

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

BARRY ARKIM — PETITIONER *Por Se*  
(Your Name)

vs.

JOSEPH NOETH — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

New York State Court of Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

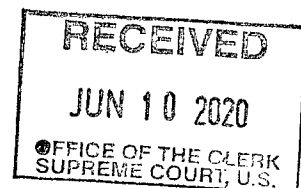
PETITION FOR WRIT OF CERTIORARI

BARRY ARKIM 91-B-0146  
(Your Name)

Sing Sing Corr. FAC.  
(Address)

354 Hunter ST. Ossining, NY 10562  
(City, State, Zip Code)

(914) 941-0108  
(Phone Number)



QUESTION(S) PRESENTED

Did the Court violate Petitioner's right to Confront witnesses against him when it relied upon the assistant district attorney's affidavit to deny Petitioner's motion for 440.10 relief?

Answer: The question was not addressed below.

## 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 follows:

Leitia James  
Attorney General  
Attorney for Respondent

Marcus J. MASTRACCO  
Supervising Assistant  
Solicitor General  
Office of the Attorney General  
The Capitol  
Albany, NY 12224-0341  
(518) 776-2050

### RELATED CASES

Crawford v Washington, 541 US 86 (2004) 3,4,6,7  
People v Pacer, 6 NY3d 504 (2006) 3,4,6  
Pointer v Texas, 380 US 400 (1965) 7  
Melendez-Diaz v Massachusetts, 557 US 305 (2009)

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### OTHER

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 Attach to the Petition  
 for page number for cases

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☒ For cases from **state courts**:

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

- ☐ reported at Appellate Division, Fourth Dept.; or,  
☒ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the Order of Supreme Court, Erie County court appears at Appendix A to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was MARCH 24, 2020  
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

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

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

NY Const., Art. 1, § 6 ..... 7  
US Const., Amend. 6 ..... 7



## STATEMENT OF THE CASE

On April 27, 1990, Petitioner was charged in a seven-count indictment with rape in the first degree (Penal Law 20.00, 130.35[1]), two counts of sodomy in the first degree (Penal Law 20.00, 130.50[1]), two counts of burglary in the first degree (Penal Law 20.00, 140.30[2][3]) assault in the second degree (Penal Law 20.00, 120.05[6]), and criminal possession of a weapon in the third degree (Penal Law 20.00, 265.02[1]). The charges arose from allegations that on or about November 13, 1989, Petitioner and another man broke into the Complainant's apartment in the City of Buffalo where they raped and sodomized her. In order to escape from her assailants, the Complainant jumped through a closed window, sustaining lacerations from the broken glass. Following a trial in Erie County Court before Judge Michael L. D'Amico and a jury, Petitioner was found guilty of all counts. On January 18, 1991 the Court sentenced Petitioner as a persistent violent offender to an indeterminate sentence of 25 years to life imprisonment on each of the seven counts, the sentence imposed on the rape and two sodomy counts ordered to run consecutively to each other; the sentences on the remaining counts were to run concurrently to the other counts. Petitioner been in the custody of the New York State Department of Correction since the day of sentencing, serving his sentence of 75 years to life imprisonment.

On or about March 10, 1994 Petitioner filed a petition seeking relief pursuant to CPLR Article 48, which petition was subsequently converted to an Article 440 proceeding and transferred to the trial court (D'Amico, J.) for disposition (A10-A18; numbers in parentheses preceded by "A" refer to pages of Petitioner's appendix). (See ATTACH PAGES)

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## STATEMENT OF THE CASE

Petitioner had argued, inter alia, that he was not guilty of the sexual offenses for a significant reason, to wit, although the complainant was subsequently discovered to have become infected with gonorrhea, Petitioner was not afflicted with gonorrhea on the date of the sexual assault upon the complainant. Petitioner testified on his own behalf and, as part of his testified at trial, denied that he had gonorrhea (282, 316; numbers in parentheses refer to trial transcript of the November, 1990 trial).

As part of their response to Petitioner's CPL 440.10 motion, the People had submitted an affidavit of the trial Prosecutor, Nancy E. Hartz, sworn to June 29, 1995, in which the Assistant District Attorney swore that she had seen records from the Erie County Health Department that "unequivocally stated that Petitioner tested positively for gonorrhea" (A20).

In a Memorandum and order, dated March 27, 1996, the Court (D'Amico, J.) denied the motion without a hearing (A34-A42). With respect to whether Petitioner's Counsel was ineffective for not investigating whether Petitioner had gonorrhea, the Court ruled that "since this Court finds no merit in Petitioner's unsubstantiated assertion and

## STATEMENT OF THE CASE

Since an essential allegation is refuted by [the trial Prosecutor's] affidavit, that Portion of Petitioner's motion is denied in its entirety without a hearing (A 38; emphasis supplied). Pursuant to CPL 450.15 and 460.15, Petitioner filed for Permission to appeal the denial of his CPL 440.10 motion to Appellate Division Fourth Department. The application was denied, as were a number of later CPL 440.10 motions. In addition, a Petition for federal habeas Corpus relief in the United States District Court for the Western District of New York was also denied (996 F.Supp. 245 [1998]).

On or about July 12, 2018 Petitioner filed a Petition for Writ of habeas Corpus in Supreme Court, Erie County, naming as defendant Noah Joseph, Superintendent of Attica Correctional Facility, where Petitioner was incarcerated on that date (A 43). (Subsequent to the filing of his Petition, Petitioner was relocated by the Department of Corrections to Sing Sing Correctional Facility in Ossining, NY.) In an order, dated July 27, 2018, Supreme Court, Erie County (Boller, J.) denied the Petition but granted, inter alia, Petitioner's request for reduced filing fees and Poor Person relief vis-a-vis Petitioner's filing a notice of appeal to the Appellate Division Fourth Department (A 111-A 112). Petitioner has not been the subject of a CPL

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## STATEMENT OF THE CASE

460.50 order. In an order entered November 1, 2018, the Court assigned the Legal Aid Bureau of Buffalo, Inc. to represent Petitioner Barry Arkim a/k/a Edward Mason on the appeal of the denial of his petition for habeas Corpus relief (A2). The Court has granted Petitioner's requests for extension of time to perfect the appeal, with the latest deadline being June 17, 2019 (A3). The People of the State of New York are represented on appeal by the New York State Attorney General's Office.

The Direct Appeal

Petitioner's appeal to the 4th Dept. was perfected in September, 1991. In a memorandum dated January 31, 1992, the Court affirmed the Judgment of Conviction, rejecting the two arguments contained in the brief prepared by Petitioner's assigned Counsel, the Legal Aid Bureau of Buffalo. The Court also reviewed the issues raised in Petitioner's Pro se Supplemental brief but did not grant him any relief thereon (People v Arkim a/k/a Ed Mason 179 AD2d 1019 [4th Dept. 1992]). Petitioner's assigned Counsel applied for permission to appeal to the Court of Appeals, but the State's highest Court subsequently issued a certificate denying leave to appeal on April 15, 1992 (79 NY2d 997 [1992]).

## REASONS FOR GRANTING THE PETITION

This case involves little more than the application of this Court holding in Crawford v Washington, 541 US 36, 124 S.Ct. 1354. The Sixth Amendment does not Permit the Prosecution to Prove its case via ex parte out-of-Court affidavits, and the Admission of such evidence against Petitioner Arkim was error. In short, under this Court decision in Crawford the assistant district attorney affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the personnel at the Erie County health Department were unavailable to testify at trial and that Petitioner had a prior opportunity to cross-examine them, Petitioner was entitled to "be confronted with" the analysts at trial. Crawford, supra, at 54, 124 S.Ct. 1354.

## REASONS FOR GRANTING THE WRIT

The overriding issue at defendant's November, 1990 trial was whether defendant had sexually assaulted the Complainant. The woman testified that defendant was the man who had raped and sodomized her. Defendant, however, testified on his own behalf that he had done no such thing.

While in the hospital recovering from injuries that she had sustained when she leapt through a glass window in an effort to escape her assailants, the woman complained of certain gynecologic symptoms (22). She was thereafter diagnosed as having contracted gonorrhea (22). Not surprisingly, whether defendant was infected with gonorrhea on the date of the sexual assault became an issue of utmost importance insofar as whether the People had proved beyond a reasonable doubt that defendant had raped the Complainant. Defendant had testified that he was not infected with gonorrhea on the date of the assault (282, 316). (During her summation, the assistant district attorney, in an effort to impermissibly bolster and vouch for the credibility of the Complainant, argued to the jury that "physical proof of the sexual intercourse was the gonorrhea. . . . The defendant told

## REASONS FOR GRANTING THE WRIT

Detective Teague, hey, does she have gonorrhea, because I do" [35].

More violative of defendant's constitutional rights, however, than the Prosecutor's bolstering statement during her closing argument was this same Assistant District Attorney's preparation of and submission to the Court of an affidavit that was replete with hearsay. This affidavit was part of the Prosecution's effort to defeat defendant's 1994 Post-verdict motion to vacate his conviction pursuant to CPL 440.10. Defendant's trial took place in 1990 but it was not until 2004 that the US Supreme Court decided *Crawford v Washington*, 541 US 86 (2004). The affidavit that the People submitted to the trial Court violated defendant's right to confront witnesses against him, as the Court of Appeals has since held in *People v Pacer*, 6 NY3d 504, 512 (2006).

In the June 29, 1995 affidavit, Assistant District Attorney Nancy E. Hart states:

James A.W. McLeod, Esq., who assisted trial counsel, obtained defendant's records from the County Health Department, which had tested

## REASONS FOR GRANTING THE WRIT

defendant for gonorrhea. Mr. McLeod had those records in Court during trial and showed them to both me and trial Counsel. I saw that the records unequivocally stated that defendant tested positive for gonorrhea. Both Mr. McLeod and trial Counsel acknowledged that the records showed defendant tested positive for gonorrhea (A20).

The trial Court accepted the Prosecution's affidavit and cited to it in its March, 1996 ruling denying defendant's motion to vacate his conviction (A38). Significantly, however, ten years later, in 2006 the Court of Appeals held in Pacer, Supra, that such Proof-by-affidavit violated a defendant's Sixth Amendment right (Crawford v. Washington) to confront witnesses against him. Indeed, according to Paragraph 5 of the Prosecutor's affidavit, there were a number of witnesses who had supplied evidence against defendant, none of whom defendant ever had the right to confront or cross-examine.



## REASONS FOR GRANTING THE WRIT

(Some of the Putative witnesses against defendant were anonymous Personnel from the Erie County Department. See *infra*.)

Specifically, according to the Prosecutor's affidavit, the witnesses who possessed evidence of defendant's alleged diagnosis of gonorrhea were (1) attorney James McLeod; (2) Personnel at the Erie County Health Department who had provided the Department's record; (3) (arguably different) Personnel at the Health Department who had tested defendant for gonorrhea; (4) defendant's trial Counsel—who, by agreeing with the Prosecutor that defendant was infected with gonorrhea (notwithstanding defendant's trial testimony to the contrary)—became a witness against his own client and therefore provided ineffective assistance of Counsel (see, e.g., *People v Mitchell*, 21 NY3d 964, 967 [2013]; *People v Kirkland*, 68 AD3d 1794, 1795 [4th Dept. 2009]; and (5) assistant district attorney Nancy E. Hart, who had viewed the Department of Health Records.

Simply stated, one would be hard-pressed to draft a paragraph that contained more examples of evidence against defendant on the issue of

## REASONS FOR GRANTING THE WRIT

Whether defendant was infected with gonorrhea than the actual Paragraph 5 of the Prosecutor's affidavit that was relied upon by the Court to deny defendant's motion to vacate his conviction. In Pacer, supra, the Court of Appeals Prohibited such Proof-by-affidavit where the People had adduced an affidavit from the Department of Motor Vehicles to Prove that the defendant "knew or had reason to know his [driving] Privileges were revoked..." (id. at 509). In affirming the Appellate Division, Fourth Department order that "under Crawford, the trial court should not have admitted the affidavit" (id. at 507), the Court of Appeals was clear that "the lack of a live witness to confront eliminated defendant's opportunity to contest a decisive piece of evidence against him. This is exactly the evil the Confrontation Clause was designed to prevent" (id. at 512).

Similarly, the affidavit herein Prepared by the Prosecutor and accepted as Proof by the CPL440.10 Court that defendant had gonorrhea and, therefore, that he was the man who had raped the gonorrhea-infected Complainant suffers from the same infirmity, to wit, a denial of defendant's right to confront these many witnesses against him on the crucial issue of identity.

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, Pointer v Texas, 380 US 400, 403 [1965], Provides that "[I]n all Criminal Prosecution, the accused shall enjoy the right... to be confronted with the witnesses against him." In Crawford, this Court after reviewing the Clause's historical underpinnings, they held that it guarantees a defendant's right to confront those "who 'bear testimony,' " against him. 541 US, at 51. A witness's testimony against a defendant is thus inadmissible, unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Id., at 54, 124 S.Ct. 1354.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bakky Akpim

Date: June 1, 2020