, 64 AD3d 1026, 1026 [2009], lv denied 13 NY3d 712 [2009]).¹ In any event, inasmuch as none of the grounds asserted

¹ Petitioner's request for permission to appeal from the order denying his motion pursuant to CPL article 440 was reportedly denied on July 8, 2011.

A5

by petitioner would entitle him to immediate release from custody, habeas corpus relief is inappropriate (see People ex rel. Kaplan v Commissioner of Correction of City of N.Y., 60 NY2d 648, 649 [1983]; People ex rel. Rodriguez v Miller, 150 AD3d 1500, 1500-1501 [2017]). Accordingly, Supreme Court properly dismissed the petition (see CPLR 7803 [a]).²

Garry, P.J., Egan Jr., Clark, Devine and Rumsey, JJ.,
concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

Robert D. Mayberger

Robert D. Mayberger
Clerk of the Court

² To the extent that Supreme Court indicated that the dismissal was "without prejudice to renewal as a CPL 440.[10] motion," any such motion would be subject to the restrictions in CPL article 440.

A6

STATE OF NEW YORK
SUPREME COURT

ULSTER COUNTY

The People of the State of New York, ex rel.,

MIGUEL DeFREITAS, 92A5961

Petitioner

-against-

Decision & Order

Index No.: 18-2380

JAIFA CALLADO, SUPERINTENDENT OF
SHAWANGUNK CORRECTIONAL FACILITY,

Respondent.

Supreme Court, Ulster County

Motion Return Date: August 1, 2018

RJI No. 55-18-01079

Present: Christopher E. Cahill, JSC

Appearances: MIGUEL DeFREITAS #92A5961
Petitioner, Pro Se
Shawangunk Correctional Facility
PO Box 700
Wallkill, New York 12589

BARBARA D. UNDERWOOD
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224
By: Brian W. Matula, Esq.

Cahill, J.:

The petitioner/relator has brought this habeas corpus petition to obtain his immediate release from state custody. In support of his petition, he asserts that the Nassau County indictment which was the basis of his conviction of the crimes for which he is incarcerated was void *ab initio*, thus rendering his conviction void. He also seeks the appointment of counsel and a copy of the minutes of the grand jury proceeding which resulted in his indictment.

After reviewing the submissions, the court concludes that the petition must be dismissed without prejudice to renewal as a CPL 440.00 motion in the court of conviction. The court agrees with the respondent that the claims that petitioner/relator has asserted that repealed provisions of the Code of Criminal Procedure, Section 279 were used to join the separate charges in petitioner/relator's indictment, must be raised in a CPL 440.00 motion to set aside the indictment (see e.g. Peo. ex rel Shafter v. Leonardo, 178 Ad2d 704 [3rd Dept. 1991] lv denied, 79 NY2d 754 [1991]). In addition, even if Mr. DeFreitas is successful on his claims, he will be entitled to a retrial but not to immediate release (see e.g. Peo. ex rel Douglas v. Vincent, 50 NY2d 901 [1980]).

In view of this dismissal, petitioner/relator's motion for appointment of counsel and for a copy of the grand jury minutes is denied without prejudice to renewal in the court of conviction.

This decision/order is without costs to either party.

This shall constitute the Decision and Order of the court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York

October 1, 2018

ENTER,


CHRISTOPHER E. CAHILL, JSC

Papers considered: Writ of habeas corpus dated July 11, 2018, notice of petition for a writ of habeas corpus dated June 20, 2018, petition dated June 20, 2018 and exhibits 1 to 7; respondent's return dated August 1, 2018 and annexed exhibits A and B; reply dated August 8, 2018.

COUNTY COURT - STATE OF NEW YORK

Present:

HON. MERYL J. BERKOWITZ,
County Court Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Motions No. C-861
C-956

-against-

MIGUEL DEFREITAS,

Defendant(s).

District Attorney
Nassau County
A.D.A. Andrea M. DiGregorio, Esq.
Mineola, NY 11501

Miguel DeFreitas
Defendant pro se
#92A5961
Shawangunk Corr. Facility
P.O. Box 700
Wallkill, NY 12589

Defendant moves to vacate judgment of conviction (C-861) and for a CPL 440 order (C-956) based on the People's failure to file opposition on original return date of motion C-861.

Defendant was convicted after trial for attempted murder 1st Degree (PL 110/125.27), two counts Robbery 1st Degree (PL 160.15(2)(4), Criminal Possession of a Weapon 3rd Degree (PL 265.02(4)) and Reckless Endangerment 1st Degree (PL 120.55). On June 9, 1992, Defendant was sentenced (Baker, J.) to 25 to life on the attempted murder, 12½ to 25 on each Robbery 1st (consecutive), 2½ to 7 on the Reckless (consecutive) and the remaining counts concurrent lesser time.

On April 5, 1994, Defendant's assigned appellate counsel filed a brief on Appeal. Procedural issues arose during appeal. Ultimately, on August 14, 1995, the Appellate Division affirmed Defendant's judgment of conviction. On October 12, 1995, the Court of Appeals denied leave to appeal.

Thereafter, Defendant, pro se, filed a coram nobis petition, on February 26, 1999, which was denied.

On January 2, 2009, Defendant by counsel, brought another writ of error coram nobis, which was again denied, and not given leave to Appeal by the Court of Appeals.

All of the claims Defendant sets forth in motion C-861 are based on matter of record and are summarily denied. (CPL 440.10 (2)(c).

A9

A9

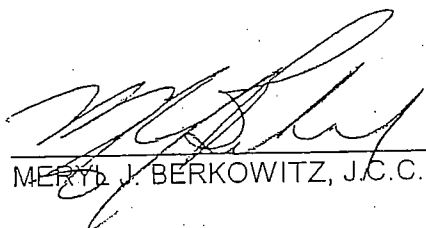
Defendant's motion (C-956) is denied, as the Court granted the Peoples application for an extension of time.

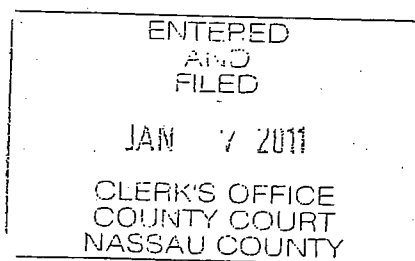
This constitutes the decision and order of the Court.

SO ORDERED:

Dated: 1/6/11

Mineola, NY


MERTIN J. BERKOWITZ, J.C.C.



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT
-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

A.D. No. 92-04806
AFFIRMATION IN
RESPONSE

MIGUEL DEFREITAS,
-----X

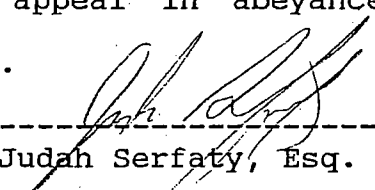
STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

JUDAH SERFATY, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms under the penalties of perjury:

1. I am attorney associated with Matthew Muraskin, Attorney in Charge of the Legal Aid Society of Nassau County and counsel assigned to represent the above-named defendant in an appeal before the Appellate Term, Second Department, from a judgment of conviction rendered on October 23, 1992.

2. I make this affirmation in response to the appellant's motion to hold his appeal in abeyance, so as to allow him to move this Court for a new assignment of appellate counsel.

3. While our office has provided appellant with proper representation, to the extent that appellant contends that he is not satisfied with his current appellate representation, we do not oppose his request to hold the appeal in abeyance and for assignment of new appellate counsel.



Judah Serfaty, Esq.

DATED: Hempstead, New York
November 21, 1994

Al

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

MIGUEL DeFREITAS,

Defendant-Appellant.
-----X

AFFIRMATION
IN OPPOSITION

A.D. No. 92-04806
Ind. No. 77897

ANDREA M. DiGREGORIO, an attorney duly admitted to practice law in the State of New York, affirms the following under the penalty of perjury:

1. I am an Assistant District Attorney, of counsel to the Honorable Denis Dillon, District Attorney of Nassau County, and submit this answer to defendant's pro se motion, returnable December 2, 1994, for an order to hold his appeal in abeyance so he can move to strike the appellate brief filed on his behalf by the Legal Aid Society and to ask for reassignment of appellate counsel.

2. The following is based upon information and belief, the source of said information and grounds for said belief being an examination of the records of the Office of the District Attorney of Nassau County and the papers offered in support of the instant application.

A12

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

8303L
Y/em

CHARLES B. LAWRENCE, J.P.
DAVID S. RITTER
WILLIAM D. FRIEDMANN
GABRIEL M. KRAUSMAN, JJ.

92-04806

The People, etc., respondent,
v Miguel Defreitas, appellant.
(Ind. No. 77897)

DECISION & ORDER ON MOTION
Motion to File A Supplemental Brief

Motion by the appellant *pro se* for leave to file a supplemental brief on an appeal from a judgment of the County Court, Nassau County, rendered June 9, 1992.

Upon the papers filed in support of the motion and the papers filed in opposition and relation thereto, it is

ORDERED that the motion is denied.

LAWRENCE, J.P., RITTER, FRIEDMANN and KRAUSMAN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

January 13, 1995

PEOPLE v DEFREITAS, MIGUEL

A13