No.: 20-7308

ORIGINAL

IN THE

SUPREME COURT OF THE

UNITED STATES

Michael N. Kelsey, J.D. -- Petitioner

vs.

The State of New York -- Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Michael N. Kelsey, J.D.
Petitioner Pro Se

16A4286 Hudson Correctional
50 East Court Street
Hudson, NY 12534

QUESTIONS PRESENTED FOR REVIEW

I. Are New York State's criminal appellate procedures deficient, and/or prejudicial to a criminal defendant's due process, equal protection and/or state-granted right to appeal when the state appellate procedures require that factual challenges to the conviction precede a direct appeal by a post-conviction motion, and the sentencing judge advises a defendant of his right to appeal but not the right to a factual challenge via the post-conviction motion such that the Petitioner should be granted a new appeal?

II. Did Appellate Counsel's failure to expand the record prior to filing an appeal deprive the Petitioner of effective assistance of counsel, and did New York State Courts inhospitably deny Petitioner his right to appeal when state law and procedures unduly complicate the right to appeal a criminal conviction by relegating factual challenges to the post-conviction motion, such that Petitioner is entitled to a new appeal?

III. Did the New York State courts inhospitably withhold from the Petitioner the presumption of correctness due him by federal law, and/or otherwise unreasonably deny the Petitioner due process and/or his right to appeal by denying his petition for a writ of error seeking to vacate his appeal denial and proceed first with a motion to expand the record that ineffective appellate counsel denied him, such that Petitioner is entitled to a new appeal with the opportunity to first expand the record?

IV. Are New York State's appellate procedures, as written or as applied, inadequate or ineffective to protect and safeguard a criminal defendant's right to appeal and/or due process or equal protection when, as here, the state court refused to deploy its statutory fact-finding authority/discretion to consider the Petitioner's timely filed and served pro se supplemental brief and/or failed to investigate its factual contentions that the appeal was proceeding on "errors and omissions," such that the Petitioner should be granted a new appeal and/or in keeping with state precedent that a hearing be held to determine if a new trial should be ordered?

V. Did Respondent State's appellate court commit constitutional injury to the Petitioner and/or abuse its discretion to make factual findings when it irrationally affirmed the verdict and ex post facto superimposed its three-years-after-the-fact reasoning to cure a fatal defect in the trial transcript instead of ordering a new trial, such that Petitioner is entitled to a new trial and/or new appeal?

VI. Is the Respondent State's use of negative specific act character testimony in criminal trials a violation of existing federal law and/or a criminal defendant's rights under the Constitution, such that Petitioner's trial verdict (influenced by such testimony) should be overturned and/or are the Respondent State's appellate court's failures to evaluate the harmful effects of such testimony in Petitioner's trial as required by federal law grounds to order a new appeal for the Petitioner?

VII. Was Petitioner's claims to ineffective trial counsel and ineffective appellate counsel insufficiently or inhospitably evaluated by the Respondent State's appellate courts such as to entitle him to a new appeal, and/or is New York State's preference for its own distinctive state standard for evaluating ineffective claims to the exclusion of the federal STRICKLAND V. WASHINGTON standard delaying the detection of ineffective counsel and also thereby withholding meaningful appellate review to criminal appellants in violation of the Constitution's guarantees to due process, equal protection, and in prolonging cruel and unusual punishment if wrongfully convicted as a result of ineffective counsel such that federal habeas relief should be made available to criminal appellants even prior to the exhaustion of state remedies?

VIII. Does a state's claim to offer the right of appeal to criminal defendants -- as New York purports to do -- require that the state maintain procedures, processes, standards, presumptions of correctness, supervision and enforcement procedures as it relates to appellate counsel and judges to maintain a level of adequacy and effectiveness such that when a series of state failures to protect an appellant's appellate rights can be demonstrated -- as herein presented -- that the Appellant should thereby be permitted to bypass the exhaustion of state remedies and immediately access federal review of his claims under federal habeas relief under a default theory that when a state fails to provide meaningful appellate review that such default cancels out the state remedy exhaustion requirement in deference to the constitutional rights of the appellant and/or a federal recognition of a federal right of appeal such that Petitioner's conviction should be stayed pending a federal review of his claims?

IX. Does a criminal appellant's due process rights to a trial transcript and/or the Respondent State's declared right to an appeal mandate that New York courts implement and enforce policies that assure that appellants will be provided full and complete records of criminal proceedings by which accurate and complete appeals may be taken, such that New York's failures and that of the trial court to provide Petitioner with a full transcript requires that the trial verdict and all judicial decisions subsequently relying upon it be vacated and that the Petitioner be granted a new trial?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Service upon the Respondent has been effected upon the New York State Attorney General.

LIST OF RELATED CASES

PEOPLE V. KELSEY, Application for Leave to appeal the denial of a pro se CPL 440.10 motion judged to be procedurally defaulted as not raised on direct appeal. Exhibits relating to this action can be found in the Appendix under C10, C11, A6, and C2 (in chronological order). Petitioner's Leave application is scheduled to be heard by the NYS Supreme Court, Appellate Division, Third Department on 2 March 2021. Should the decision be negative a second petition for a writ of certiorari or a supplemental brief will follow raising issues relating to the trial.

KELSEY V. LEWIN, Index # 16417-20, NYS Supreme Court, Columbia County is a state habeas corpus filing for which the writ has been granted and a hearing scheduled for 5 March 2021. The Petition can be browsed in Appendix D7. This constitutional challenge to the statutes governing the conviction will leave in place two misdemeanor convictions, such that even if the Petitioner is released from custody on 3/5/21 this Petition for writ of certiorari will remain viable as it relates to the two misdemeanor convictions.

KELSEY V. LEWIN, Index #: 9:20-CV-01211-LEK, US District Court, Northern New York District. This was/is a federal habeas corpus claim that was dismissed without prejudice in December 2020 as state remedies remain (decision located at Appendix C13).

KELSEY V. HUG, Index # CA2020-00014, NYS Supreme Court, Columbia County transfered from Oneida County in August 2020 and stayed due to COVID-19 impositions on the Court. This petition against Petitioner's Appellate Counsel can be browsed in Appendix D5.

KELSEY V. DUWE, INDEX #: CA2020-001055, NYS Columbia County Supreme Court transferred from Oneida County in August 2020 where a summary judgment motion was filed by Petitioner and awaiting a decision from the Court on six counts of fraud against a police agent leading to Petitioner's arrest when a judicial stay was imposed due to COVID-19 impositions on the court. This Petition can be browsed in Appendix D8.

KELSEY V. CATENA, ETC., Index #: CA2020-001577, NYS Supreme Court, Columbia County transferred from Oneida County in August 2020 and has been subject to a judicial stay order due to COVID-19 preventing it from being scheduled.

KELSEY V. ROBAR, ETC., Index # unknown. Filed in NYS Supreme Court, Dutchess County in November 2020 and yet to be assigned to a judge.

KELSEY V. RUTLEDGE, Index # unknown. Filed in NYS Supreme Court, Dutchess County and yet to be assigned a judge. Petition included in Appendix D1.

TABLE OF AUTHORITIES CITED

Cases (followed by page numbers)

Cases continued

STATUTES AND RULES (followed by page numbers)

TABLE OF CONTENTS

INDEX TO APPENDICES

Appendix C7:	Correspondence between Petitioner and Respondent Courts regarding Petitioners Pro Se Supplemental Brief
Appendix C8:	Respondent ADA's Brief in the Direct Appeal, Dec. 2019
Appendix C9:	Appellate Counsel's October 2019 Appellate Brief
Appendix C10:	Petitioner's February 2020 CPL 440.10 Motion
Appendix C11:	Petitioner and Respondent ADA's response papers to Petitioner's CPL 440.10 motion (March/April 2020)
Appendix C12:	Portion of Petitioner's Oct. 2016 Sentencing Transcript
Appendix C13:	Petitioner's federal habeas corpus Dec. 2020 Bail Application Affirmation
Appendix D1:	Kelsey v. Rutledge Petition
Appendix D2:	Complaint #4 from Petitioner's Grievance to the NYS Commission on Judicial Conduct, June 2020
Appendix D3:	Portion of a January 2019 Civil Deposition
Appendix D4:	Petitioner's correspondence with Appellate Counsel and Respondent Courts regarding appellate counsel
Appendix D5:	Kelsey v. Hug Petition
Appendix D6:	Petitioner's Analysis of the Constitution's Ratifiers' Thoughts on Appeal
Appendix D7:	Kelsey v. Lewin Petition
Appendix D8:	Kelsey v. Duwe Petition
Appendix D9:	Complaint #1 from Petitioner's Grievance to the NYS Commission on Judicial Conduct, June 2020

This Petition for Certiorari is dedicated NYS Son of Liberty, Alexander McDougall, "The John Wilkes of America."

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certirorari issue to review the judgments below:

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A1 to the petition, the Leave denial of the New York Court of Appeals Justice, and is reported at

The opinion of the NYS Supreme Court, Appellate Division denying a writ of error coram nobis is located at Appendix A2 and is unpublished.

The opinion of the NYS Court of Appeal Justice denying Leave to appeal the Direct Appeal is located at Appendix A3 and is reported at

The opinion of the NYS Supreme Court, Appellate Division denying direct appeal is located at Appendix A4 and is reported at People v. Kelsey, 174 Ad.3d 962; 107 NYS.3d 150.

The opinion of the NYS Supreme Court, Appellate Division on the motion to accept a pro se supplemental brief is located in Appendix A5, and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was 28 December 2020. A copy of that decision appears at Appendix A1.

The jurisdiction of this Court is invoked under 28 USC 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, Constitution of the United States;
Amendment VI, Constitution of the United States;
Amendment XIV, Constitution of the United States;
New York State Criminal Procedure Law, Article 440.10 -- Appendix B1
22 NYCRR 1250.11 -- Appendix B2
NYS Criminal Procedure Law, Article 470.15 -- Appendix B3
NYS Criminal Procedure Law, Article 470.05 -- Appendix B4

STATEMENT OF THE CASE

A three-term county lawmaker, then candidate for state legislature and a long volunteer for the Boy Scouts of America, the Petitioner led

a high adventure backpacking trip in August 2014. Two months later (and ten days shy of Election Day) Petitioner was accused of misconduct not then rising to the level of abuse, but which morphed into a "groping" claim at Petitioner's December 2014 arrest (see Appendix D1). Petitioner elected to stand trial and was convicted by a jury trial in May 2016, and sentenced in October 2016 to seven years prison with ten years of post-release supervision. This Petition for a writ of certiorari relate to the 2019 appeal and its aftermath.

Petitioner's retained appellate counsel filed his appellate brief (Appendix C9) in October 2018, which was denied by the state appellate court on 3 July 2019 (Appendix A4). Petitioner also submitted his own pro se supplemental brief (Appendix C6), citing concerns with appellate counsel and the respondent's briefs. Upon denial of his appeal, Petitioner motioned the state appellate court for a vacatur of the appeal via a writ of error corum nobis (Appendix C3) claiming that appellate counsel did not adhere to state appellate procedures, amounting to ineffective assistance of appellate counsel and a state deprivation of meaningful appellate review, inter alia. This petition for Writ of Error Corum Nobis was denied by the intermediate court in January 2020 (Appendix A2) and the state high court on 28 December 2020 (Appendix A1). This Petition ensues.

Petitioner continues to maintain his innocence. Lawsuits have been filed alleging police fraud (Appendix D8), police withholding exculpatory evidence (Appendix D1) and claims of prosecutorial misconduct (Appendix D7) for which a state writ of habeas corpus has issued with a hearing scheduled for 5 March 2021.

REASONS FOR GRANTING THE WRIT

Direct and concise arguments for granting the Writ follow with supporting factual and legal bases corresponding to each of the questions presented for review at the forefront of this Petition follows.

Argument

I. NEW YORK'S COURT SYSTEM BREACHED DUE PROCESS & ITS OWN SELF-IMPOSED DUTY TO ADVISE DEFENDANTS AS TO THEIR APPEAL RIGHTS WHEN IT FAILED TO INSTRUCT PETITIONER OF THE POST-CONVICTION MOTION PROCEDURES BY WHICH A FAIR AND ADEQUATE APPEAL COULD ENSUE.

The NY Court of Appeals took the opportunity in the 1969 case, PEOPLE V. MONTGOMERY, 24 NY.2d 130 "to announce clearly that every defendant has a fundamental right to appeal his conviction." The same court decision acknowledged it as "a primary duty" of the State and "a fundamental concern that defendants be informed of their right to appeal," and that if "it is determined that he was not told of his rights, then clearly he was denied the 'equal protection' of the law." Such a due process right and responsibility of the Court cannot be delegated to members of the bar, the MONTGOMERY court wrote in clear and unequivocal language.

Such a fundamental right to appeal is a hollow one if the Court's primary duty of advising criminal defendants excludes mention of the State practices of post-conviction motions to vacate judgment codified in Criminal Procedure Law Section 440. By design and supported by a plethora of case law spanning over half a century, the New York procedure for contesting criminal convictions (and sentences) as it relates to matters of fact (but nevertheless contests and grievances of a constitutional proportion) has been by way of the CPL 440 motion. "At any time after entry of judgment, the Court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that ... the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States" Criminal Procedure Law 440.10(1)(h) (EXHIBIT B1).

Historically 440-motions have also been known as Writs of Error Corum Nobis. LYONS V. GOLDSTEIN, 290 NY 19 (1943). "A Writ of Error Corum Nobis applies only to those instances where defendant's constitutional rights have been violated." PEOPLE V. COHEN, 81 NYS.2d 455. The "remedy of corum

nobis is available when there has been an abrogation of a defendant's constitutional rights which does not appear in the record" PEOPLE V. VANCE, 37 Ad.2d 661 (3rd Dept 1958).

Most frequently, corum nobis writs/440 motions are the "vehicles" by which convicted persons are able to expand the record to establish facts essential to proving the ineffectiveness of the right to counsel. "Claims of ineffective assistance of counsel are best addressed in post-conviction proceedings" PEOPLE V. LOVE, 112 Misc.2d 514 (1982). "Defendants ineffective assistance of counsel claim should have been raised via a post-judgment motion so that the record could be expanded to permit trial counsel to explain his trial tactics" PEOPLE V. GILBERT, 295 Ad.2d 275 (1st Dept. 2002). "Defendant's ineffective assistance of counsel claim turned on matters concerning counsel's trial preparation that were not reflected in the record and required further development by way of a motion to vacate judgment" PEOPLE V. GONZALEZ, 8 Ad.3d 210 (1st Dept 2004); PEOPLE V. HENDRIX, 8 Ad.3d 72 (1st Dept. 2004).

New York not only permits ineffectiveness of counsel claims and other constitutional claims contesting a conviction that require an expansion of the record by way of post-conviction motions, the State requires such a motion or otherwise the convicted person -- as here -- forfeits his claim to expand the records to support claims of unconstitutionality. "Under New York law, claims of ineffective assistance of trial counsel generally must be addressed to the trial court in a motion to vacate rather than a direct appeal" TAYLOR V. KUHLMANN, 36 F.Supp.2d 524 (1999) (emphasis supplied). "Contention that defendant was denied effective assistance of counsel was primarily based on matters outside the record and thus could not be reviewed on direct appeal" PEOPLE V. RHODES, 11 Ad.3d 487 (2d dept 2004). "Claims of ineffectiveness of counsel could only be raised by post-judgment motion to the extent they arose from matters outside the record on appeal" PEOPLE

PIKE, 254 Ad.2d 727 (4th Dept 1998).

Because New York judicial practice bifurcates the constitutional review of a criminal conviction into direct appeal and post-conviction motion practice, the convicted person's established fundamental state right to appeal must necessarily require judges whose duty it is to advise about appellate review of the record, to also advise criminal defendants of post conviction motion proceedings including CPL 440. The same logic and truth spoken in 1969 by the MONTGOMERY Court should apply to 440-motions so that criminal defendants are made aware that they can raise constitutional claims outside the record, and how to do it. Absent this, the judicial counsel is only partially accurate, and perhaps misleadingly harmful.

"Our decision very simply demonstrates a fundamental concern that defendants be informed of their right to appeal, and that where an attorney, whether assigned or retained, fails to apprise his client of the vital privileges, there is no justification for making the defendant suffer for his attorney's failings," wrote the MONTGOMERY court. It matters not that MONTOGMERY was superceded by statute by CPL 460 (which established rules regarding appeal notices and perfection). The focus of MONTGOMERY was that it is "a state responsibility" to communicate the right of appeal, and yet because the state splits the process into two vehicles of review, it is counterproductive if not potentially treacherous for the State to counsel one post-conviction evaluation but exclude others including ones that if not followed could preclude a full review (i.e. the 440-motions). It also should behoove the State to advise criminal defendants that claims of ineffective assistance of counsel often must be claimed in a 440-motion, rather than on a direct appeal, as the self-interest of attorneys may lead them to omit advising clients and thereby subject themselves to scrutiny.

The "primary duty" established by MONTGOMERY requiring judges to advise defendants of their right to appeal remains in practice today, notwithstan-

ding the case being superceded by statute. At Petitioner's October 2016 sentencing the judge honored his MONTGOMERY duty:

> "And Mr. Kelsey, I know you've reveiwed your appellate rights with counsel, but I must advise you that you do have the right to appeal from the sentence and any prior proceedings to the Appellate Division of the Supreme Court of the State of New York. That right will be lost to you if you do not appeal within 30 days..."
>
> EXHIBIT C12, p.24-25.

The judge did not advise or explain that the post-conviction motion relief available under CPL 440 could be used to expand the record, or that it is the chief and first method of appeal when claiming ineffectiveness of counsel. An argument can be made that had the judge done so the errors leading to this application may have been avoided. In consequence, Petitioner's appellate counsel filed a direct appeal primarily arguing ineffectiveness of trial counsel claims without first filing a 440-motion to expand the record. This caused the Appellate Division to deny Petitioner's appeal, as also the trial court to deny the Petitioner's pro se 440-motion filed after the appeal as "procedurally defaulted." See Appendix A6.

That Westlaw searches and many of the cases cited herein reveal that confusion as to the proper procedure(s) is widespread in New York, and has been so for a long time. Myriads of cases reveal that criminal defendants have not received full, fair, adequate or meaningful reviews of all their constitutional claims when New York's bifurcated appellate "vehicles" clash with one another. The result is the frustration of that "fundamental right to appeal," not to mention the federal rights that underly the purpose of why criminal appeals are necessary in the first place. The Court in GRIFFIN V. ILLINOIS, 351 US 12 (1956) required that criminal defendants rights to appeal must be "adequate and effective" under the guarantees of the Fourteenth Amendment. Current practice in New York is far below that standard, prompting an appeal to the U.S. Supreme Court to speak up so that the right to criminal appeal is more than an empty and sterile ritual.

Argument

II. APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO EXPAND THE RECORD VIA A 440-MOTION PRIOR TO FILING THE APPEAL; SUCH PROCEDURAL FAILURE FRUSTRATED PETITIONER'S CONSTITUTIONAL RIGHTS.

The standard for assessing ineffective assistance of counsel was determined in STRICKLAND V. WASHINGTON, 466 US 668 (1984). STRICKLAND's standard applies to appellate counsel in first-tier appeals. SMITH V. ROBBINS, 120 S.Ct. 746 (2000); EVITTS V. LUCEY, 469 US 387 (1985). Fairness of the appellate process requires that a defendant receive more than mere nominal representation from counsel. EVITTS V. LUCEY. "In order to prevail on an ineffectiveness of counsel claim, a defendant must first show that his counsel's performance was deficient and must then show that the deficiency caused actual prejudice. STRICKLAND V. WASHINGTON. The deficiency prong is established by showing that the attorney's conduct w[illegible] 'outside the wide range of professionally competetent assistance' ID at 690. The prejudice prong is established by showing that there's a'reasonable probability' that but for the deficiency 'the result of the proceedings' would have been different" ID at 694. This two prong test applies to the evalution of appellant counsel as well as trial counsel. See MAYO V. HENDERSON, 13. F.3d 528 (2d Cir. 1994); CLAUDIO V. SCULLY, 982 F.2d 798 (2nd Cir. 1992); ABDURRAHAMN V. HENDERSON, 897 F.2d 71 (2nd Cir. 1990)" as quoted in CLARK V. STINSON, 214 F.3d 315 (2000).

Respondent New York State limits direct appeals to a consideration to matters, documents or information that were before the trial court. XIAOLING SHIRLEY HE V. XIAOKANG KU, 130 Ad.3d 1386 (3rd Dept. 2015) (documents or information that were not before [the trial court] cannot be considered by this Court on appeal). Facts not contained in the recor are not reviewable on direct appeal. PEOPLE V. PIPARO, 134 Ad.2d 295

(2nd Dept. 1987). A criminal defendant cannot appeal directly based upon matters outside the record. PEOPLE V. BELL, 161 Ad.2d 772 (2nd Dept. 1990). Content and form of the record on appeal are governed by Civil Practice Law and Rules, Rule 5526 ([redacted]).

The prevailing appellate norm in New York State, prior to filing an appeal, is to expand the record when issues, matters or documents that dehors the record are necessary to the appeal. "Where allegations raised on issue in defendant's brief involved matters dehors the record, they could not be considered by the Supreme Court, Appellate Division ... but defendant could address such issues in application to county court to vacate judgments of conviction and have all substantial and material questions of fact granted by such application resolved by that court" PEOPLE V. ROBERTS, 89 Ad.2d 912 (2d Dept. 1982). "Defendant's challenge ... involved matters outside the record, and thus appropriate procedural vehicle to address that contention was to motion to vacate judgment of conviction" PEOPLE V. WATSON, 14 Ad.3d 419 (1st Dept. 2005) (emphasis supplied).

Filing a post-conviction motion via CPL 440.10 to expand the record prior to filing a direct appeal is the prevailing norm in New York State. PEOPLE V. BROWN, 382 NE.2d 1149 (1978) (since record often does not provide enough information on effectiveness of counsel, an Article 440 motion is usually a better method for ineffectiveness of counsel claims). "In absence of record concerning adequacy of defendant's representation, issues of alleged inadequate representation by assigned counsel cannot be reviewed in appellate court, and is more properly raised by post judgment motion" PEOPLE V. MARTIN, 52 Ad.2d 988 (3rd Dept 1976). An Article 440 motion "is designed to inform the court of facts not reflected in the record and not known at the time of judgment that would as a matter of law, undermine the judgment" PEOPLE V. HARRIS, 109 Ad.2d 351 (2nd Dept. 1985). To the extent

that the defendant's claim of ineffective assistance of counsel goes beyond the record it may not be reviewed on direct appeal. PEOPLE V. MONROE, 52 AD.3d 623 (2008). "Defendant's claim of ineffective assistance of counsel concerned matters outside the record and was more properly the subject of a post-conviction motion rather than an appeal" PEOPLE V. GREEN, 9 Ad.3d 687 (3rd Dept. 2004). In addition, the ABA Standards impose upon counsel to "advise of any post-trial proceedings that might be pursued before or concurrent with an appeal" ABA Standards for Criminal Justice, 21-2.2(b) 2nd edition 1980.

"Generally the ineffectivness of counsel is not demonstrateable on the main record," the NY Court of Appeals observed in PEOPLE V. BROWN, 45 NY.2d 852 (1978), "in the typical case it would be better, and in several cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary explanation by collateral or post-conviction proceedings brought under CPL 440.10" (emphasis supplied). Here, appellate counsel's brief submitted to the NYS Appellate Division on Petitioner's behalf primarily raised ineffective assistance of trial counsel claims without first filing and without concurrently filing a CPL 440.10 motion. See Appellate Brief in C9. This is ineffective assistence of counsel, for which the Petitioner filed a petition for Writ of Error Corum Nobis with the Appellate Division (Exhibit C3) for which the Court denied the writ, leading to this request for certiorari.

The prevailing norm that appellate counsel should first file a post-conviction motion to expand the record before filing an appeal is long-standing in New York particularly as it concerns claims of ineffective assistance of trial counsel. "Any claim that defendant was deprived of effective assistance of counsel should be resolved by trial court on motion to vacate judgment" PEOPLE V. PRENTICE, 91 Ad.2d 1202 (4th Dept. 1983). In fact, the Respondent ADA of St. Lawrence County actually observed in his appeal oppos-

ition papers, not once but three times, that Appellate Counsel did not follow the prevailing norm of filing a 440-motion to argue ineffective assistance of counsel claims before filing his appeal. Such statements are indictments against the Petitioner's appellate counsel:

> "Defendant raises a variety of ineffective assistance of counsel claims, which are not cognizeable on direct appeal"
>
> Exhibit C8, p.18.

> "Several of defendant's claims involve matters that are outside the record and would, therefore be more properly addressed in a CPL 440 motion."
>
> Exhibit C8, P.19.

> "Based on defendant's claims, it appears that this argument would have been more appropriately raised in a CPL 440 motion as it involves and makes references to matters outside the record."
>
> Exhibit C8, p.24.

In all three of the above quotes taken from the Opposition Brief on Direct Appeal, the first prong of the STRICKLAND test for ineffective assistance of counsel is firmly established. In essence, Appellate Counsel's failure to first file a CPL 440-motion to expand the record as it concerns the matters argued, particularly as it related to ineffectiveness of counsel claims, had the effect of thereby forfeiting Petitioner's otherwise right to an appeal. This is prejudice, the second prong of STRICKLAND. Not unlike counsel's failure to file a Notice of Appeal in ROE V. FLORES-ORTEGA, 528 US 470 (2000), "counsel's deficient performance has deprived respondent of more than a fair judicial proceeding; that deficiency deprived the respondent of the appellate proceeding altogether."

Appellate Counsel's failure to file a CPL 440-motion prior to filing the direct appeal, also in effect forfeited Petitioner's right to file a CPL 440-motion as the trial court's June 2020 denial of Petitioner's pro se 440-motion (EXHIBIT A6) ruled that Petitioner was procedurally defaulted to raise claims that should have been raised earlier. Petitioner's Leave application to contest the June 2020 procedural default decision is now before the Respondent Appellate Division, so that specific faults with that

decision will not appear herein, but to ~~the~~ SET interested those complaints can be found in EXHIBITS C2 and C1, the latter the application that the Respondent Court of Appeals denied leading to this application for certiorari. Still a brief survey of the ineffective assistance of trial counsel claims that were included in Petitioner's post-appeal pro se 440-motion reveal much about the facts and arguments that did not make it to the record to be considered on the direct appeal due to Appellate Counsel's failings.

In assessing the following 440-motion claims recall that under New York law "Defendant could not assert his ineffective assistance of counsel claims on direct appeal to the extent it made factual assertions not supported by the record, but was required to bring claim through a motion to vacate judgment" PEOPLE V. MONTES, 265 Ad.2d 195 (1 Dept 1999). Petitioner's pro se 440-motion sought to expand the record by advancing the following claims relating to ineffective assistance of counsel, all of which did not receive any attention on appeal on account of Appellate Counsel's failure to follow the procedural norms:

> Defense Counsel failed to bring to the Court's attention three exculpatory BRADY affidavits that law enforcement kept from the defendant until the eve of trial impeaching the allegants and showing that their claims evolved. EXHIBIT C10, pages 21-27.
>
> Defense Counsel failed to expose a well documented instance of perjury. EXHIBIT C10, pages 28-35.
>
> Defense Counsel failed to introduce crucial evidence or prepare for a crucial stage of trial. EXHIBIT C10, pages 36-42.
>
> Defense Counsel failed to subject the prosecutor's witnesses to meaningful adversarial testing. EXHIBIT C10, pages 43-51.
>
> Defense Counsel failed to object to Fourth Amendment evidence and failed to assert Petitioner's right to a hearing. EXHIBIT C10, pages 62-73.
>
> Defense Counsel failed to call expert and medical witnesses to testify at trial. EXHIBIT C10, pages 74-97.
>
> Defense Counsel failed to interview, prepare and call witnesses at trial. EXHIBIT C10, pages 124-135.

Defense Counsel failed to prepare for critical stages of the trial. EXHIBIT C10, pages 136-171.

It is argued that each of these claims, not to mention the cumulative force, establishes and meets Petitioner's burden for proving prejudice under STRICKLAND that had such claims and the background supporting information in which the 440-motion is filled been available for the Respondent Appellate Court's review on direct appeal that there is a "reasonable probability" that but for counsel's unreasonable failures the appeal would have been granted. Petitioner's CPL 440-motion also contains constitutional claims related to prosecutorial and judicial misconduct whose introduction prior to the appeal to the record may have led to Petitioner's success on the appeal of having the conviction reversed.

Clearly New York State appellate procedures insist that Appellate counsel expand the record via post-judgment motions prior to filing for appeal, particularly and expressly as it concerns in-effective assistance of counsel claims. Appellate Counsel did not follow this norm, and by his defective conduct he caused Petitioner prejudice including the forfeiture of a meaningful appeal and later CPL-440 motion review. We turn now to the unreasonableness of the Respondent State courts in not allowing for correction to Appellate Counsel's error and prejudicial effect upon the Petitioner.

Argument:

III. THE RESPONDENT STATE WAS UNREASONABLE NOT TO EXTEND TO THE PETITIONER A PRESUMPTION OF CORRECTNESS BUT INSTEAD DENYING PETITIONER'S WRIT OF ERROR CORUM NOBIS APPLICATION

Filing for a writ of error corum nobis is the traditional method in New York State to raise a contention of ineffective appellate counsel with the Court so as to cure deficient legal appellate performamce. PEOPLE V.

DIRENZZIO, 14 NY.2d 732 (1964). Petitioner pursued the proper method and timely submitted a Petition for such a writ the Respondent Appellate Division (and later Court of Appeals), advising both that his rights to effective appellate counsel and due process were violated by Appellate Counsel's 2018 Appellate Brief (EXHIBIT C9) "as there exists errors, omissions and instances of misconduct;... since this information is reasonably believed to have an impact on a reviewing court's consideration in a direct appeal if the record was enlarged so as to include them, the application of a CPL 440-motion was and remains appropriate as a preliminary to the direct appeal" (EXHIBIT C3, Petition, para.10). At all times, for the reasons articulated in his Petition papers it was reasonable and within the procedural norms of Respondent State law for Petitioner to have requested the issuance of a writ of error, and for the Court to have vacated the appeal decision (EXHIBIT A4) to have allowed for a CPL 440-motion to precede it so as to expand the record and establish the support for ineffectiveness of trial counsel claims as is the prevailing norm in the State that appellate counsel did not adhere (see argument SUPRA).

Respondent Appellate Division and Court of Appeals courts failed to protect and safeguard Petitioner's federal and state rights to due process and effective counsel, when both Courts denied Petitioner relief. Both courts unreasonably breached their duty that in this instance required them to extend a presumption of correctness to Petitioner's claims as argued in the Petition seeking the writ. "When counsel's deficient performance deprives a defendant of an appeal that he otherwise would have taken ... a reviewing court must 'presume prejudice' with no further showing from the defendant of the merits of his underlying claims" ROE V. FLORES-ORTEGA, 528 US 470 (2000).

The ROE court was explicit: "We rejected any requirement that the would-be appellant 'specify the points he would raise were his right to

appeal reinstated." This point deserves re-emphasis as chief among Respondent ADA's arguments in opposing the granting of a Writ of Error was exactly the kind that the U.S. Supreme Court in ROE rejected (Respondent ADA opposed Petitioner's Writ Petition for "unspecified claims of ineffective assistance" that he criticizes the Petitioner as "fail[ing] to articulate or identify"; "The People have been unable to identify any specific legal issues that require a more detailed response and would simply ask that this Court deny defendant's motion as he has failed to identify or argue any alleged failings or claims of ineffective assistance". EXHIBIT C4, para. 8, 9 & 11). Such argument ignores the presumption that criminal appellants ought to enjoy as ruled in ROE:

> "'To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding pro se' ... We similarly conclude here that it is unfair to require an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit."

The Respondent Courts would have been in direct opposition with federal law if they accepted Respondent ADA's above-argument, although we cannot say for sure why the Respondent Court's denied Petitioner's Writ petition as neither Court bothered to provide a reason in its denial -- perhaps a further due process violation and disregard for the rights and dignity of appellant litigants.

Like ROE, Petitioner argued in his Petition seeking a writ of error that Petitioner was prejudiced by appellate counsel's deficient performance. He "was deficient in failing to first file an Article 440 motion with the trial court wherein facts and circumstances not reflected in the record and/or not known at the time of conviction/sentencing could receive proper noticing and become part of the record by which a proper appeal could ensue" Petitioner argued in his papers as a pro se litigant (EXHIBIT C3). As argued SUPRA, such deficient performance arose because the Respondent State's

bifurcated appellate process limits matters tending to be dehors the record to post-conviction motions prior to being considered on direct appeal. Su a policy is despite CPL 470.15(1) giving appellate courts' the ability to consider and decide factual situations as they deem fit -- a point this brief will later return. Here, we merely note that the State's bifurcated appellate process and the Respondent court's refusal to issue a writ of error when appellate counsel did not follow the prevailing norm appellate procedure demonstrates an inhospitable frustrating of this Petitioner's ability to air grievances of constitutional dimensions. Petitioner's affidavit requesting the writ of error was clear on the constitutional need that was at stake:

> "The appeal is seriously deficient, largely because it fails to incorporate the actual facts and circumstances that did not make its way to the record of the case..." (EXHIBIT C3, para. 7).
>
> "Respondent based some of his arguments off non-record inferences, and because the correction of errors required the airing of several off-record misconduct..." (EXHIBIT C3, para.8).

Petitioner's Petition was narrowly tailored to arguing that Appellate Counsel short-changed him"in not first filing an Article 440 motion to document on the record the plenitude of facts and circumstances not now on the record..." (EXHIBIT C3, para.13). As ROE V. FLORES-ORTEGA supports, it was unnecessary to detail specific argument at the time of Petition -- although the subsequent CPL 440-motion Petitioner filed presents 206-pages of arguments. ROE stands for the premise that a presumption of correctness ought to have immediately attached to Petitioner's Petition for Writ of Error, and such presumption is underscored by an explicit statement that no further showing of underlying claims was necessary. Accordingly, on both grounds the Respondent Courts were unreasonable in denying Petitioner's writ petition, seeking judicial assistance to safeguard and protect his constitutional guarantees. Respondent Court's failures amount to withholdance of

the very "adequate and effective" minimum constitutional safeguards that the Supreme Court specified that State courts must supply when granting appellate rights. EVITTS V. LUCEY, 469 US 387 (1985).

On state due process arguments alone, New York's courts were unreasonable to deny Petitioner's plea for a writ of error. Writs of Error Corum Nobis are the appropriate procedural remedies to challenge due process and appellate counsel ineffectiveness claims under state law. PEOPLE V. BARCHERT, 69 NY.2d 593 (1987). Such a procedural remedy have been expressly preserved by the Courts to address these very type of problems. The court in BARCHERT held that such writs of corum nobis survived the adaptation of the criminal procedure law as the CPL "did not expressly abolish the common law writ of corum nobis."

For all the reasons as stated, and for the benefit of those similarly situated as the Petitioner relying on appellate counsel to follow state procedure but fails to do so, and the state court fails to correct appellate ineffectivness of counsel, the U.S. Supreme Court is urged to intervene and admonish the State Court that due process and the constitutional rights of criminal defendants require Courts to give them the presumption of correctness in writ of error petitions, as an essential part of the "adequate and effective" minimal constitutional safeguards required of a State such as New York that claims to recognize the right to appeal as a fundamental right. Beyond this, the Court is also urged to review New York's bifurcated appellate process and procedure as a whole as to whether it is in fact inhospital and frustrating to constitutional claims so as to require mode of operations reform.

** Petition for Writ written entirely while under month-plus long lock-down quarantine for COVID-19; Typo-clemency and other understanding appreciated.

Argument:

IV. RESPONDENT STATE COURTS FRUSTRATED PETITIONER'S APPELLATE RIGHTS AND DENIED HIM DUE PROCESS DURING THE APPEAL PROCESS RESULTING FROM INHOSPITABLE APPELLATE PROCEDURES

Petitioner's appellate and due process rights were curtailed by the Respondent State causing him prejudice even prior to their July 2019 appeal denial. Disatisfied with Appellate Counsel's deficient performance, and sensing flaws in the appellate procedures themselves that later became discernible, Petitioner took the extraordinary step to submit a pro se supplemental brief -- as New York State law permits -- so as to address and correct errors and omissions in both the Appellate and Respondent briefs, only to have the Respondent Appellate Court disregard the pro se supplemental brief, and with it Petitioner's rights.

State statute 22 NYCRR 1250(11(g)(2) permits appellants to submit pro se supplemental briefs, even as here where a Petitioner is represented by retained counsel. Noticing "errors and omissions" in the "seriously deficient" appellate brief, and the need to "correct the record," Petitioner corresponded with the Respondent Court (EXHIBIT C7) leading to an April 2019 motion seeking acceptance of a 12-page Pro Se Supplemental Brief (EXHIBIT C6). "Permission to submit a supplemental pro se brief is essential to the interests of justice," Petitioner's affidavit in support stated, "to make sure that the Appellate Division has accurate and evidential information in deciding the appeal" (C7). Such papers also argued that Respondent had distorted the record. "Respondent's errors are numerous in alleging effective trial counsel in specific ways that are easily negated by the record, such that without documentation and the accompanying citations, so as to dispute, the Court will lack meaningful reflection of Respondent's claims. Such a lack will impact and prejudice my appeal by

masking the true scope and nature of trial counsel's ineffectiveness, and the denial of due process and fair trial" EXHIBIT C7, para. 11 &12.

Respondent Appellate Court issued its decision on May 2019 to grant Petitioner's motion request to submit a pro se supplemental brief, two months before denying the appeal in full (see EXHIBIT A5). Such acceptance of the pro se supplemental brief was limited: "Ordered that the motion is granted only to the extent that the pro se reply brief is deemed timely filed and served, and only those portions of the record on appeal will be considered by this court." As argued herein, such a motion grant with these limitations amounted to a de facto dismissal to entertain, consider or accept in any way the Petitioner's claims and corrections in violation of Petitioner's due process and appellate rights. Accordingly, the Court's July 2019 denial of the appeal does not even mention the Petitioner's pro se supplemental brief, let alone consider any of its content, a noted departure of previous State procedural acceptance of Pro Se Supplemental Briefs. Consider for instance CIAPRAZI V. SENKOWSKI, 2003 WL 23199520 wherein the reviewing Court mentioned the appellant's pro se supplemental brief by name and acknowledgment "which this court considered." Note also the decision in CAMPBELL V. GREEN, 440 F.Supp.2d 125 (2006) wherein the court "specifically acknowledge that it had considered Campbell's pro se brief in arriving at its decision during its appeal." Such consideration of those Appellant's pro se supplemental briefs while totally excluding the Petitioner suggests Equal Protection Clause violations on the part of the Appellate Court in addition to due process violations.

Under Respondent state law CPL 470.15(1), intermediate courts possess the power to consider and determine questions of law as well as fact (EXHIBIT B3). Additionally under CPL 470.15(3) the same courts are empowered to reverse or modify judgments/sentences based upon the law, based

upon facts, or as a matter of discretion in the interests of justice. Such discretion includes under CPL 470.15(6) the authority to reverse or modif for "error or defect [that] was not duly protected ...[which] deprived the defendant of a fair trial." While it is clear from the statute that such authority is within the Court's discretion, when a Court decides not to exercise its powers to review claims of unconstitutionality that impeded an appellant's trial rights -- as here -- and consequently such willful refusal to consider the unconstitutional claims merely because it arose de hors the record, can still amount to a violation of Petitioner's appeal rights as is herein argued.

As per CPL 450, and case law, New York's intermediate courts exist for the sake of Appellants. Of all the New York Courts, the appellate divisions have the power to review facts for defects including the power to disagree with the manner in which juries considered conflicting testimony in the interests of justice. PEOPLE V. BEAKLEY, 69 NY.2d 490; PEOPLE V. ROMERO, 7 NY.3d 633. The role of the Appellate Courts in serving the interests of justice and because they possess the power to disturb judgments by examining facts and not just law, also cuts the other way when appellate courts turn a blind eye to "timely filed and served" arguments and factual assertions as Petitioner ~~did so~~ raised in his supplemental pro se brief. In neglecting to consider Petitioner's claims that he did not receive effective representation and other claims, albeit properly filed, the Court in essence deprived him of due process and his right to appeal.

The Appellate Court's refusal to give the Petitioner due process in his direct appeal is particularly abhorrent considering the court's role in administering justice as determined by its own case law. New York law dictates that new trials must be ordered when appellants were denied fair trials even when an appellant was convicted by overwhelming evidence of

guilt, a characteristic missing in the instant case. The court in PEOPLE V. BROWN quoting PEOPLE V. DIAZ, 39 NY.2d 457 and PEOPLE V. BENNETT, 29 NY.2d ____, wrote that even when "guilt [was] established by overwhelming evidence ... nevertheless [a] defendant was entitled to a fair trial." "The cardinal right of a defendant to a fair trial is respected in every instance," the Court decreed in PEOPLE V. CRIMMINS, 36 NY.2d 230 (1975). Except in the Petitioner's case the cardinal right to a fair trial was denied him by among other things ineffective counsel which Petitioner properly raised in his supplemental pro se reply brief accepted as"timely filed and served" but otherwise ignored. In refusing to consider the Petitioner's claims the Court deprived the Petitioner of his rights.

Under BRADLEY V. MEACHUM, 918 F.2d 358 (3rd Cir. 1990) state courts must determine matters of federal law before deciding if state procedural rules apply to the case. If the Second Circuit were to have such a rule the Respondent court would have violated such a rule. Compliance would have required the court to accept the documents submitted with Petitioner's pro se brief for purposes of establishing constitutional claims rather than just summararily rejecting them as dehors the record on appeal. Since ~~the~~ the documents included BRADY material withheld from the jury, we argue that the BRADLEY V. MEACHUM rule was required by the appellate court under the Court's requirements to protect Petitioner's due process rights under the required MATTHEWS V. ELDRIDGE, analysis rather than just summarily dismissing Petitioner's pro se brief arguments/documents without any such analysis or review.

A further indicator that Respondent Courts were inadequate in their appellate duties, and neglectful of Petitioner's due process, can be seen by a consideration of MAPES V. COYLE, 171 F.3d 408 (6th Cir. 1999). Therein Petitioner's "properly raised" claim was also disregarded on appeal.

Briefly with respect to the specific claims presented in the Petitioner's ~~pro se supplemental brief but totally ignored by the Appellate Division~~ were allegations that trial counsel did not prepare for trial. These were argued in response to Respondent ADA's brief claims that trial counsel provided "meaningful representation." Where an attorney makes a claim to a court that can be refuted by evidence and testimony, as here, the interests of justice seem to require that such a claim be challenged and the Court consider the arguments and evidence showing otherwise. When that Court is empowered by statute with fact-finding authority and discretion to even second-guess jury decisions, it is nothing less than dishonest and an invitation for a continued miscarriage of justice for said Court to ignore evidence and arguments to the contrary as this Court has done. Petitioner's pro se supplemental brief argued:

> "The tragic fact that underlies the defendant's present conviction and sentence is that trial counsel refused to prepare for trial, spending any time related to the case on negotiating a plea deal, which the defendant told him at his hiring ... that no plea deal would be accepted. ... Instead trial counsel vacationed in Florida, refused to meet with witnesses for testimony preparation of voir dire (including the defendant) and spent the three days between trial day #2 and #3 not preparing for the trial but sightseeing in Montreal with his girlfriend."

The Pro Se brief also provided background information on how defense counsel showed up for Petitioner's scheduled Huntley Hearing "without any plan for proceeding, no witnesses subpoenaed (not even the doctors who the case's first counsel had ready to testify and deposits were paid)... wherein the defendant was involuntarily forced to waive the hearing as his attorney was not prepared for it." A court empowered with fact-finding authority required to consider constitutional claims before state procedural rule-adherence might have taken such a claim as grounds to schedule an evidentiary hearing in the interests of determining the truth of such a claim, particularly since the Huntley Hearing waiver was a major prong of Apellate Counsel's ineffectiveness claim. It is long held that constitutional claims

are not extinguished during waivers, but survive (JOHNSON V. ZARBST, 304 US 458 1938). The appellate court did not schedule an evidentiary hearing where factual assessments could be made to evaluate the constitutional claim, instead the Court's July 2019 decision instead decreed that trial counsel provided "meaningful representation" (EXHIBIT A4). As with NUNES V. MUELLER, 350 F.3d 1045 (9th Cir. 2003) it is here unreasonable when the Court had the power to expand the record, but did not do so. "A failure to find facts, is actually an unreasonable determination of facts." TAYLOR V. MADDOX, 366 F.3d 992 (9th Cir. 2004).

The aforementioned BRADY affidavits were police statements of witnesses that impeached the allegants and undermined the felony convictions altogether These were withheld from the defense, and never shared with the jury. See EXHIBIT D1 for an active Complaint against the Police Officer who withheld these exculpatory documents from the District Attorney. As with the Petitioner's supplemental brief statements regarding the ineffectiveness of trial counsel, these BRADY affidavits were submitted to the Court because the Respondent ADA made factually untrue statements in his papers to the court claiming that the allegants' credibility was never called into doubt. These affidavits say otherwise. Petitioner's pro se brief discusses these affidavits on pages 8-12 of EXHIBIT C6. As with before, the issue comes down to Petitioner's rights when the Court is being prompted to believe allegations from a party that is innaccurate. Is the right to appeal and due process not frustrated, and the State appellate process inhospitable when a Court empowered by statute with the power to consider both facts and defects in proceedings chooses to turn a blind eye to "properly filed" challenges to those allegations? "A judicial process that renders constitutional error invisible is, after all, itself an affront to the Constitution" (Justice Souter Dissent in SMITH V. ROBBINS, 120 S.Ct. 746 (2000).

Argument:

V. RESPONDENT APPELLATE COURT ABUSED ITS DISCRETION WHILE DENYING DUE PROCESS AND EQUAL PROTECTION OF THE LAW TO PETITIONER WHEN RULING "THE RECORD SHOWS..." WHEN THE RECORD IS ENTIRELY VOID OF WHAT IT CLAIMED.

At the same time that the Appellate Court refused to consider evidence and argument that was dehors the record that could have benefitted the Petitioner (see arguments SUPRA), the same Appellate Court looked beyond the record as urged by the Respondent ADA in his papers in what can only be termed an abuse of discretion, which has caused constitutional deprivations to the Petitioner.

Judicial abuses of discretion can be found when a reviewing court "bases its decision on error of law or uses the wrong legal standard; bases its decision on clearly erroneous factual finding, or renders a conclusion that though not necessary a product of legal error or clearly erroneous factual finding cannot be located within the range of permissible decisions" KLIPS GROPRINEC V. CPRO E-COMMERCE LIMITED, 880 F.3d 620, 2018 WL 54338. Judicial abuses of discretion include acting "arbitrarily and irrationally" and basing its discretion on "erroneous factual or legal premises" US V. WELSH, 879 F.3d 530, 2018 WL 386658.

Here, in Petitioner's 2019 Appeal the Respondent Appellate Court was Made aware by The ~~an~~ appellate brief that claimed that Petitioner was denied a fair trial and effective assistance of trial counsel over the improper introduction of alleged prior bad acts. As argued in the appellate brief, the trial court reserved its ruling on the morning of jury selection when the prosecutor first announced plans to introduce them, and after trial counsel objected (see Appellate Brief, p.18; EXHIBIT C9). A day later and following numerous prosecutorial objections to the defendant's opening statement the appellate brief states:

> "The Court interrupted Appellant's opening and had an off the record conversation in chambers (A-098). Subsequent to that conversation, the court placed some of the details of it on the record. The People had asserted that Appellant's statements about having a stellar reputation had opened the door to the introduction of his prior bad acts (A-098). Given that the Court had already made its ruling (off the record), trial counsel responded merely by stating, 'I respect your ruling judge'"

The Appellate Brief continues:

> "There is no evidence in the record that the Court determined whether the proposed evidence was material and if so, to what element of the alleged offenses. Furthermore, there is no evidence that the Court weighed the probative value of the evidence against the prejudicial impact of its introduction"

Respondent ADA conceded this lack of evidence in the trial record in his Respondent Brief (EXHIBIT C8 p.27), and then remarkably asked the Court to overlook the voids in the trial records which the appellate court then did so.

Appellate Counsel's brief listed and described the various procedural safeguards that New York State requires both prosecutors and courts to pass through for the benefit of criminal defendants and their rights. Then Appellate Counsel stated in clear unequivocal language: "Here there is no evidence that the Court ever engaged in this analysis for any of the prior bad acts that the People introduced" (p.20). Despite the trial record's total absence of any indicators that the trial court complied with state law in protection of the Petitioner's rights, the Appellate Court's July 2019 decision (EXHIBIT A4) wrote itsdown after-the-fact rationales that it then passed off as if it was part of the trial record from three years before. Some of this rationale was "such evidence was admissible to show defendant's intent and motive" (page 6), but most egregious was its clearly erroneous factual-finding: "The Record Shows that county court balanced the probative value of this testimony against its prejudicial effect" (emphasis added). Such a blatant misrepresentation of the trial record is clearly an abuse of the court's discretion. The record most certainly does not show any such

weighing. Nor does the record reveal requisite discussion and naming by the prosecutor of non-propenisitory purposes for the introduction of such testimony.

Petitioner argued that his due process and equal protection rights were violated in his Fall 2019 Application for Leave to the NY Court of Appeals. He specifically compared the situation to where the same court rejected his pro se supplemental brief arguments as dehors the record at the same time the Court was exercising its discretion to "find" evidentiary hearings that were not to be found in the record as an indicator of the arbitrariness, i.e. discrimination, that defines unequal protection of the law:

> "In accepting the pro se brief the Court limited the brief to only those matters appearing in the record ... that said, if the Appellate Court has a rule about only ruling on the record, then it becomes a matter of justice for the court to stick to its rules, and not make exceptions when it benefits its particular prejudices, politics, or home team." EXHIBIT C5, page12B

Petitioner's Leave application specifically referenced ITKIN V. RINGER, 12 Ad.2d 732, a 1960's case where a stenographer was not present while the court conducted business in chambers. The court in ITKIN ruled that "it is impossible to pass upon the rulings of the trial court because of the procedure adopted or reviewing the depositions in chambers without a stenographer present." Instead the ITKIN court ruled "that in the interests of justice a new trial should be directed." If, even if arguendo, the trial court did conduct the appropriate procedural safeguards off-record, equal protection of the law, due process and sound judicial disrection all demand that a new trial be ordered, not for the Appellate Court to create its own"facts" and superimpose them onto the trial record.

An argument in support of the claim that Petitioner was unequally treated appears also in the Leave application in Exhibit C5 wherein Petitioner cited PEOPLE V. SCARINGE, 137 Ad.3d 1409. Therein a criminal defen-

dant's trial verdict was overturned when, as here, the trial transcript displayed no non-propensty justification or court weighing of the prejudicial effect prior to the introduction of the prior bad acts. Claiming unequal treatment, Petitioner wrote that the decision in his case "ignores the entire record and instead seeks to perpetuate a fraud and a cover-up." Such misconduct strikes at "the entire legitimacy of this court -- perhapss even the justice system itself" (EXHIBIT C5, p.14). So also in PEOPLE V. SORRELL, 108 Ad.3d 787, decided on the very same day as Petitioner's appeal the inequitable treatment is glaring. "In SORRELL a competent judge considered the prejudicial effect of evidence, limiting or excluding much of it and facilitated 'extended arguments' on the record to determine if any 'permissible non-propensitory purposes existed,'" The Petitioner wrote in a 2020 Commission on Judicial Conduct grievance complaining of the Respondent judges, "In KELSEY there was no such weighing, no such limiting, no such excluding, no extensive arguments, and no discussion of non-propensity purposes" (EXHIBIT D2, p.12).

For all the foregoing reasons, and particularly because the overarching theme of this Petition argues that Respondent State is consistently and inhospitably enforcing its proclaimed refusal to consider off-record evidence on direct appeals even when it frustrates the constitutional claims of convicted criminal defendants, while exercising its statutory judicial discretion to discern facts in the record as here -- not to protect defendants and their rights, but rather only when it serves the State's interest in validating trial verdicts, the supervisory authority of the U.S. Supreme Court is urged to intervene, reverse, and admonish a State whose Courts disrespect, dilute, and disable the Constitutional protections of defendants without shame and without honor.

Argument: VI:

NEW YORK STATE FLAUNTS AND DISREGARDS FEDERAL LAW AS WHEN RESPONDENT STATE's USE OF NEGATIVE CHARACTER TESTIMONY IN PETITIONER's TRIAL WAS THEN AND REMAINS UNCONSTITUTIONAL

In 1901 New York State's Court of Appeals ruled that a criminal defendant's prior bad acts and prior criminal convictions could be admitted into evidence at a criminal trial under very specific conditions and via procedures meant to protect a defendant's constitutional rights. PEOPLE V. MOLONEAUX, 108 NY 264. At the time, New York State liberally allowed character testimony into criminal trials wherein good character evidence when considered with other evidence was deemed a generator of reasonable doubt. EDGINTON V. UNITED STATES, 164 US 361; PEOPLE V. SLOAN, 181 Misc. 822. Yet, when the U.S. Supreme Court came to prohibit all character testimony from criminal trials -- good as well as bad -- in the 1948 case MICHELSON V. UNITED STATES, 335 US 469, a New York case, New York State henceforth banned the use of good testimony in criminal trials, it would seem, while retaining its permitted exceptions for prior bad specific act testimony as introduced at Petitioner's trial to his prejudice. Such continued use of negative specific act testimony in criminal trials by the Respondent State of New York is directly in opposition to the holding in MICHELSON, and for the very reasons that MICHELSON outlawed use of all character testimony is why the introduction of alleged prior bad act testimony in Petitioner's trial violated his rights to a fair trial and due process. When urged to correct the problem on direct appeal, the state appellate court also defiantly turned a blind eye to constitutional safeguards pronounced by the U.S. Supreme Court (this time, FRY V. PHILER, 554 US 112), causing this Petitioner to wonder if the Fourteenth Amendment's protections of citizen rights imposed upon the States has somehow exempted New York from adhering to the Constitution, federal law, and the rule of law itself?

While the U.S. Supreme Court claims to have not yet established a clear precedent on when due process rights are violated by the admission of uncharged crimes, i.e. prior bad acts or negative character testimony, (JOHNSON V. ARTUS, 2010 WL 3377451), in the Petitioner's mindset such a ruling was in fact determined by MICHELSON and ought to be enforced. The holding in MICHELSON was to close "the whole matter of character, disposition and reputation" altogether during criminal trials so as to prevent trials from turning into "circuses" when "damaging rumors, whether or not grounded" were circumventing justice by "complicat[ing] and confus[ing], the trial, distort[ing] the minds of jurymen and befog[ging] the chief issue of litigation. MICHELSON's ruling was a solution to "prevent confusion of issues, unfair surprise and unfair prejudice." It banned all use of specific act testimony, good as well as bad. Yet, in the Petitioner's case while the Court did not permit positive specific act testimony to enter in by defense witnesses*, the Court -- and New York law under MOLONEAUX et.al. -- allowed in negative specific act testimony.

The negative influence negative character evidence testimony can have on the jury -- and on the verdict -- has in recent years received the attention of the U.S. Supreme Court, although it seems to have had no effect on New York's rogue justice system. In 2007, the Court advocated in FRY that appellate courts reviewing trials for constitutional error were to use a "substantial and injurious effect" standard to evaluate whether wrongfully admitted testimony prejudiced a defendant in the jury's eyes. The Second Circuit, of which New York is a part, affirmed this rule in WOOD V. ERCOLE, 644 F.3d 83 (2011). And yet, just as negative specific act

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* = When Defense Witness D.R. attempted to testify, the trial judge cut him off, "I don't want to hear about specific instances. I don't want to hear about your opinion of him. All you can testify to is a rapport of the community sentiment," almost a verbatim MICHELSON quote.

testimony was permitted to enter into the trial court in defiance of MICHELSON, (and in absence of a hearing to weigh the prejudicial effect as required by state law), neither did the Respondent Appellate Court evaluate the prejudice of the alleged prior bad acts on the jury's mindset at Petitioner's trial to determine their substantial and injurious effect as required of it by federal law. Quite simply, New York courts do whatever they want with no accountability -- not even the constitution or it appears even their own conscience.

Appellate Counsel called the introduction of the alleged prior bad acts into the trial "prosecutorial misconduct" (EXHIBIT C9, page 20), noting also that the Prosecutor peppered the defendant with all sorts of prior bad act claims for acts not previously subjected to any hearing or previously identified with a non-propensitary purposes as required by State law. Nor were the facts of the alleged prior bad acts even verifiable. Of these the Appellate Division supplied its own reasons to defend the use of the negative specific act testimony including "to show the defendant's intent and motive" when the trial record itself was void of such attempted rationale. And yet, had the Appellate Court conducted a hearing to deduce prejudicial effect, perhaps such an inquiry might have revealed the alleged prior bad acts, by the prosecutor's own witness' testimony revealed that such game never had a sexual nature to it, defeating the Court's after-the-fact attempts to salvage trial court errors for the sake of the State's interests rather than reverse their constitutional role suggests they are required to do when error and defect deprive accused persons of fair trials and due process. (See D3 for the prosecutor's witnesses' 2020 civil deposition testimony regarding the game of pididdle, a game that three defense witnesses testified was played on long trips to keep the driver awake, not for sexual perverted purposes, pace prosecutor, pace appellate court).

The State court's penchant for doing as it wishes, no matter what the

law requires, is again indicted as arbitrary by the appellate court's opposing decisions issued the same day as the Petitioner's. On the same 3 July 2019 that appellate court affirmed Petitioner's verdict in part by defending the use of negative character testimony, the Court also overturned the verdict based upon the trial court's prejudicial use of prior bad act testimony in PEOPLE V. SAXE, 2019 WL 28365322. Two cases with two very different outcomes. In SAXE, the appellate court ruled that Mr. Saxe was prejudiced because the negative character testimony made him appear a "serial sex offender who had not been punished for his prior crimes." In the Petitioner's case, the Court conducted no prejudicial test, but merely invented justifications for the lower court when the record was deemed insufficient. Such inquitable and arbitrary treatment is violative of the Petitioner's 14th amendment rights. For additional reflection on this topic see EXHIBIT D2 for the Petitioner's grievance to the State Commission on Judicial Conduct complaining of the Respondent judges.

The U.S. Supreme Court is urged to weigh in not only on whether its caselaw in MICHELSON and FRY are binding on the states, but also whether negative specific act testimony is always a constitutional violation, or if it can be permitted then so also should positive character testimony for which the Court's holding in MICHELSON is preventing. Either way the constitutional trial rights of defendants are being impeded wherein it is within the Court's orbit to act.

Argument:

VII. RESPONDENT STATE IS IGNORING THE FEDERAL STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

In both Petitioner's direct appeal and in his Petition for Writ of Error Corum Nobis, Petitioner claimed ineffective assistance of counsel. In both, Respondent State denied him relief. As with the appeal, it is

argued that both decision denials are in need of reversal as the Respondent State is failing to observe the federal standard of STRICKLAND V. WASHINGTON, and that such a failing to observe the federal standard has unconstitutionally denied Petitioner of the relief sought.

Petitioner's appellate brief (EXHIBIT C8) and pro se supplemental brief (EXHIBIT C6) both argued for ineffective assistance of trial counsel, which the Respondent State rejected in its decision (EXHIBIT A4). Petitioner's Petition for a writ of error (C4) alleged ineffective assistance of appellate counsel, which the state denied (A2 and A1). The right to effective assistance of counsel on a first-tier appeal is guaranteed by the 14th Amendment. EVITTS V. LUCEY, 469 US 387 (1985); ROE V. FLORES-ORTEGA, Since the right to effective asssitance of counsel is essential to due process in both trial and appeal, the Petitioner is short-changed when the State refuses to adhere to, and to analyze defects in proceedings by the federal standard.

New York judges are not shy in divorcing themselves from the federal standard while endearing themselves to their own state standard, as was openly discussed in PEOPLE V. STULTZ, 2 NY.3d 277, a case that also adopted the state standard as their benchmark for determining appellate counsel Effectiveness. The STULTZ court admitted to retaining their state standard of "meaningful representation" as was determined in PEOPLE V. BALDI, 54 NY.2d 137 (1981) (constitutional requirements are met when the defense attoreny provides meaningful representation). The STULTZ court claims -- erroneously as this argument will plead -- that the chief distinction between the state BALDI standard and the federal STRICKLAND standard is only that the latter proceeds further in requiring the proof of prejudice, which is not a necessary showing under BALDI. We disagree. We find BALDI fails to review, assess and evaluate the grievances of claimants as to their attorney's deficient performance and as such turns a blind-eye to

counsel's alleged defects, instead focusing on what counsel did right. Such a standard does not evaluate ineffectiveness, nor does it protect criminal defendants from defective performance. Rather the BALDI standard merely protects and insulates state attornies at the expense and frustration of the constitutional rights of criminal defendants/appellants. New York and its BALDI meaningful representation standard is not just at odds with the federal STRICKLAND standard, it is being deployed by the State to frustrate and impede the detection and correction of actual ineffectivness of counsel.

In Petitioner's direct appeal, Respondent Appellate Division invoked the state meaningful representation standard in its rejection of appellate counsel's ineffective assistance claims. See EXHIBIT A4, page 5. Therein the appellate court quoted PEOPLE V. HACKETT, 167 Ad.3d 1095: "In general, a defendant's constitutional right to effective representation is met so long as the evidence, the law, and the circumstances of a particular case, viewed in totality, reveal that the attorney provided meaningful representation." Such a standard looks at the positive, not at the negative, an important distinction setting it apart from STRICKLAND V. WASHINGTON, 466 US 668 (1984). Petitioner argued this point in his CPL 440.10 motion, a pro se submission (EXHIBIT C10, p.__), wherein he pointed out that the State standard in HACKETT and BALDI seems to confuse the right to effective counsel with the very distinct right to procedural due process:

> "The actual text, in the defendant's eyes, is not whether the counsel gave an opening and summation, and asked questions ... but was the quality and adversarial expectations met; was the available evidence and witnesses introduced to the jury, was the defendant's position properly articulated -- was there a roadmap and was the roadmap followed."

The federal standard in STRICKLAND is an objective test, not one based in subjective "meaningfulness." STRICKLAND demands reasonablness under prevailing norms for which a showing of prejudice alongside evidence of def-

icient conduct. The difference is that the state test looks for positive acts on the part of the counsel (was his teeth brushed and hair combed) while ignoring defects and omissions including those that may have veered from norms (as here, did he make typical objections like to dismiss when the prosecution ended its case, or in asking for limited instructions when prior bad acts were introduced -- both as argued in the appellate brief). In asking the wrong questions, the state court reaches the wrong answers. The State, it is presumed, may still apply its own state standard but only after it applies the federal standard when federal rights are alleged to have been violated. Because the state ignores the federal standard, the Petitioner has not received a meaningful appeal and his claims to an unconstitutional trial and verdict remain.

Of scandal, the respondent state's BALDI standard gives free license to appellate courts to merely rubberstamp trial verdicts so long as counsel showed up for work (see for instance PEOPLE V. BENEVENTO, 91 NY.2d 828 (1985) where meaningful representation was equated with reasonable competence). For a court charged with detecting errors and defects (CPL 470.15) the state standards it adopts seems to go far out of their way to avoid finding defects and errors -- which is perhaps the point when the State is focused on the state standard of finality, and not on protecting the rights of defendants as is what the right to an appeal should be all about. The natural conclusion is that in New York the so-called right to appeal is in-name only, that the entire apparatus of judicial hierarchy and proceedings is just for show, a mere procedural pass-through because the courts, its presumptions, and its standards are not concerned with whether the constitution and its safeguards governed justice but merely will the public think so.

The Court is asked to take its own review of the State standard in use by New York and decide whether, as Petitioner alleges, such standard

is inimical and inhospital to the STRICKLAND standard as recognized by federal law. The fact that New York courts are claiming to offer convicted persons a right to an appeal and are tying up defendants in state court proceedings until their state attempts at overturning or pleading a wrongful conviction/imprisonment keeps a defendant from exercising the right of federal habeas corpus should require a state court to utilize the federal standards, if the State court is not utilizing the federal standards then criminal defendants should be permitted to access the federal courts sooner so that the protections guaranteed by the Constitution are not endlessly and unnecessarily frustrated or subverted.

Argument:

VIII. NEW YORK LACKS APPROPRIATE SAFEGUARDS FOR SECURING THE RIGHTS OF APPELLANTS AS EVIDENCED BY AN INABILITY TO POLICE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

"Every defendant has a fundamental right to appeal his conviction and that, accordingly basid fairness and due process require that the right not be dissipated." PEOPLE V. MONTGOMERY, 24 NY.2d 130 (1969). "Corum Nobis was enlarged to include claims premised on the loss of a defendant's right to a first-tier appeal, or a lack of a meaningful review on that direct appeal from the conviction caused by counsel's deficient legal performance" PEOPLE V. DERONZZIO, 14 NY.2d 732 (1964). If New York is committed to "every defendant's" right to appeal then it must seriously do some reform beginning with its policing and responses to claims of ineffective appellate counsel.

Justice Thomas rightfully observed in SMITH V. ROBBINS, 120 SCT 746 that the constitutional right to appeal established in GRIFFIN V. ILLINOIS, applies equally to all post-conviction proceedings. By Petitioner's pro se supplemental brief the appellate court received actual and constructive knowledge that Petitioner had serious concerns with the appellate process.

The mere fact alone that Petitioner went to the extraordinary step to file a pro se brief -- and one with claims and documents exposing misconduct undermining the verdict -- should have clued the appellate court into defects and errors by which they have the legal and moral obligation to detect and resolve. The Court did not take action.

Petitioner then filed a Leave application with the NY Court of Appeals (EXHIBIT C5) highlighting problems with the appeal process including those wherein the appellate court ran amok from its own rules to find findings in the record that does not exist in the record (see SUPRA). Petitioner raised 19 new objections in his Leave application, but for which his application was denied. There was no opinion, no thoughtful analysis; nothing.

Petitioner also filed a Petition seeking a writ of error corum nobis. Petitioner wrote the appellate court in such a petition that "appellate counsel's papers did not reach a level of performance sufficient to satisfy an objective standard of reasonableness, particularly since Petitioner wa able to identify 19 issues of law in his application for leave not raised by Appellate counsel." He also argued that there were "extensive errors and omissions that occurred in the defendant-petitioner's May 2016 trial ... that were not argued on appeal" (EXHIBIT C3, para. 9). Just as with the Leave application above, the denial decision to Petitioner's writ of error petition was totally silent. There was no opinion, no thoughtful analysis; nothing.

State law places strict time limits on appellate procedures, and yet when a pro se defendant struggles to meet these deadlines because appellate counsel will not turn over the casefile and the Court is notified -- again the litigant receives nothing in response. It may be dicta, but Justice White's wisdom in McMANN v. RICHARDSON, 90 S.Ct 1441 should resonate, "Judges should strive to maintain proper standards of performance by attorneys." In EXHIBIT D4 are four of the letters Petitioner wrote his retained

but now dismissed appellate attorney in the months following his July 2019 appellate denial asking Counsel to send him his casefile for purposes of filing pro se leave requests. One of these letters was addressed to the Clerk of the NY Court of Appeals wherein Petitioner stated:

> "I am experiencing difficulty in obtaining my file from my appellate attorney to whom I have been writing repeatedly ... I hope this Court might assist me in having an Order issued."

Note that this same letter was written regarding Petitioner's pending Leave to the NY Court of Appeals, a purpose the casefile would have been helpful for.

Also included in EXHIBIT D4 is a letter written of the Trial Judge "declining to sign an order" mandating the transfer of the casefile so that Petitioner might write his CPL 440-motion (the very document that Appellate Counsel was ineffective for not first filing prior to the appeal). Under New York law, casefiles belong to clients. SAGE REALTY CORP. V. PROSKOVER ROSE GOETZ & MENDELSOHN LLP, 91 NY.2d.30 (under settled law an attorney's former client is presumptively entitled to inspect and copy any documents which relate to its representation and are in counsel's possession including attorney work product); PALIN V. WISEHURT & KOCH 2002 WL 1033804 (SDNY 2002). (A client should be granted full access to his attorney's file including work product). Unable to get assistance from either court with supervision and oversight over the case, Petitioner was forced to bring suit in the State Supreme Court for conversion and replevin (see EXHIBIT D5). Such extraordinary measure was necessary because the State lacks adequate procedural remedies for ensuring that pro se clients have the recources and records they need to pursue post-conviction appeals and claims in furtherance of their constitutional rights.

"The failure of appellate attorney to transfer his casefile," Petitioner wrote on page 32 of his pro se CPL 440-motion, "prevents the defendant from outlining the full reconstruction of how defense counsel..." noting also on

page 162 of the same motion (here, EXHIBIT C10) that the casefile includes "a copius amount of documents that confirm and expand" upon defense counsel's failings. Without the casefile, Petitioner was forced to submit all the forementioned documents to the Court, and when assistance was sought from the Court no assistance was forthcoming. In the broader picture, New York State claims to have a fundamental right to appeal, but the State will not take any measure to protect that right. The State's bifurcated procedures limit and exclude what issues and records can be scrutinized on appeal. The State's caselaw restricts courts from considering evidence that is dehors the record, even in defiance of statutory authority to intermediate courts to detect errors (CPL 470.15). When the courts do exercise such discretion it is not to expand the appeal record for the sake of appellants but to "find" and manufacture reasons to correct the transcript of lower courts. The State does not follow federal law on character testimony or on mandated pejudicial effect assessments. The State ignores the federal standard of attorney effectiveness, and when asked to intervene to assist an appellant with obtaining a casefile to argue ineffective counsel, inter alia, the Court instead ignores the appellant the presumption of correctness that federal law entitles him. There comes a time when the curtain needs to be drawn back to reveal what lay behind it. There is no right of appeal in New York State. Instead there are empty mechanical processes by which appellants are required to pass through in the name of due process so as "exhaust" roadblocks that euphenisms call "remedies."

Located in EXHIBIT A7 is a decision denying the Petitioner federal habeas relief and specifically the right to be out on bail while the State appellate machinery grinds and turns with no end in sight. The federal court decision dismisses Petitioner's plea for habeas relief without prejudice in essence noting that "state court remedies are available to him" (page 4). We disagree, arguing that the "remedies" are substantively hollow

and sterile by design. IE is argued that New York State does not meet the ~~mimumim level of appellate constitutionality, as argued herein, to justify~~ suspending the Writ of habeas corpus or otherwise allowing federal courts to enforce Petitioner's federal rights. This Petition for certiorari asks the U.S. Supreme Court to evaluate what level of federal oversight citizens are owed when their constitutional rights are violated by state governments, and a right to appeal-in-name-only is meted out by the said State in such a way as is New York's that the very aim of scrutinizing a verdict for error and constitutional defect is not followed, but subjected to perpetual frustration. Must a wrongfully convicted person exhaust all state "remedies," when a behemoth state shows no regard for constitutional rights in its proceedings, prior to seeking redress from a federal court in curtailing or curbing state judicial despotism? If New York State had not professed to have and make available to its convicted population a right to appeal, there would be no question of a convicted person having access to the federal courts to argue wrongful conviction/imprisonment. Such access implies a federal right of appeal, something that argument in EXHIBIT D6 claims is fully compatible with the Constitution in light of the mindset of the men who ratified it, and adopted its Bill of Rights. Just because New York State chose in 1969 to grant a state right of appeal to its convicted does not and should not "suspend" federal review and enforcement of those rights when New York State does not adequately and effectively police itself, its procedures, its bench, its bar, and it's presumptions, standards, and alignment with federal law. Comity and federalism concerns should not trump the guarantee of the Bill of Rights and the 14th Amendment to its citizens. A State that violates its citizen's rights is an atrocity; what is worse is when the same state claims to have a system of review and correction, but deploys it to contravene those rights and the federal government lets it. This Petitioner's study of U.S. history thought that was why the 14th Amendment was passed, and earlier the Writ of Habeas Corpus.

ARGUMENT IX NEW YORK LACKS MINIMUM APPELLATE PROTECTIONS AT THE TRIAL LEVEL ~~INCLUDING LAX AND MANIPULATEABLE~~ SYSTEMS FOR PRESERVING THE TRIAL RECORD

The Due Process Clause of the 14th Amendment entitles criminal defendents access to their trial transcript as a minimal procedural safeguard for pursuing appeals. LANE V. BROWN, 372 US 477 (1963); ANDERS V. STATE OF CALIFORNIA, 386 US 738 (1967). Trial transcripts are "necessary for him to have some record of the proceedings in order to prosecute his appeal properly." ESKRIDGE V. WASHINTGON STATE BD, 357 US 214. Due process requires that an appellant "will have, at the very least, a transcript or other record of the trial proceedings." ROSS V. MOFFITT, 417 US 616. Such a right is denied to the Appellant when, as here, the trial judge routinely goes off-record and the stenographer fails to record trial business leading to a defective transcript with more holes than Swiss cheese.

New York requires that "complete stenographic notes [are] to be taker Each stenographer ... must take full stenographic notes" (Judiciary Law, Art. 2, Sec. 295). And yet, the Court Reporter frequently did not transcribe dialogues at the Bench or in chambers, often at the direction of the trial judge. See Appendix D9, a grievance made to the state's Commission on Judicial Conduct which was rejected for lack of oversight over trial judges, for a detailed description of the voids and omissions caused to the Petitioner's transcript). Each of these voids, ommissions, and abnormalities to the legally required "full stenographic notes" caused prejudice to the Petitioner by diluting and depriving him of otherwise appealable defects to the trial, violations of his rights and/or support for arguments elsewhere within the record. Recall that Argument V herein focuses completely on a hearing that the Appellate Court claims must have happened even though the transcript does not preserve it. Note also that when Bench conversati over voiced objections are omitted it causes deficiencies to subsequent otherwise appealable issues including effectiveness of counsel or prosecut-

orial misconduct, and perhaps even judicial misconduct. While not argued herein, Petitioner's CPL 440.10 motion (Appendix C10) argues that the transcript voids covered up judicial misconduct, as does Petitioners' Leave application (Appendix C5) alleges such covering-up by the Appellate Court.

New York Courts have faced defective transcripts before. "Although the absence of a stenographic record does not require reversal absent prejudice to the defendant, such prejudice will be found where the record cannot be reconstructured, because the defendant will have no way to appeal the trial court's ruling." PEOPLE V. HARRISON, 85 NY.2d 794. This same court noted, "the prejudice to the defendant -- impairment of effective appellate review -- is manifest."

"On account of the trial court's failure to preserve a complete record, we know that defense counsel made objections to the prosecutor's questions, but not what those objections were ... defendant lost any means of appellate review of these rulings." PEOPLE V. DENNIS, 265 Ad.2d 271 (1999). Appendix C10 lists 13 instances of trial transcript voids (not an exhaustive list), of which eight are voids following an objection where a sidebar conversation was not preserved. Those 13 documented voids are now permanently lost to the Petitioner, as is also any opportunity for meaningful appellate review, because the Respondent State does not enforce its laws for full stenographic notes to be taken, or otherwise require electronic or digital recordings. The rights of criminal defendants, like the Petitioner, are therein impacted, as it affects appellate review if not also right to a public trial.

The failure of a state that offers criminal defendants the right of appellate review but fails to preserve that right by enforcing laws or requiring full recordings of procedures also impacts the federal rights of defendants under the Constitution's habeas protection. Either, if not both justify a federal response.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully Submitted, Michael N. Kelsey, Michael N. Kelsey 2/5/21