No. 20-5627

IN THE

SUPREME COURT OF THE UNITED STATES

JUSTIN WOODARD, PRO-SE - PETITIONER

Vs.

NEW YORK STATE COURT OF APPEALS, et al., RESPONDENT(s)

ON PETITION FOR A WRIT OF CERTIORARI TO

NEW YORK STATE APPELLATE DIVISION, 4TH JUDICIAL DEPT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Was defendant's Constitutional **Fourteenth Amendment** right to Due process violated when the Monroe County Trial Court denied the re-opening of a suppression hearing (Huntly) when defendant's reasons for re-opening were within statutory guidelines, meritorious, and likely to be successful in the suppression of his statements to police involving his Invocation of his right to counsel?

2) Was defendant's Constitutional **Fifth & Fourteenth Amendment** rights violated when the prosecution used, in their case in chief, defendant's Grand Jury testimony in contravention of the express terms of a cooperation agreement thereby breaching the agreement and violated defendant's rights guaranteed by the United States Constitution?

3) Was defendant's Constitutional **Sixth Amendment** right to effective assistance of counsel violated when defense counsel failed to Investigate **ALL** the facts of this case and thereafter, failed to Invoke the express terms of the Cooperation Agreement, which precluded the admission of defendant's Grand jury testimony at Trial?

LIST OF PARTIES

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

[X] 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 the petition is as follows:

A) Monroe County Supreme Court.

B) New York State Supreme Court, Appellate Division, Fourth Judicial Department.

RELATED CASES

1) **People v. Woodard, 96 A.D.3d 1619,** Fourth Dept., App. Div. Judgment affirmed and entered on June 15, 2012.

2) **People v. Woodard, 19 N.Y.3d 1030,** Leave to appeal denied. Judgment entered on September 9, 2012.

3) **Woodard v. Chappius, 2014 WL 122359 (W.D.N.Y),** Habeas Corpus denied. Judgment entered January 13, 2014.

4) **Woodard v. Chappius, 631 Fed Appx. 65,** Appeal denied. 2nd Cir. Court of Appeals, 2016.

5) **People v. Brewer, 118 A.D.3d 1407,** Appeal #1, Judgment affirmed and entered June 20, 2014

6) **People v. Brewer, 118 A.D.3d 1409,** Appeal #2, Judgment reversed and entered June 20, 2014.

7) **People v. Miller, 122 A.D.2d 1369,** Judgment affirmed and entered November 21, 2014.

8) **People v. Miller, 25 N.Y.2d 952,** Judgment entered March 9, 2015, leave to appeal denied.

9) **People v. Miller, 128 A.D.3d 1425,** Judgment entered May 1, 2016. Error Coram Nobis denied.

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STATUTORY AND CONSTITUTIONAL AUTHORITY

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PETITIONER RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGEMENT BELOW.

For cases from **Federal Courts:**

The opinion of the United States **Court of Appeals** appears at Appendix J to the petition is **631 Fed. Appex. 65,** and has not been selected for Publication in West's Federal Reporter.

The opinion of the United States **District Court** appears at Appendix I to the petition and is reported at **2014 WL 122359.**

For cases from **State Courts:**

The opinion of the highest state Court to review the merits appears at **96 A.D.3d 1619,** 4th Dept., Direct Appeal.

The opinion of the Monroe County Court appears at Appendix B to the Petition and is unpublished - 440.10 Denial

The opinion of the Fourth Judicial department appears at Appendix A and is unpublished - 440.10 Appeal.

JURISDICTION

The Judgment of the New York State Court of Appeals denying discretionary review was entered on April 9, 2020 which triggers the tolling time for a Writ of Certiorari. This courts jurisdiction rests on 28 U.S.C § 1257

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant Constitutional and statutory provisions are reproduced **infra** at Appendix D.

STATEMENT OF THE CASE

Petitioner Justin Woodard seeks review by way of Writ of Certiorari regarding a order of the New York State Court of Appeals denying leave to appeal dated April 9, 2020. A description of that order is: "Order of the Supreme Court, Appellate Division, Fourth department, entered January 31, 2020, affirming an order of the Supreme Court, Monroe County, entered December 26, 2015" - which involved the denial of defendant's CPL § 440.10 motion to vacate his conviction.

In the underlying Criminal action, defendant was convicted of Second degree Murder and Attempted First-degree Robbery and sentenced to an aggregate prison term of 20 year's to life in prison.

On January 4, 2007, Robert Brewer at the behest of William Miller, shot Keith Holloway to death at the home of Carmella Miller on Norton Street in Rochester, New York. Some time later, law enforcement Authorities learned that defendant Justin

Woodard may have been involved in the crime as driver of the vehicle that took Brewer and Miller to and from the crime scene. On November 20, 2007, defendant and his half-brother Sinclair Mountain were arrested without a warrant by multiple police agencies including the Elmira Police who, on that day, were executing search warrants in connection with a Narcotic Investigation not known by defendant at the time of his warrantless arrest. Subsequent to his Warrantless arrest, defendant and his half-brother, were brought to the Elmira Police station where defendant invoked his right to counsel after police threatened him that he wouldn't see his kids until they were his age. Hour's later defendant was taken to a truck stop in Dansville, New York, by two Elmira Officer's and turned over to two officer's from the Rochester Police department. While in transit to the Rochester police headquarters defendant was read his **Miranda** rights by Officer O'Brian. Defendant, at that time , and again, invoked his right to counsel and named the specific Attorney that he wanted to speak with before answering any questions. Defendant was told by Officer O'Brian that he did not need a lawyer because nobody said he had done anything. The Rochester Investigator's told defendant that they just wanted to get his side of the story because they had heard he was at the scene of the crime.

During the interrogation defendant made statements and incriminated himself after a promise was made by police that if he told the truth he could go home that night. After Defendant made these incriminating statements, he was released from custody, however, two weeks later, on December 4, 2007, defendant was arrested and charged by felony complaint with one count of Second degree murder and one count of Attempted First degree robbery. Defendant thereafter entered into a Preindictment Cooperation agreement with the Monroe County District attorney's office and pursuant to that agreement, testified before the Grand Jury as a prosecution witness. His Grand jury testimony was consistent with his

statements to the Rochester police when they took over custody of him and made promises to induce his statements. Because of a subsequent arrest and conviction for promoting prison contraband while at the Monroe County jail, the District Attorney unilaterally modified the cooperation agreement from a five year determinate term for attempted First-degree robbery to 15 year's for the same crime. Defendant's Attorney Charles T. Noce with defendant's consent thereafter terminated the agreement by letter dated June 23, 2007. Defendant was subsequently Indicted on the charges set forth in the felony complaint having a strong suspicion that he was indicted because of his own testimony that he provided under the terminated Cooperation agreement.

Defendant's attorney then moved to suppress the statement defendant made to police in Rochester, arguing that the statement was not voluntary, that defendant was not properly advised of his Miranda rights by the Rochester police, that he lacked the capacity to understand his rights, and that he did not effectively waive his rights to remain silent. Counsel did not, at that time, make a right-to-counsel argument or make any arguments relating to defendant's interaction with the Elmira Police and his Invocation of his Sixth Amendment right. It should also be noted that defense counsel made his suppression motion without ever meeting with defendant to ascertain that facts of the case.

After a suppression hearing was held, but before a decision was made, Mr. Noce made a letter request to re-open the hearing on the basis that prior to being picked up by the Rochester police Investigator's, defendant had invoked his right to counsel to the Elmira Officer's who took him into custody for the sole purpose of handing him over to Rochester Police. Defendant contended that since the Elmira Police had apprehended him solely for the purpose of handing him over to Rochester Investigator's rather than Elmira Drug Charges, his request for counsel carried over to the Rochester police Interrogation. Mr. Noce stated that the reasons he was

making the request to re-open at that time was that, after the Suppression hearing, defendant, informed him that he had invoked his right to counsel to the Elmira P.D, telling that department he would not speak or cooperate with them and that he wanted his attorney present.

Annexed to the letter request was an affidavit from defendant attesting that he did invoke his right to counsel in Elmira, that he, "was unaware prior to the [suppression] hearing of what time frame would be discussed regarding [his] custodial situation on November 20, 2007", and that he told his attorney subsequent to the hearing "that [he] had already invoked [his] right to counsel while [he] was with the first police agency."

By decision and order dated January, 2009, the hearing court found that defendant's statement was voluntarily made and denied suppression. The decision did not address the request to re-open. It should be noted that the courts decision was erroneous inasmuch as the court did not have all the facts before it, nor did the court allow all the facts to come before it. This was so largely because of defense counsel's shortcomings and his failure to even meet with defendant before drafting his suppression motion and also his failure to properly and fully investigate the facts of the case.

Thereafter on February 5, 2009 defendant's counsel made a formal motion on Notice to re-open the suppression hearing on the grounds previously stated in the letter request. Defense counsel Noce supplemented this motion by letter dated February 10, 2009, stating that the motion was being made on the authority of CPL § 710.40(4). As part of that letter, Mr. Noce stated that, because defendant was initially taken into custody by the Elmira drug task Force, it was impossible to determine before the time of the hearing whether his invocation of the right to counsel in Elmira concerned the subject homicide or another drug offense for which the Elmira P.D where investigating him. Only at the hearing did counsel learn that

no Elmira charges were pending, however, it should be noted that defense counsel had from March 2008 until January 2009 to ascertain and investigate that facts and circumstances of defendant's case.

The People, of course, opposed the motion to re-open on the basis that the facts upon which re-opening was sought were already known to the defendant at the time of the suppression hearing.

By decision and order dated February 17, 2009 the hearing court agreed with the people that "the additional pertinent facts which defendant claimed to have discovered were all circumstances relating to his arrest", and that his invocation of his rights to counsel to the Elmira P.D was "a fact that was easily capable of being shared with his attorney". As such, "if defendant withheld this information from his counsel, he did so at his own peril". Alternatively, the motion court rejected "[t]he argument that only facts elicited at the hearing caused the making of the motion," finding that "[i]t would be incumbent for defense counsel to argue ab initio that all police contacts with defendant related to the subject homicide." As such, any misapprehension about the purpose of defendant's initial arrest would not have prevented counsel from making a right-to-counsel argument. Accordingly, the court declined to re-open the **Huntly** hearing.

Defendant then proceeded to trial where the prosecution used his Grand Jury Testimony in their **case-in-chief** as evidence against him. Defendant was subsequently convicted on both counts, after which he was sentenced to 20 year's to life in prison.

Defendant timely appealed his conviction and sentence and filed a brief in the Appellate Division, Fourth Department that argued six (6) points. In pertinent part, defendant argued that the people were precluded by the cooperation agreement from introducing his Grand Jury testimony into evidence during their case-in-chief. Defendant also argued that the trial court abused it discretion in

refusing to re-open the suppression hearing, and that trial counsel was ineffective for: (a) not moving to suppress his written statement on the ground that it was the fruit of an arrest without probable cause, (b) not invoking the cooperation Agreement in response to the people's offer of his Grand Jury testimony, (c) Failing to investigate the circumstances surrounding his arrest so as to discover that he had invoked his right to counsel, and (d) failing to move for a trial order of dismissal.

On June 15, 2012 the Fourth Department, Appellate division affirmed defendant's conviction and sentence. see **People v. Woodard, 96 A.D.3d 1619 (4th Dept. 2012)** Please also see **Appendix H, pg. 39A-41A.**

Defendant timely sought leave to appeal to New York's highest court (N.Y.S Court Of Appeals) and was denied leave on September 12, 2012. see **People v. Woodard, 19 N.Y.3d 1030 (2012).**

On April 27, 2015 defendant moved Pro-Se to vacate his conviction pursuant to CPL § 440.10. Subsequently, defendant obtained Jane S. Myers, Esq., as Pro-Bono counsel, and submitted supplemental moving paper's contending that his counsel was ineffective for: (A) Failing to conduct proper investigation and discover that defendant Invoked his right to counsel in Elmira, and raise that issue in a suppression motion; and (B) failing to argue that defendant was arrested without probable cause. Annexed to the supplemental moving paper's were affidavits from defendant and His half-brother Sinclair mountain, who was present at the time of defendant's interaction with the Elmira police. Defendant attested that when the Elmira officer's arrested him, he believed that he might have been arrested on Narcotics charges and told them he wanted to have his attorney present. Defendant thereafter named the specific attorney who had previously represented him. Mr. Mountain attested that he was hand-cuffed and taken to the Elmira Police Station along with defendant and, while in custody, he heard the

Elmira Police threaten defendant that he would not see his kids until they were his age. see sworn affidavits in **Appendix E, Pg. 24A-30A.**

The people filed paper's opposing the motion. By letter ruling dated December 23, 2015, the Monroe County Court (Hon. Francis A Affronti, J) denied the motion. see Unpublished opinion at **Appendix B, Pg. 4A-7A.** The court held, in pertinent part "[t]he Appendix reflects that counsel sought to re-open the suppression hearing on the basis that the defendant invoked his right to counsel, which motion was denied", and thereafter, under CPL § 440.10(2)(c) "the alleged deficiency in counsel's representation is apparent from the record and therefore, no hearing is required." The court further determined that a single error by otherwise competent counsel does not deprive a defendant of effective assistance of counsel unless it is of "such prejudicial magnitude that there exists a reasonable likelihood of a different outcome," and that even if a motion to suppress on right to counsel grounds would have been successful, "defendant's" testimony before the grand jury, which was consistent with his statement to police, was nevertheless considered by the jury." Thus, the alleged error by counsel was not so prejudicial as to have likely resulted in a different outcome. However, contrary to the courts holding, it was clear error for defendant's Grand jury testimony to be admitted in the people's case-in-chief, and should not have been evidence for the jury to consider. see **U.S v. North, 920 F.2d 940; Kastigar v. U.S, 406 U.S 441; U.S Pelletier, 898 F.2d 297.**

Defendant then sought, and was granted leave to appeal to the Fourth Department, Appellate Division. In his briefs to that court, defendant argued: (i) that his ineffective Assistance claim relied upon materials outside the record and was not procedurally barred; (ii) that counsel's failure to ascertain the circumstances of his Elmira Arrest and make an appropriate suppression motion was ineffective, and (iii) that such ineffectiveness was not harmless error because

the Grand Jury testimony was also inadmissible under the terms of the Cooperation agreement.

By decision and order dated January 312, 2020, the Fourth Department, Appellate Division affirmed the decision of the lower court see **Appendix A, Pg. 1A -3A.**

Defendant thereafter sought leave to appeal to New York's highest court (N.Y.S. Court Of Appeals). In his leave application defendant turned to the merits of the case and submitted that the fourth department was simply wrong in placing the onus upon him to inform his Attorney of the circumstances of the Elmira Arrest. As the Appellate division acknowledged, it is well settled that the right to effective representation includes the right to assistance by an attorney "who has taken the time to review and prepare both the law and the facts relevant to the defense and who is familiar with, and able to employ at trial basic principles of criminal law and procedure" **People v. Droz, 39 N.Y.2d 457, 462 (1976) (Emphasis Added) citing People v. Bennett, 29 N.Y.2d 462, 466 (1972).** Errors which impact "basic points essential to the defense are often found to be determinative." Thus, where an attorney failed to "consult" with the defendant thus never learned that the defendant had pled guilty to the last three charges of the indictment, he was found culpable for the admission of damaging testimony that related only to those charges. see **id; accord, People v. Rossborough, 122 AD3d 1244 (4th Dept. 2014)** ("A defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation, and the failure to investigate may amount to ineffective assistance of counsel.") **citing People v. Jenkins, 84 A.D.3d 1403 and People v. Kurkowski, 117 A.D.3d 1442.** Thus counsel has a duty to make reasonable Investigations or to make a reasonable decision that particular Investigations are unnecessary, and his decision must be grounded in knowledge of relevant legal principles. see **Greiner v. Wells, 417 F.3d 305, 320-21 (2nd Cir. 2005); Lindstadt**

v. Keane, 239 F.3d 191, 200-02 (2nd Cir. 2001).

It is simply not the job or duty of a criminal defendant, who is unfamiliar with the science of criminal law and procedure to determine for himself what facts are relevant and to curate those facts for his counsel. Defendant had only one prior conviction for criminal mischief and had no experience with the criminal justice system. There is a reason why it called "ineffective assistance of counsel" and not "ineffective assistance of oneself". Instead, as **Droz, Supra** Illustrates, it is counsel's job to "**Consult**" with his client and learn the relevant facts, and even a plea of guilty to pert of the indictment, which the defendant could easily have told his attorney about is something that the attorney was culpable for failing to learn. see **Droz, 39 N.Y.2d 462; see also People v. Pendergraph, 170 A.D.3d 1630 (4th dept. 2019).**

Indeed even in the 1930's, it was recognized that without "**consultation**" thoroughgoing Investigation and preparation by defense counsel, the defendant would be denied the "aid of Counsel", in any real sense. **Powell v. Alabama, 287 U.S 45, 57 (1932).**

Moreover, the "standard" of "reasonable competence" adverted by the fourth department does not warrant a different conclusion. Any reasonably competent Criminal defense Attorney would, at the initial Interview with his client discuss the clients arrest and inquire into all relevant circumstances, including whether his client invoked his right to counsel. see **ABA Criminal Defense Function Standard 4-3.2(a) (20120** (as soon as practicable, defense Counsel should seek to determine "ALL" relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the clients responses) In this case, the simple question "what happened when you were arrested in Elmira" would have revealed the information that Mr. Noce needed in order to raise the right-to-counsel issue in a

suppression motion. The standard of "reasonable competence" should not excuse an Attorney from making such elementary inquiry nor, should it shift the burden to the non-lawyer defendant to inform his counsel of facts that counsel could have and should have obtained by asking a few simple and basic questions. Thus, whether Mr. noce's failure to make a right-to-counsel argument in his initial suppression motion is framed as a failure to investigate, or as a failure to raise all the issues that should have been obvious, the result is the same, such failure was Mr. Noce's **not defendant's** (Emphasis Added). Moreover, Mr. Noce in his 2009 affidavit regarding a motion to re-open the suppression hearing candidly took the blame for such failure, admitting that he hadn't realized until the suppression hearing that the circumstances of the Elmira arrest might even be relevant.

There is also a reasonable probability that, if a suppression motion had been made on right-to-counsel grounds, defendant would have prevailed. In the lower court, the people argued that because officer Adams of the Elmira P.D testified at trial that defendant had never asked for an attorney, a suppression motion would have failed. But the trial jury never heard from either defendant or Sinclair Mountain, and it is certainly not a foregone conclusion that a suppression court, after hearing the witness and after officer Adams was cross-examined, would have excepted the officers word over theirs. Any conflict between sworn statements of defendant and Mr. Mountain on one hand, and officer Adams on the other, is an Issue of credibility that cannot be determined without an evidentiary hearing. It is settled that a CPL § 440.10 that hinges on conflicts between witnesses "cannot be resolved on affidavits alone, but only after a hearing at which testimony is received, affording the court a basis on which to make credibility determinations" **People v. Smith, 301 A.D.2d 471, 473 (1st dept. 2003).** The credibility of a witness and whether his testimony is to be believed

was not a matter for the (440.10 motion) court, but for the jury on retrial." **DeCanzio v. Kennedy, 67 A.D.2d 111. 119 (4th dept. 1979)** Thus, the lower court was not entitled to reject defendant's ineffective assistance of counsel claim without, at minimum, holding an evidentiary hearing at which witnesses can be cross-examined and their credibility weighed.

Finally, a word must be said about harmlessness, which was discussed by the County Court, but not reached by the Fourth Department. The County courts conclusion that any harm from failing to suppress the defendant's statement to the police was obviated by admission of the Grand Jury statement is simply wrong, because the Grand Jury statement also should never have been admitted. It is undisputed that the Grand Jury statement was made pursuant to a Cooperation Agreement, and the terms of that agreement provided that if it were terminated, "statements made by the defendant **during the pendency** of the agreement, regarding the crime specified above **will not be used against him on the people's direct case in chief in that prosecution**". Elsewhere in the agreement, the term "statements" was specifically defined to include **"Grand Jury testimony"** during their **case-in-chief** (Please see Cooperation agreement **infra** at **Appendix F, Pg. 31A-34A**) Therefore, the prosecution should have never been allowed to introduce the Grand jury testimony during the direct case irrespective of defendant being convicted of promoting prison contraband during the pendency of the agreement.

Defendant notes that when the issue of the Grand Jury testimony was raised on appeal, the Fourth Department did not find that it was properly admitted, instead; the court held that any error was "harmless" in light of the admission of defendants oral statement. see **People v. Woodard, 96 A.D.3d 1619, 1620 (4th dept. 2012)** In other words, on direct appeal the admission of the Grand Jury testimony was deemed harmless because of the oral statement defendant made to police, and then on the 440.10 motion decision, the admission of the oral statement was

deemed harmless because of the Grand Jury testimony. Defendant posits that it can't be both ways. If defendant's counsel had successfully obtained suppression of the oral statement, then the Fourth Departments evaluation of the harmfulness of the Grand Jury testimony would no doubt have been very different, and therefore, the weighing of prejudice from Mr. Noce's failure to raise a right-to-counsel argument must take account the fact that both statements were inadmissible. Weighed in that light, the prejudice from failure to suppress the oral statement is clear. Without the statement of the Grand Jury testimony, the jury would have been left with only the testimony of Kentrell Burks, which put defendant at the scene and testified that he was driving Mr. Brewer and Mr. Miller around but did not make him a participant in the shooting, and contrary to what the Fourth Department stated, would not have corroborated defendant's Grand Jury testimony. It is entirely possible that this would not have been legally sufficient to convict and that the case would have survived a trial motion to dismiss, there is certainly a reasonable probability that a jury that heard only Mr. Burks' testimony, would have acquitted defendant. For these reasons and the reasons that follow, a writ of Certiorari should be granted.

REASONS FOR GRANTING THE PETITION

POINT I

DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE TRIAL COURT OBVIATED DEFENSE COUNSEL FROM EXPLORING THE CIRCUMSTANCES SURROUNDING DEFENDANT'S WARRANTLESS ARREST BY THE ELMIRA POLICE AND REPROBATING DEFENSE COUNSEL'S REASONS FOR RE-OPENING THE

HUNTLY HEARING BASED ON ERRONEOUS OPINIONS AND FURTHER ABROGATED ITS OWN TIME LIMITATION FOR COUNSEL TO SUBMIT A MEMORANDUM OF LAW IS SUPPORT OF LITIGATION PRESENTED IN THE INITIAL SUPPRESSION HEARING.

A combination **Wade** and **Huntly** hearing was conducted on January 15, 2009, on consent of the people. At the hearing, the people called two Investigators. Inv. Lawler and O'Brian from the Rochester police Department, through whom it was revealed that while custody of the defendant had been transferred by members of the Elmira P.D on November 20, 2007, they had no arrest warrant. When defendant's attorney attempted to inquire into the circumstances justifying the arrest (that is, whether he had been charged with a crime by Elmira authorities or, to put it otherwise, whether there was a probable cause basis for the arrest), he was not permitted to do so by the court on a sustained objection by the people. At the conclusion of the hearing, the court afforded both attorney's the opportunity to submit memoranda of law after the hearing transcript was to be provided. The court thereupon adjourned the matter to February 13, 2009 for the express purpose of rendering a decision on the issues.

A transcript of the hearing was subsequently certified on January 20, 2009, five days later. Without the benefit of any memoranda of law, by decision and order (one page) dated just nine days later on January 29, 2009, the court denied suppression of both defendant's statements (oral & written) as made on November 20, 2007. No mention was made by the court in its decision of the reason for defendant's arrest. The decision of the court was made fifteen (15) days **before** it originally stated it would render one without notice to either party.

While dated a week prior to the issuance of the Wade/Huntly decision and only two days after the date the hearing transcript was certified, the defendant's letter-motion to re-open the hearing was filed on January 30, 2009, Fourteen days

before the Huntly hearing decision was to be rendered. Thereafter, by noticed motion dated February 5, 2009, the defendant's counsel formally moved for the same relief, basing his request on not only his inability to delve into the circumstances of his clients arrest by the Elmira Police - which thereby precluded him from inquiring into the "seminal" issue of whether there was any legal basis for the arrest - but also on the basis of his sworn allegation that he had invoked his right to counsel to Elmira P.D before being transferred into the custody of the two Rochester Investigators. See defendant's sworn affidavit **infra** at **Appendix E, Pg. 27A-30A.** At the courts request, both the defense and the prosecution submitted Memoranda of law on the subject of whether the hearing should be re-opened. The people opposed the motion.

The court, by decision and order (one page) dated February 17, 2009, denied the motion to re-open the hearing, finding that there was no "pertinent facts" that could have not been discovered with the exercise of due diligence before the hearing. It should be noted that the court erroneously precluded the presentation of critical and relevant evidence relative to the Sixth Amendment violations implicated both by the initial hearing evidence and subsequently through defendant's uncontroverted allegations as contained in his sworn affidavit in support of his motion to re-open the Huntly hearing.

It should also be noted that despite having earlier reserved the right to make further motions should the need arise, neither then, nor at any other point during the proceedings conducted in the trial court is there any record evidence that the defendant's attorney submitted a separate motion challenging or seeking a hearing on the probable cause basis for his clients arrest by the Elmira Police or to suppress his statements on the ground that his client had waived his right to counsel to investigators Lawler and O'Brian outside the presence of an attorney after earlier having invoked his right to counsel, which exemplify's counsel's

counsel's ineffectiveness times ten. (**Emphasis Added**)

First, while defendant was permitted to reveal that the Rochester Police had no warrant for defendant's arrest, when the defendant's attorney attempted to inquire of the people's alleged witnesses of the basis upon which the defendant had been arrested by the Elmira police, he was precluded from doing so. This, in of itself, was a gross abuse of discretion and reversible error since by precluding "full" inquiry into a predicate issue of **Constitutional** dimension, the court did not have before it a full evidentiary basis upon which to rest its decision regarding the admissibility of the defendant's statement as made on November 20, 2007 to the Rochester police.

It is well settled that on a motion to suppress a defendant's post-arrest statements, the suppression court is **"required"** to permit the defendant to delve fully into the circumstances attendant upon his arrest, **People v. Misuis, 47 N.Y.2d 979 (1979); see also People v. Wise, 46 N.Y.2d 321 (1978).** This is so since even a statement made voluntarily under **Fifth & Sixth Amendment** standards, will nevertheless be suppressed if it has been obtained through the exploitation of an illegal arrest, i.e., as a **Fourth Amendment** violation, **Brown v. Illinois, 422 U.S 590.** Here by restricting the inquiry of defense counsel, the defendant was not permitted to fully expose the circumstances surrounding his arrest and thereby lay bare the Constitutional violation... to properly enable the court to determine whether the statement was admissible or not.

Had defense counsel been permitted to inquire into the circumstances surrounding the arrest by the Elmira Police - as became apparent from the defense motion to re-open the hearing - it would have been revealed that the defendant was arrested not pursuant to a warrant or on Criminal charges, but rather only as an accommodation to the Rochester P.D. It would have been revealed that he had been taken into custody by the Elmira police and several hour's later transported

to Dansville in hand-cuffs by two Officer's where custody was transferred to two Investigators with the Rochester P.D.

from a reasonable standpoint it can not be said that defendant was not "under arrest" when he made his incriminating statements to police, see **People v. Brnja, 50 N.Y.21d 366. 372; People v. Robinson, 282 A.D.2d 75, 79.** If the arrest was not supported by probable cause - and query how could it have been when he was after he provided what the investigators believed to be a truthful recitation of his involvement - irrespective of any possible waiver or invocation of his **Fifth and Sixth Amendment** rights, then his statement was required to have been suppressed.

By restricting the inquiry into the circumstances surrounding defendant's arrest, the court undeniably deprived itself of critical facts concerning who **(1)** actually took the defendant into custody, **(2)** where and by whom he was arrested, **(3)** whether and by whom he was Mirandized, and **(4)** if he was Mirandized, whether he invoked his right to remain silent and/or to counsel as was later claimed in his affidavit in support of his motion to re-open the hearing. By failing to permit inquiry into the circumstances of the defendant's arrest, the Monroe County court made its determination on the admissibility of the defendant's post-arrest statement without complete factual record basis. That, it is submitted, was **error** and a gross abuse of discretion.

POINT II

THE COURT NOT ONLY ABUSED ITS DISCRETION, BUT ALSO VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN THE COURT REFUSED TO RE-OPEN THE SUPPRESSION HEARING AFTER COUNSEL SUPPORTED THE MOTION WITH SWORN AFFIDAVITS AND WAS WITHIN STATUTORY GUIDELINES TO RE-OPEN THE HEARING.

A trial court may re-open a pre-trial hearing if "satisfied, upon a showing

by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination" of his pre-trial application. **NY CRIM PROC LAW § 710.40(4); see People v. Fuentes, 53 N.Y.2d 892, 894 (1981).** While the court of appeals[1] has held that a court is not required to grant a motion to re-open "'after' a decision denying suppression has been announced, it has suggested that in order to satisfy the so-called 'threshold requirement' for re-opening a hearing, the defendant must establish a factual predicate either at the initial hearing or in his motion seeking to re-open". see **People v. Coughlin, 995 F Supp 268, 277 (EDNY), aff'd 129 F.3d 254 (2nd cir. 1997) (discussing People v. Mercado, 62 N.Y.2d 866 [1984]).** As the **Gagne** court observed, cases interpreting the statutory authority permitting the re-opening of suppression hearings have "exhibit[ed] a generous policy of re-opening suppression hearings" with the "general rule" being "to re-open the hearing when it appears that the new evidence would give the [defendant] at least some chance of prevailing on the merits." This was such a case **(Emphasis added).**

Having learned that there had been neither an arrest warrant for nor criminal charges lodged against the defendant by Elmira P.D and that the arrest had been made only to accommodate the Rochester P.D. Upon not being permitted to inquire further into the circumstances surrounding the arrest, the defendant's attorney sought to re-open the hearing. First he moved by letter motion and then by formal Noticed motion. Along with his formal Motion defendant's attorney attached with it Defendant's and Sinclair Mountain's sworn Affidavits attesting the defendant invoked his right to counsel, and therefore met the so-called "threshold requirement" spoken of by the court of Appeals regarding the re-opening of a suppression hearing. The people opposed the motion. In doing so, the prosecutor ignored altogether that the defense sought to expose further the **Dunaway** issue that had only been partially revealed at the initial hearing and

instead challenged the defendant's claim that he had invoked his right to counsel to Elmira P.D. even before custody had been transferred to the Rochester Investigators. In the latter respect, the prosecutor argued that the challenge was untimely, and by implication, specious. But at no point did the prosecutor contradict the defendant's right to counsel claim.

Once again, and again without allowing for inquiry into the factual basis for the defendant's Constitutional claim, the court erroneously adopted the prosecutors argument and denied the motion to re-open the hearing. Under the circumstances herein, it is submitted that this amounted to a gross abuse of discretion on the courts part and violated defendant's Constitutional right to due process. Moreover, defendant's reasons for re-opening concerned him invoking his Constitutional right to remain silent and was within statutory guidelines to re-open the hearing. Given the time at which the motion was interposed, there was ample time to allow for the hearing to be re-opened without delaying the trial. The motion was made well in advance of the anticipated trial date and two weeks before the anticipated decision of the suppression hearing itself. Additionally, by virtue of the evidence that was introduced at the initial hearing, there plainly remained unanswered the question of whether there had been a reason for the defendant's arrest beyond merely facilitating a sister agency's on-going investigative efforts. Finally, and possibly most importantly, by virtue of the defendant's uncontroverted claim that he had invoked his right to counsel to Elmira Police, the court willfully ignored the question of whether the defendant's constitutional claim had a factual basis such that suppression of a vital and highly prejudicial piece of prosecution evidence would have been required.

It cannot be reasonably argued that the issue of the circumstances surrounding his original arrest - whether as a matter implicating the lack of probable cause as the defendant's attorney suggested in his moving paper's or, as

it may have related to the defendant's claimed invocation of his right to counsel - were pertinent and could have and should have resulted in suppression. see **United States v. Crews, 445 US 463, 471-473 (1980)** (statement made following an illegal arrest must be suppressed as fruit of a poisonous tree); **People v. Carrasquillo, 54 N.Y.2d 248, 254 (1981) (same); see Michigan v. Mosely, 423 US 96 (1975)** (statement made after invocation of right to counsel without waiver in counsel's presence must be suppressed) **People v. Cunningham, 49 N.Y.2d 203, 210 (1980) (same).** Even so, the Monroe County Court elected to deny to the defendant the opportunity to reveal the Constitutional violation, which also implicates Due process.

Adopting the reasoning of the prosecutor, the trial court reasoned that the defendant was presumed to know the circumstances of his arrest. (citing to **People v. Greaves, 12 A.D.3d 690 [2nd Dept. 2004], lv denied 4 N.Y.3d 763 [2005]**); While it is acknowledged that such a presumption is indeed readily accepted in the law (see **People v. Hankins, 265 A.D.2d 572 [2nd Dept. 1999], lv denied 94, N.Y.2d 880 [2000]**. The Fourth Department Appellate Division also erroneously agreed with the trial court, **See Appendix A, P.g 3A.**

The case-law the Fourth Department, Appellate Division, relies on is completely misplaced inasmuch as the instant case presents a totally different fact pattern from those cases and falls short of being supportive in any meaningful way. Here, unlike in other instances (see e.g., **People v. Toxey, 220 A.D.2d 204, 205 [1st Dept. 1995], app denied, 88 N.Y.2d 855 [1996]**), to expect the defendant to have knowledge of the circumstances of his arrest was error and inappropriate. It was learned at the suppression hearing, the defendant was not arrested pursuant to either an arrest warrant or charges relating to any criminal activities in Elmira. Instead, upon the basis of the evidence presented at the hearing as supplemented with one of the hearing witness's narrative reports, it was learned that the actual reason for taking the defendant into custody was a

"plan" by which he was to be turned over to the Rochester Police, such plan apparently having been effectuated by unnamed member(s) of the Elmira Drug Task Force and other unnamed member(s) of the Rochester Police Department. Apparently in furtherance of that "plan", custody of the defendant was transferred to the two Investigators from the Rochester Police Department. Under this unique situation, it is submitted that to presume that this defendant knew of the circumstances of his arrest was indecorous and as such, both the trial court and the Appellate Division erred in concluding as such. On that basis, the failure of the defendant to know the circumstances of his arrest so as to move for suppression was clear error. For this court to also agree would be a travesty and a gross miscarriage of justice.

Although not reached by the Appellate Division, the trial court also erred in finding that the defendant had not "adequately explained" why the motion to re-open the hearing had not been brought sooner. According to the court, the motion was not received in chambers until after its written decision "had been written and filed", such having been also a basis of comment by the prosecutor in opposing the motion. While this may have been accurate in the technical sense, at the time the initial letter/motion was ostensibly drafted (such being January 22, 2009) and even at the time it was filed (such being January 30, 2009) the court decision remained unknown to the defense; it was apparently not received until some time after the motion had been filed and certainly after it had been drafted. Furthermore, at most important here is the fact that the court itself advised both the defense and the prosecution that it would issue a decision on February 13, 2009, which was a full two weeks after defense counsel submitted its motion to re-open. Put another way, defense counsel submitted the motion to re-open a full two weeks before the Judge said he would issue his decision on suppression. Which

would have given the court more than ample time to re-open the hearing and still render a decision by February 13, 2009. Instead, the Judge jumps ship and renders a decision on suppression without either lawyer submitting a Memorandum of law, two weeks before he said he would render one, and then has the temerity to question the defendant as to why he didn't bring the motion sooner! In short, this case is not a case in which there was an inordinate delay in bringing the motion, or in which granting the motion would have "in any way" delayed the trial. It was, by consideration of its timing, not only untimely, but was filed at the earliest possible opportunity.

Timeliness of the motion aside, it must be noted that the defendant's Constitutional right to counsel claim was uncontested by the prosecutor. The prosecutor did not include in his response an allegation - even one made on information and belief - that the defendant had not been **Mirandized** by Elmira police, or that if he had, that he waived his rights. Instead he implied that the claim was specious by virtue of his timeliness challenge. Thus, all that was before the court at the time it made its decision on the motion was the **uncontroverted** allegation that there had been an invocation of the right to counsel by the defendant, an allegation that on the facts then known to the court as revealed at the hearing would necessarily have resulted in suppression of the statement made to the Rochester Investigators. see **People v. Rodgers, 48 N.Y.2d 167 (1979); People v. Zjacome, 123 A.D.2d 358 (2nd. Dept. 1986). app denied, 69 N.Y.2d 881 (1987).**

The defendant's application was not altogether dissimilar to that which was reviewed by the fourth Department in 2005 in, **People v. Smith, 24 A.D.3d 1286, lv denied, 6 N.Y.3d 838 (2006).** In that case, the defendant challenged the decision of the trial court to permit the people's request to re-open the **Huntly** hearing to address the defendant's contention made for the first time (at the initial hearing)

that he invoked his **Miranda** rights. The 4th Dept. citing to **People v. Hernandez, 124 A.D.2d 893 (3rd Dept. 1986)**, found that it **had been proper** to grant the people's motion to re-open the suppression hearing. It would seem then, that if it was proper for the people to re-open upon such a claim, when the defendant makes such a claim, he to should also be permitted to demonstrate his claim.

In this instance, the defendant did indeed demonstrate his entitlement to re-open the suppression hearing. That being the case, it is submitted that it was an abuse of Judicial power and discretion for the suppression court to deny defendant's motion. It is very likely that defendant would have been successful had his motion to re-open been granted. It is undisputed that defendant Invoked his right to counsel with the Elmira Police and with the Rochester Investigators, which was never opposed by the prosecution. The prosecution opposed on the ground that the motion to re-open was untimely. As such, the defendant's conviction should be reversed and remanded for further proceedings, or in the alternative, it should be remitted for a hearing to expose the entirety of the factual circumstances surrounding his arrest and the taking of his oral and written statements on November 20, 2007. In the absence of such relief, the defendant's due process rights have been violated, as has his right to a fair trial insofar as the trial necessarily contained evidence that may have been obtained upon the heels of a Constitutional violation.

POINT III

DEFENDANT'S FIFTH AMENDMENT CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE COURT ALLOWED THE PROSECUTION TO ADMIT DEFENDANT'S COMPELLED GRAND JURY TESTIMONY IN THEIR CASE IN CHIEF, WHEN A COOPERATION AGREEMENT EXPRESSLY STATED THAT HIS GRAND JURY TESTIMONY WOULD NOT BE USED IN THE PEOPLE'S DIRECT CASE.

Following his December 4, 2007 arrest, the defendant (then represented by counsel other than he who represented him post-indictment), entered into a cooperation agreement with the people. By the terms of that agreement, in exchange for his cooperation against William Miller and Robert Brewer relative to the homicide, the defendant was to be permitted to enter a guilty plea to a single charge of Attempted First degree Robbery and it was recommended by the people that he was to receive a determinate sentence of Five (5) years. The agreement had been executed not only by the defendant and his then attorney (Mr. LaDucca) but also by the same Assistant District Attorney (Christopher Rodeman, esq.) who eventually would prosecute the case at the trial level. That being the case, it cannot be reasonably argued that ADA Rodeman did not have knowledge of the provisions of that contract.

In furtherance of the agreement, the defendant provided testimony before the Monroe County Grand Jury as a prosecution witness and **was compelled to waive immunity**, which was not part of the contract terms, nor was defendant made aware that he would have to relinquish immunity prior to entering the Grand Jury room as a prosecution witness. Less than two weeks later, on December 26, 2007, the defendant was charged with misdemeanor promoting prison contraband and, some two months later - on February 28, 2008 - entered into a negotiated disposition whereby he entered a plea to that charge while being represented by a different attorney and received a time-served sentence. This disposition was entered into by the defendant in apparent unawareness of the consequences it would have - that is that the Cooperation Agreement would thereby be considered violated.

Included in the express provisions of the agreement was one concerning what use could be made of the defendant's cooperation-furthering statement(s) should the agreement be terminated. Specifically, the agreement provided that: [I]t is

agreed that statements made by defendant during the pendency of this agreement, regarding the crime specified above **will not be used in the people's direct case** in that prosecution... See Appendix F, Pg. 33A, ¶ 8a. By this express provision, it is clear that in the event the Cooperation agreement was terminated - as ultimately was to be the case - any statements made in furtherance of the agreement could not be introduced during the people's direct case but only for purposes of Impeachment and/or rebuttal. This was not, however, how the prosecutor represented the matter of the admissibility of the defendant's Grand Jury testimony to the court when the subject of admissibility was challenged in anticipation of the trial by defense counsel. In fact, representing that he had "seen case-law" [whereby] it's very common to admit defendant's Grand Jury testimony. The prosecutor articulated to the court that defendant has "signed a contract that was very clear - that information could be used against him at some future point in time" and that the testimony could "come in as an admission" being that it "was sworn testimony under oath". Even if not intentionally deceptive (which is certainly not conceded herein) ADA Rodeman's representation to the court was a blatant and purposeful mis-statement of the controlling provision of the Cooperation agreement into which he, as the people's representative, had himself entered.

It should be noted that although it may be "common" for a prosecutor to admit a defendant's "under oath testimony", however, doing so in this case was prejudicial inasmuch as the terms the prosecution "<u>also entered into</u>" expressly stated that **defendant's statement(s) would not be used in the people's direct case in chief"** irrespective of what "case-law" ADA Rodeman happened to see. There is absolutely no **exceptions** stated anywhere in the contract to the contrary (**Emphasis Added**). Moreover, defendant did not testify under his own volition, **he was**

compelled to testify (as a prosecution witness) in order to receive a favorable sentence of five (5) years, and therefore was also forced to abandon his Constitutional Fifth Amendment right, and **waive Immunity** during his Grand Jury testimony for fear of not abiding by the express terms of the cooperation agreement and ultimately receive the promised Five (5) year sentence. Defendant in this case was truthful at the Grand jury and served as an important role in the prosecution of his co-defendants. It was only after he pled guilty to another charge, totally unrelated to the homicide that the prosecutor "Flipped the Script" of the Cooperation agreement and began to mis-represent the terms of the agreement, and engage in deceptive tactics with his own contract agreement and erroneously convinced the trial court that he could use anything defendant said during his grand jury testimony in the prosecutions case-in-chief against the defendant at his own trial.

Being in the nature of a contract (see **United States v. Castelbuono; 643 F Supp 965 [EDNY 1986],** the terms of a cooperation agreement such as was employed here in this case **are to be given their plain meaning.** see **People v. Rich, 166 A.D.2d 615 (2nd dept. 1990), app w'drawn & denied, 77 N.Y.2d 999 (1991), see also People v. Stokes, 165 Misc2d 934 (Monroe Co. Ct. 1995).** Here the plain meaning of the above-quoted language of the cooperation agreement provides that upon termination thereof, use of any statements made in furtherance of the agreement are to be limited to impeachment or rebuttal and **cannot** be used in the people's direct case.

Irrespective of whether the prosecutor's mis-representation to the trial court regarding the terms of the agreement is characterized as an inadvertent or as an intentional misrepresentation - the latter having been the basis for the Fourth Departments disciplinary action against the same prosecutor stemming from his conduct in a separate matter (see **Matter of Rodemen, 65 A.D.3d 350 [4th dept.**

2009]) - the result is the same, the defendant was prejudiced, his Grand Jury Testimony having been introduced as an integral element of the people's direct case in contravention of the express terms of the agreement. On that basis alone, the defendant's conviction must be reversed as having been entered on the basis of a Due Process violation and possibly even as a result of purposeful prosecutorial misconduct.

Furthermore, even in the absence of what could have been the prosecutor's intentional misrepresentation about the cooperation agreement, it is submitted that in the interest of ensuring the defendant's right to a fair trial, the trial court itself had a Judicial obligation and duty to scrutinize the agreement. The agreement was before the court, having been supplied to the court in its entirety by the prosecutor during the course of the defendant's motion to dismiss the indictment. In order to discharge its obligation to ensure the fairness of this prosecution and the proper administration of Justice (see **People v. Gonzales, 38 N.Y.2d 208, 210 [1975]; see also US Const. Amend. XIV; Code of Judicial Conduct Cannon 3 [A])**, it is submitted that the trial court was required to review the predicate document already before it (i.e., Cooperation agreement). Had it done so, such review would have revealed the pivotal item of evidence that would otherwise have been precluded, at least in the People's direct case. On the Basis too, then, the defendant's conviction must be reversed and a new trial ordered.

It should also be noted by this court that Paragraphs 8a & 8b of the Cooperation agreement hopelessly conflict with each other, are ambiguous and furthermore contradict one another. **See Appendix F, Pg. 33A ¶'s 8a & 8b.** The language in Paragraph 8a confers **USE Immunity**, (i.e., "it is agreed, that statements made by the defendant during the pendency of this agreement, regarding the crime specified above will not be used against him on the people's case-in-chief in that prosecution.") To secure a defendant's cooperation... [t]he

government may "informally" grant him use immunity in exchange for his cooperation. That is what took place in this case. The prosecution "agreed" that any statements made by him during the pendency of the agreement would not be used against him in the prosecutions case-in-chief. This statement is a perfect example of "use immunity". Because of this informal grant of use immunity in the cooperation agreement, it influenced the defendant to testify against his co-defendants as a witness for the prosecution without having to be concerned about his statements being used against him. However, when defendant entered the grand jury room he was told that he had to waive immunity and after doing so, was not advised of his Fifth Amendment rights to remain silent, and that anything he stated could and would be used against him in the prosecutions case-in-chief, but even if he was advised of his Fifth Amendment privilege, it would not have mattered inasmuch as the cooperation agreement also stated that defendant's "failure to testify" would result in defendant being prosecuted for "any State or Federal crimes encompassed by [the] agreement". With this being the case, the defendant testified involuntarily and under compulsion. Defendant was not allowed to freely exercise his Fifth Amendment privilege out of fear of the prosecutor claiming he was in violation of the terms of the agreement (i.e., refusing to answer questions and/or incriminating himself), and as a result of that, not getting the benefit of the plea bargain, (i.e., Five (5) year determinate term). The prosecution should not be free to build up a criminal case, in whole, or in part, with the assistance of enforced [or compelled] disclosures by the accused, see **Ullman v. United States, 350 US 422.**

When the prosecutor compelled defendant to waive immunity and did not advise him that anything he stated to the Grand Jury could and would be used against him in the people's case-in-chief (because it would be considered "an admission, under oath".) The prosecutor was not only violating his own terms of the

agreement, but was also eroding the fundamental guarantee of Due Process under the Constitution. The prosecutor impermissibly used deceptive tactics to induce defendant's testimony which also seems, ostensibly, to be a common practice for this rogue prosecutor. In 2009 regarding the Matter of Christopher Rodemen, the Fourth Judicial department censored the prosecutor for, inter alia, **Dishonesty; Fraud; Deciet,** and/or **Misrepresentation**, engaging in conduct that is prejudicial to the administration of Justice **Please see Appendix G.** It is quite ironic that what the Fourth Department found this rogue prosecutor liable for in 2009, were the same things he demonstrated in this case with defendant in 2007-08. **(Emphasis Added)**, and shows that this prosecutor indeed has the propensity to be unfair and deceitful, among other things.

The Grand jury inquiry where the defendant appeared for the prosecution, ostensibly became an investigation directed against defendant and was pursued with the purpose of compelling him to give self-incriminating testimony upon which to indict and convict him. There would be no other reason for this prosecutor to force defendant to waive immunity in contravention of the Cooperation agreement, which previously stated that his statements would not be used against him. At the outset of the Grand Jury inquiry defendant was under the assumption that even though he waive immunity, the terms of the agreement were still in effect whereby his statements could not be used against him. The defendant was not warned by the prosecutor before giving testimony that, because he waived immunity, the terms of the agreement were no longer in effect. It is therefore submitted that Due process **requires** that the government adhere to the terms of **any** plea bargain or **"use"** immunity agreement it makes. see **Mabry v. Johnson, 467 US 504, 509; 104 S.ct 2543, 2547; 8 L.Ed.2d 437 (1984); Santobello v. New York, 404 US 257, 262; 92 S.ct 495, 499; 30 L.E.d.2d 427 (1971)** ("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the

inducement or consideration, such promise must be fulfilled) United States v. (jerry) Harvey, 869 F.2d 1439, 1443-44 (11th cir. 1989); Innes v. Dalsheim, 864 F.2d 974 (2nd Cor. 1988), cert denied.

It is further submitted that the deliberate use at trial of defendant's Grand Jury testimony in violation of the prosecutor's express terms to the contrary violates Due process, see e.g., Santobello, 404 US at 262, and contrary to previous decisions by the 2nd Circuit court of appeals and the Fourth Department) cannot not be considered harmless error; cf. Gallo, 859 F.2d at 1082-84.

Finally, it must also be noted by this court that details of defendant's Federal Habeas Corpus motion to the Western District of New York and its appeal to the Second Circuit court of appeals were inadvertently omitted from the statement of the case, however, although they were omitted, the decisions in those case are, in part, what brings this case into conflict with at least Five (5) other circuit courts.

POINT IV

BOTH DECISIONS OF THE FOURTH DEPARTMENT APPELLATE DIVISION, THE WESTERN DISTRICT COURT OF NEW YORK, AND THE SECOND CIRCUIT COURT OF APPEALS REGARDING THE COOPERATION AGREEMENT ARE IN CONFLICT WITH AT LEAST FIVE CIRCUIT COURTS INCLUDING THE EIGHTH CIRCUIT COURT OF APPEALS.

First, the Western District of New York held, in part; that because defendant's attorney terminated the cooperation agreement and the district attorney declined to reinstate it after defendant failed a polygraph test, that the cooperation agreement was no longer in effect, and that the "only agreement" in effect at the time of trial was the waiver of immunity, which allowed the prosecution to use [defendant's] Grand jury testimony in it's direct case. This

holding completely disregards the express terms of the cooperation agreement, in that, the agreement specifically stated that: "[i]t is agreed that statements made by the defendant during the **pendency** of this agreement, regarding the crime specified above **will not be used against him on the people's case-in-chief**, the agreement also states, in part, that "[A]lthough the statements may not be used in the governments case-in-chief in that prosecution, they may be used for impeachment purposes and for rebuttal". It is submitted that the terms of the agreement **did not require** the agreement to be "in effect" for the D.A not to use his statements.

The Second Circuit held, in part, that defendant raises no colorable argument that the Grand Jury testimony should have also been suppressed, or that he would not have testified before the Grand Jury had the statement been suppressed. It is submitted that defendant did not move to suppress the Grand Jury testimony because of the express terms of the agreement that specifically stated that his statements would not be used against him in the prosecutions direct case.

Specifically, the decision in defendant's case conflicts with **United States v. Brown, 801 F.2d 352 (1986) - Eighth Cir. Court of Appeals.** The cooperation agreement in **Brown** is analogous to the agreement in defendant's case, in that, statements made "in reliance upon the agreement" will not be used against **Brown** except in a prosecution for perjury or false statements, and that the United States will not be bound by the agreement should the defendant "commit any further crimes" See **Brown, Supra.** The Eastern District Court of Arkansas dismissed the indictment on the bases that the Government received the benefits of **Browns** cooperation pursuant to the agreement, and because of that, the government could not prosecute him and dismissed the indictment. On appeal to the Eighth Circuit court of appeals, that court held that a cooperation-immunity agreement is contractual in nature and subject to contract law standards... The language of the

contract is to be read as a whole and given reasonable interpretation, not an interpretation that would produce absurd results. **United State v. Irvine, 756 F.2d 708, 710 (9th Cir. 1985)** (Per Curiam) (citations omitted), accord, **United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985); United States v. Carillo, 709 F.2d 35, 36 (9th Cir. 1983); United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir.), cert denied, 454 US 831.** Cooperation agreements are analogous to plea agreement. See **Carrillo, Supra; cf. Santobello v. New York, 404 US 257, 262, 92 S.ct 495, 498-99, 30 L.E.d.2d 427 (1971)** (Plea Bargain) **United States v. Garcia, 519 F.2d 1343, 1345 (9th Cir. 1975)** (deferred Prosecution agreement) "it is clear that a defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement. **United States v. Calabrese, Supra.**

Although the Eighth Circuit held that the District Court erred in deciding that "as a matter of Law" the cooperation agreement was enforceable against the government - even though **Brown** breached the agreement... [r]equiring **Broen** not to commit further crimes... [a]nd to "fully cooperate" by truthfully disclosing any knowledge or information..., however, this is not where the conflict lies. The conflict is that even though the Court of appeals reversed this case in favor of the government because of **Browns** breach which relieved the government of its reciprocal obligations. The Eighth Circuit **also held** that the case **must** be remanded inasmuch as the question of **Browns** breach was not an issue to be finally determined "unilaterally" by the government, **United States v. Calsbrese, Supra.** Because **Brown** raised a factual dispute on the issue of breach (as Defendant also does), on remand the District Court was ordered to hold an evidentiary hearing and determine whether **Brown** breached the agreement. [T]he government has the burden of establishing a breach by the defendant if the agreement is to be considered unenforceable.

This is precisely what **did not** happen in defendant's case. The cooperation agreement was before the trial court Judge during defendant's motion to dismiss the indictment and the Judge, ostensibly, never reviewed or scrutinized the agreement, instead the Judge "adopted" the prosecutor's interpretation of it's terms and allowed defendant's Grand jury testimony at trial in the people's case-in-chief. Inasmuch as the trial court Judge adopted the prosecutor's interpretation he was fundamentally allowing the prosecutor to unilaterally determine what could and could not be used at trial. This was error on a Constitutional level and implicated defendant's Due Process right under the Fourteenth Amendment. The court itself "as a matter of law" and in accordance with **US v. Brown, Supra** was required to determine whether or not defendant's statements could be used against him at trial. Moreover, inasmuch as the defendant raised a factual dispute regarding the terms of the agreement both in his direct Appeal and even more so in his 440.10 motion to vacate his conviction and its appeal, the courts were required to remand his case for a hearing to determine the question of defendant's breach of the agreement, and they **did not!.**

The Seventh Circuit, U.S v. Ataya, 864 F.2d 1324; The Fourth Circuit, U.S v. Simmons, 537 F.2d 1260; The Tenth Circuit, U.S v. Calbrease, Supra; The Eleventh Circuit, U.S v. Woods, 780 F.2d 929; The Second Circuit, U.S v. Pelletier, 898 F.2d 297, quoting, Mabry v. Johnson, 467 U.S 504, 509. All agree that a requisite safeguard of defendant's Due Process rights **requires** a Judicial determination, based on adequate evidence of a defendant's breach of a plea Bargaining agreement and that, the question of a defendant's breach is not an issue to be determined unilaterally by the government **(Emphasis Added)** Furthermore, **Due Process** also requires the government to adhere to the terms of **any** immunity agreement it makes, and in the absence of a finding of substantial breach on the part of defendant, the government **must fulfill its obligations** under the agreement. see

US v. Ataya, 864 F.2d at 1330. Contrary to the holding in defendants case, the Second Circuit itself in U.S v. Pelletier, Supra held: "[H]aving granted... Immunity and having further limited itself to using [defendant's]... testimony against [him] only in the event [defendant] intentionally lied, and even then only in a prosecution for perjury, the government was not free to use that testimony either to indict or to obtain a conviction on nonperjury charges".

Because the reasoning of **Pelletier** strikes the court as "sound", it believed that its holding should be followed, and according to contract principles, [the court] must limit the government to the remedies which they **consented** to in the agreement. Although there [was] "case-law" that suggest[s] that an immunity agreement is void upon the defendant's breach, the courts have so held only where the agreement explicitly provided that any falsehood would void the agreement. **Pelletier, 898 F.2d at 302; United States v. Skalsky, 857 F.2d 172 (3rd Cir. 1988); Castelbuono, 643 F.Supp at 969,** or where the agreement was silent as to the remedies (as was defendant's agreement), **United States v. Readon, 787 F.2d 512, 515-16 (10th Cir. 1986),** plea agreement silent.

Defendant's case further conflicts because even though the Eighth Circuit ruled in favor of the government, that the agreement was enforceable as a matter of law, and because of **Browns** breach for committing future crimes, and that he could be prosecuted for the 1983 offense, **however**, the court also held, that in prosecuting that offense, the government **may not use any information obtained directly or indirectly, from Brown as a result of the Cooperation agreement.** See **Brown, Supra.** This holding directly contradict the Western Districts Holding in defendant's case.

Defendant in this case does not dispute that the government in his case could have prosecuted him because of his breach, however, the prosecution **was not allowed** to use his Grand Jury Testimony and was only allowed to use evidence from

a legitimate source wholly independent of his compelled testimony, **Kastigar v. United States, 406 US 441, 448-63, 92 S.ct 1653, 1658-65, 32 L.E.d.2d 212 (1972).** It is anticipated that the government when opposing this petition will claim that the prosecutor in this case used evidence wholly Independent of the Grand Jury testimony (i.e., Kentrell Burks' testimony, and defendant's oral and written statements to police). It is submitted that although the prosecutor did have independent sources for "some" of the evidence used at trial, the prosecutor also made direct use of defendant's Grand Jury testimony. The government can not escape its error simply by showing the availability of "wholly Independent" evidence from which might have procured indictment or conviction had it not used the immunized testimony (and can not be considered **Harmless Error**), see e.g., **United States v. Gallo, 859 F.2d 1078, 1082-83 (2d, Cir, 1988)** (dissenting, judge and one other member of Majority find per se violation of Fifth Amendment and use immunity statute where prosecution made direct use of one paragraph of defendant's immunized testimony...) see also dissenting opinion in **U.S v. Brown, 801 F.2d 352.**

POINT V

THE NUMEROUS FAILURES BY DEFENSE COUNSEL'S REPRESENTATION INCLUDING HIS FAILURE TO INVESTIGATE THE CIRCUMSTANCES SURROUNDING DEFENDANT'S ARREST, HIS FAILURE TO SUBMIT A SUPPRESSION MOTION WITH "ALL" THE FACTS, AND HIS FAILURE TO INVOKE THE EXPRESS PROVISION OF THE COOPERATION AGREEMENT PRECLUDING THE USE OF ANY STATEMENTS MADE DURING THE PENDENCY OF IT AT TRIAL DENIED DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A defendant is guaranteed, by virtue of both the United States and the State Constitutions, his right to the effective assistance of counsel, US **Const. Amend. VI & XIV; NY Const. Art. 1 § 6; See United states v. Glasser. 315 US 60, 69-70.**

(1942); **Avery v. Alabama, 308 US 444 (194); Powell v. Alabama, 287 US 45, 57 (1932); People v. Silverman, 3 NY2d 200 (1957).** As the New York State court of Appeals has stated: [T]rial tactics terminated unsuccessfully do not automatically indicate Ineffectiveness. So long as the evidence, the Law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the Attorney provided meaningful representation, the Constitutional requirement will be met." **People v. Baldi, 54 NY2d 137, 145-147 (1981); see also People v. Henry, 95 NY2d 563, 565 (2000), see also Strickland v. Washington, 466 US 668 (1984).** Thus, to prevail upon a claim that defendant has been denied effective assistance of counsel, he must demonstrate that he was deprived of a fair trial by less than meaningful representation. See **People v. Hobot, 84 NY2d 1021, 1022 (1995); People v. Flores, 84 NY2d 184, 186 (1994).** A defendant must demonstrate the absence of objectively reasonable trial strategy or other legitimate explanations for counsel's failure(s), see **People v. Benevento, 91 NY2d 709, 712-713 (1998); People v. Rivera, 71 NY2d 705, 709 (1988).** Where the perceived strategy falls "short of an objective standard of reasonableness", the defendant has been found to have been denied the effective assistance of counsel as well as a fair trial. **See People v. Wlasiuk ___AD3d___ WL 6820985 (qouting People v. Turner, 5 NY3d 476, 485, citing People v. Rivera, 45 AD3d 1249, 1251.** There is no requirement that counsel's representation be error-free. Rather, the "focus is on the fairness of the proceeding as a whole". see **People v. Henry, 95 NY2d at 565-66;** see also **Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1439 (9th Cir. 1995)** (Cumulative deficiencies may result in Sixth Amendment Violation) Thus, neither will isolated errors or losing tactics generally rise to the level of ineffectiveness... unless the error is "so serious that [the] defendant did not receive a fair trial. See **Henry, 95 NY2d at 565-566 (quoting People .v Flores, 84 NY2d at 188-189; see also People v. Rivera, 71 NY2d at 708.** Here the deficiencies and error's in counsel's

representation were not isolated; indeed, there were several instances in which the ineffectiveness of counsel's representation are immediately apparent: **(1)** Counsel failed to investigate the circumstances surrounding the defendant's arrest in 2009, and thereby failed to learn that defendant invoked his right to counsel, so as to make that part of his suppression motion, **(2)** Counsel further failed to explicitly invoke the provision of the cooperation agreement at trial precluding the use of his statements made during the pendency of the agreement. Instead, counsel objected to it's use on the basis that it would unlawfully bolster defendant's written statement made to police at Rochester headquarters. By only objecting on this basis, it further denied defendant preservation of raising the legality of the prosecution using his statements in the prosecutions case-in-chief **on direct appeal.** See Appendix A, P.g. **41A.** Defense counsel also failed to move to suppress the defendants written statement to Rochester Police on the ground that there was no probable cause for his arrest, then after learning at the suppression hearing there was no warrant for defendant's arrest, counsel remained oblivious to the circumstances and failed to verbally move for suppression based on this fact.

It is more than obvious, in this case, that defense counsel did not have any conversations with defendant, or in any way investigated this case before he drafted his suppression motion. Three basic facts of this case were that defendant invoked his right to counsel after being apprehended and threatened by Elmira police. defendant again invoked his right to counsel after Rochester police took over custody of him, and that defendant incriminated himself in a written statement after police made a promise to him that he could go home if he told the truth. Three basic facts of the case. If counsel had met with defendant, he would have learned this. In counsel's suppression motion he states that defendant's statements were not voluntary, but fails to support this allegation. Any reasonable person would

conceive that counsel would at least support this allegation with the fact that police made a promise to defendant to compel him to incriminate himself, or he would support his allegation of involuntariness with the fact that defendant invoked his right to counsel, but counsel doesn't support this allegation with anything. Counsel also states that defendant was not properly advised of his rights, and the best one yet, that defendant lacked the capacity to understand his rights, but also fails to support this allegation with anything, not even that defendant may have been under the influence of narcotics, or that he was intoxicated. Counsel made bare naked allegations with absolutely nothing to support them with. Defense counsel further did not make any argument in his suppression motion regarding defendant invoking his right to counsel, or that defendant was compelled to make incriminating statements against himself because of a promise from police that he would be able to go home if he told the truth. It is so obvious that counsel "winged" his suppression motion. The original suppression motion did not reflect anything that actually took place during defendant's arrest, which is clear evidence that counsel did not investigate the facts and circumstances of the case. The fact that defendant did invoke his right to counsel not once, but twice, and counsel's failure to properly raise and then challenge that in a suppression motion extremely prejudiced the defendant because, had counsel properly raised this and effectively challenged it, it was likely that defendant would have been successful in the suppression of his statements to police which would have certainly changed the outcome of this case. It can not be reasonably argued that defendant received "meaningful representation" in this case.

Under the both the Federal and State standards for the Constitutional effective assistance of counsel, it is possible for even a single error to constitute performance that "is so 'egregious and prejudicial' as to deprive a defendant of his Constitutional right." **People v. Turner, 5 NY3d at 480, citing**

People v. Caban, 5 N.Y.3d 143, and Murray v. Carrier, 477 US 478, 496 (1986), a failure to conduct a reasonable Investigation may, by itself, constitute Ineffective Assistance of Counsel. "It is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense." see **People v. Droz, 39 NY2d 457, 462 (1976); People v. Bennett, 29 NY2d 462, 466 (1972).**

In **Strickland v. Washington,** the Supreme court specifically addressed an Attorney's duty to Investigate stating that:

> [S]trategic choices made after through Investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that make particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments, **Strickland, 466 US at 690-91.**

Building upon **Strickland**, the Supreme Court has emphasized that the duty to investigate is essential to the adversarial testing process "because the testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies." **Kimmelman v. Morrison, 477 US 365, 384 (1986).** The duty requires counsel to make reasonable investigations or to make a reasonable decision that make particular investigations unnecessary, se **Greiner v. Wells, 417 F.3d 305, 320-21 (2d. Cir. 2005) cert denied, 546 US 1184 (2006); Lindstadt v. Keane, 239 F.3d 191, 200-02 (2d. Cir. 2001); People v. Kurkowski, 117 A.D.3d 1442, 1443 (2014)** (Failure to investigate may constitute Ineffective Assistance Of Counsel) see also **People v.**

Rossborough, 122 A.D.3d 1244, 1245 (2014); People v. Jenkins, 84 A.D.3d 1403, 1408 (2011).

Similarly, the single error of failing to raise or adequately pursue viable suppression claims may, by itself, constitute Ineffective Assistance of Counsel. see generally **People v. Rivera, 71 N.Y.2d 705, 709 (1988).** (where the defendant is able to demonstrate an absence of a strategic or other legitimate reason for the failure to advance a suppression claim, Ineffective Assistance Of Counsel is demonstratable); **People v. Miller, 11 A.D.3d 729, 730 (2004)** (Failure to move for Huntly Hearing.

There is little question that defendant's Sixth & Fourteenth Amendments were violated due to Defense Counsel's severe lack of unawareness of the facts & circumstances surrounding this case. Defendant's Fifth Amendment rights were also severely violated regarding his testimony before the Grand Jury, and it is the duty of this court to supply the jurisprudential foundation necessary to ensure Fifth Amendment values are adequately preserved when threatened in the context of a putative defendant called by a prosecutor and Interrogated before a Grand jury concerning personal acts for which the prosecution plans his criminal indictment [or conviction]. This court has consistently emphasized and, more importantly, has stood fast to ensure the essential premise underlying our entire system of criminal justice that "ours is an accusatorial and not an inquisitorial system, a system in which the state must establish guilt by evidence Independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth", **Rodgers v. Richmond, 305 US 534, 541.**

Based on the questions presented in this case and for all the reasons articulated in this petition. Defendant prays that a Writ of Certiorari will be granted. Thank You.

Justin Woodard