

No. _____

IN THE
Supreme Court of the United States

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IVAN CALAFF,

Petitioner,

—v.—

MICHAEL CAPRA, SUPERINTENDENT,
SING SING CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the custody requirement of the federal habeas corpus statute preclude a constitutional challenge to an expired prior conviction that was used to enhance the sentence the petitioner is currently serving, where the failure to challenge the earlier conviction was through no fault of the petitioner?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ivan Calaff respectfully petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued a Summary Order on November 6, 2017, affirming the District Court's denial of Calaff's habeas petition. *Calaff v. Capra*, No. 16-5058-pr, 2017 WL 5077527 (2d Cir. Nov. 6, 2017) (Summary Order). A copy is reproduced in the Appendix to this Petition ("Pet. App.") at 1a–10a.

The opinion and order of the United States District Court for the Southern District of New York denying Calaff's petition for a writ of habeas corpus, filed on October 18, 2016, is reported at *Calaff v. Capra*, 215 F. Supp. 3d 245 (S.D.N.Y. 2016), and is reproduced at Pet. App. 11a–31a. The judgment of the District Court, filed on November 3, 2016, is not reported but has been reproduced at Pet. App. 32a–33a.

The New York Court of Appeals issued its decision, dismissing Calaff's appeal on his 1993 conviction on April 3, 2014. It is reported at *People v. Perez*, 23 N.Y.3d 89 (2014), and is reproduced at Pet. App. 34a–61a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The order of the Court of Appeals was entered on November 6, 2017.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

U.S. Const. amend. XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case raises the important question of whether a habeas petitioner can assert a constitutional challenge to an expired prior conviction that was used to enhance the sentence the petitioner is currently serving, where the failure to challenge the earlier conviction was through no fault of the petitioner.

State Proceedings

In 1993, Calaff lost his constitutional right to appellate counsel and therefore his right to appeal a conviction for second-degree burglary, to which he had pled guilty. Like countless other defendants in New York, Calaff lost these rights because New York's procedure required him—without assistance—to apply for counsel while giving him no clear notice that he was required to apply. *See* Pet. App. at 66a–67a, 69a–71a. He was given no clear instructions or guidance so that he would know that if he failed to apply he would lose his right to counsel and his right to appeal. Just as when there is a failure to provide trial counsel, the petitioner was prejudiced because he could not negotiate the complexities of the appellate process without counsel.

Like many other indigent defendants in New York's First Department, Calaff mistakenly believed that his appointed trial counsel would pursue an appeal on his behalf. *Id.* at 75a. Instead, his trial counsel only noticed the appeal, all that was required of trial counsel by the rules in New York's First Department, and Calaff was never provided with counsel to perfect the appeal. *Id.* at 72a–73a.

Rather than instruct Calaff as to his rights immediately after sentencing the trial judge told Calaff's then-appointed trial counsel to hand Calaff a Notice of Right to Appeal (“Rights Notice”), which stated that the defendant could ask his “present attorney” to file a notice of appeal or file it himself in order to “exercise” his right to appeal. *Id.* at 69a. Calaff requested that his present counsel file the notice of appeal and his lawyer told him that he would “take care of” the appeal. *Id.* at 75a–76a. Calaff understandably thought that his counsel, who

filed the Notice of Appeal as Calaff requested, meant that he would take care of the entire appeal; Calaff did not understand that his trial counsel would only *notice* his appeal, but not *perfect* it. *Id.* at 79a. Calaff's counsel told him that they "would win on appeal," further reinforcing Calaff's belief that his trial counsel would handle the entire appeal. *Id.* at 75a. Believing that, Calaff did nothing further.

The Rights Notice Calaff was handed did not say that trial counsel would notice the appeal but take no additional steps to perfect it; in fact, the Rights Notice said nothing at all about the difference between *noticing* an appeal and *perfecting* it. It just said that to "exercise [his] right," the defendant could ask his trial counsel to file a notice of appeal, which is what Calaff did. *Id.* at 69a. The paragraphs in the Rights Notice immediately following that direction instructed a defendant who had appeared pro se as to how he may file a notice of appeal on his own behalf. The Rights Notice continued that "[i]f you are without funds, after the notice of appeal has been filed, you must write to the Appellate Division requesting that counsel be assigned to you for the purpose of appeal." *Id.* at 70a. The Rights Notice did not explain that this section applied to defendants who already had a lawyer, like Calaff, and were not appearing pro se.

The Rights Notice went on to state that a defendant applying for counsel was required, on his own, to make a detailed showing as to the state of his finances. *Id.*

Calaff did not understand the basics—let alone the intricacies—of New York's criminal appellate process and for that reason, he had no appointed counsel or appeal as of right. *Id.* at 75a. As a result of his not understanding, Calaff's conviction went unchallenged,

and, because of later convictions, he ultimately came to be labeled a persistent violent felony offender, with a sentence of sixteen years to life. *Id.* at 77a.

Calaff first learned that the appeal of his 1993 conviction had never been pursued in a conversation with his counsel at the Center for Appellate Litigation (“CAL”), in a separate proceeding, in 2012. *Id.* at 79a. Upon learning for the first time that his trial attorney, Bruce Klang, had not perfected his 1993 appeal, Calaff immediately sought to have that appeal perfected by applying for poor person’s relief and the appointment of counsel. *Id.* at 79a–80a. Far from intending to waive an appeal, he wanted to pursue the appeal.

Upon receiving Calaff’s motion to reopen, the Appellate Division assigned counsel, granted poor person’s relief, and enlarged the time to perfect the 1993 appeal. *People v. Calaff*, 103 A.D.3d 500 (1st Dep’t 2013). The court also granted the prosecution permission to renew its dismissal claims when responding to Calaff’s appellate brief. *Id.* at *1. Represented by CAL, Calaff argued that his 1993 conviction was invalid because he had been denied his right to appellate counsel and that he had been misled by his previous counsel’s statements that indicated to Calaff that that lawyer would pursue the appeal. The prosecution opposed Calaff’s application on the ground that Calaff’s years of inaction as to the appeal (during which he was never represented by counsel or provided with a clear explanation of his rights as to the 1993 appeal) constituted effective abandonment of his appeal. The prosecution further argued that due to the passage of time it would be prejudiced should a retrial prove necessary. The prosecution did not contest Calaff’s claims that he had been misled.

On February 19, 2013, the Appellate Division granted the prosecution's motion to dismiss Calaff's appeal. *Id.* The decision was based on Calaff's failure to timely prosecute or perfect his appeal under N.Y. Crim. Proc. Law § 470.60(1). *Id.* The Appellate Division neither referred to the constitutional standard for waiver or abandonment in its decision nor commented on the merits of Calaff's right to counsel claim. *See id.*

On April 3, 2014, the New York Court of Appeals affirmed the Appellate Division's dismissal of Calaff's appeal. Pet. App. at 61a. The court held that the First Department's dismissal of the appeal did not violate Calaff's constitutional right "to a fair appellate procedure," *id.* at 40a–41a, and was a "proper exercise[] of discretion," *id.* at 35a–36a. The court explained that the facts permit an inference that Calaff's inaction was a conscious decision not to exercise his appellate rights. The court did not reach the constitutional question whether Calaff had knowingly and intelligently waived his right to appellate counsel.

On October 6, 2014, this Court denied Calaff's petition for a writ of certiorari. *Calaff v. New York*, 135 S. Ct. 273 (2014).

The District Court Habeas Proceedings

On October 2, 2015, Calaff filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 2254. In his habeas petition, Calaff argued that the New York Court of Appeals decision was contrary to and an unreasonable application of Supreme Court precedent for two reasons.

First, New York’s requirement that indigent defendants appealing their criminal conviction apply for counsel and prove their indigency without the assistance of counsel violates the Due Process and Equal Protection Clauses of the Constitution. By placing the burden on indigent defendants to affirmatively prove their indigency before assigning counsel (assuming that they are even aware that they need to make such a showing), New York impermissibly deprives indigent defendants of an equal and fair appeal of their conviction. People with means bear no such burden.

Second, even if it were permissible to require indigent defendants to apply for appointed appellate counsel, Calaff was never given clear notice by the court or counsel as to his rights and possible waiver, and, as a result, never understood that he needed to apply for appellate counsel. Pet. App. at 79a–80a. He instead reasonably believed that his instruction to his trial counsel to notice the appeal was, as the Rights Notice he was given said, the action necessary to “exercise [his] right” to appeal, *id.* at 69a, and that trial counsel would pursue the appeal on his behalf. *Id.* at 75a. In 2012, once he first learned that there had been no appellate counsel appointed for, and no appeal of, his 1993 conviction, Calaff acted immediately to exercise his rights. He most certainly did not knowingly waive his right to appellate counsel or to an appeal.

The District Court found a constitutional violation inherent in New York’s procedures for appointment of appellate counsel. *Id.* at 25a (“[T]he First Department’s procedure as articulated in the Rights Notice was unconstitutional as an unreasonable precondition on the right to appellate counsel.”). The District Court also found that Calaff did not “waive

his right to counsel between 1993 and 2004 because his rights were not ‘simply and directly’ explained to him.” *Id.* at 28a. Nevertheless, it erroneously denied Calaff’s petition, concluding that between 2004 and 2012 Calaff had abandoned his right to appeal his 1993 conviction because a lawyer in 2004 had helped him through the process of getting appointed counsel to appeal his entirely unrelated 2004 conviction. *Id.* at 29a. The court reached that conclusion even though Calaff neither had counsel for his 1993 appeal nor a clear explanation of his constitutional rights as to that appeal until 2012.

The court held that it had jurisdiction to rule on Calaff’s petition because “th[e] action is not barred by the ‘in custody’ requirement.” *Id.* at 26a. Analyzing the Supreme Court’s decision in *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001), the District Court found that although the majority opinion only provided for an exception to the ability of petitioners to challenge a prior conviction used to enhance a state sentence “where there was a failure to appoint counsel in violation of the Sixth Amendment,” “[a] majority of the Court provided for other exceptions,” including an exception for cases where a defendant cannot “be faulted for failing to obtain timely review of a constitutional claim.” *Id.* at 26a–27a (quoting *Lackawanna*, 532 U.S. at 405). The District Court held that “[t]his is just such a case.” *Id.* at 27a. According to the court, “Calaff did not bring a timely appeal for no fault of his own because requiring Calaff to properly interpret the confusing Rights Notice was an unreasonable precondition of his right to appellate counsel.” *Id.*

The Second Circuit Decision

The Second Circuit Court of Appeals affirmed the District Court's judgment denying Calaff's petition, but on a different ground. The Second Circuit disagreed with the District Court's holding that Calaff qualified for the "no fault" *Lackawanna* exception. Without deciding whether such an exception is available to petitioners, the court concluded that "Calaff does not qualify for it" in any event because he "could have challenged his 1993 conviction when he received an enhanced sentence in 2004 based on that prior conviction." *Id.* at 8a. In reaching this conclusion, the Second Circuit recognized that "there is no consensus" among the circuit courts as to whether courts should recognize the second *Lackawanna* exception. *Id.* at 8a n.2 (citing cases).

REASONS FOR GRANTING THE WRIT

As the Second Circuit recognized, "[a]mong the courts of appeals, there is no consensus" as to the circumstances in which a prisoner may use a habeas petition to lodge a constitutional challenge to a prior conviction that was used to enhance the sentence the prisoner is currently serving. Pet. App. at 8a n.2. As a result, the right of a petitioner to secure such relief under the habeas corpus statute depends on where in the United States the petitioner is incarcerated or was convicted, and the manner in which a particular court defines "custody" of a petitioner. To ensure that all defendants are treated equally, this Court should grant certiorari to resolve the split among (and within) the courts of appeal and set a clear standard as to the custody requirement under 28 U.S.C. § 2254.

I. THE COURT SHOULD RESOLVE THE SPLIT OF THE CIRCUITS AS TO THE CIRCUMSTANCES IN WHICH A HABEAS PETITIONER CAN CHALLENGE A PRIOR CONVICTION THAT WAS USED TO ENHANCE A CURRENT SENTENCE

A. The Circuits Are Split on When a Habeas Petitioner Can Challenge a Prior Conviction That Is Used To Enhance a Current Sentence

In two companion cases in 2001—*Daniels v. United States*, 532 U.S. 374 (2001), which considered petitions of federal prisoners under 28 U.S.C. § 2255, and *Lackawanna*, 532 U.S. at 394, which considered petitions of state prisoners under § 2254—this Court considered whether a prisoner serving a sentence that was enhanced because of a prior conviction could use a habeas petition to challenge that prior conviction. In both cases, the Court held that generally:

once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Lackawanna, 532 U.S. at 403–04.

Notwithstanding that holding, eight Justices in *Lackawanna* agreed that there were exceptions that would allow a challenge to a current extended sentence on the basis of a constitutional infirmity in the earlier conviction. *Id.* at 405–06, 408–10. The five-Justice majority held that while the Court’s interest in finality and administrative efficiency would generally bar such a challenge, *id.* at 402–04, there was an exception for cases in which the underlying conviction was obtained without trial counsel in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Id.* at 404. Three members of the majority also concluded that a challenge to a prior expired conviction could be appropriate where the petitioner, through no fault of his own, “fail[ed] to obtain timely review of a constitutional claim” as to the earlier conviction. *Id.* at 405 (citing *Daniels*, 532 U.S. at 383); *see also Daniels*, 532 U.S. at 383 (“We recognize that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, *due to no fault of his own.*” (emphasis added)). Three dissenting Justices recognized an even broader exception. They concluded that challenges should not be limited to particular constitutional violations such as failure to provide counsel under *Gideon* because “there is no excuse for picking and choosing among constitutional violations here, when other forums are closed.” *Daniels*, 532 U.S. at 391; *Lackawanna*, 532 U.S. at 408 (incorporating *Daniels* dissent).¹ Thus,

¹ Justice Breyer did not address the issue. Justice Breyer dissented in both *Lackawanna* and *Daniels* for reasons unique to each case. *Lackawanna*, 532 U.S. at 410; *Daniels*, 532 U.S. at 392. In *Daniels*, Justice Breyer noted that the majority rule limiting challenges to prior convictions by a habeas attack on an

the dissenting Justices’ exception would encompass all constitutional violations, including cases where a defendant did not obtain timely review of his constitutional claim through no fault of his own.

Following the *Lackawanna* decision and the different exceptions the Justices identified, the lower federal courts have seen a need to promulgate a uniform standard. As the Second Circuit noted in this case, courts have reached different conclusions about whether a prisoner asserting a constitutional claim other than a *Gideon* violation may use a habeas petition to challenge a prior conviction that extended the prisoner’s current sentence.

The Ninth and Tenth Circuits have held that the second *Lackawanna* exception, that a defendant failed to exercise his rights through no fault of his own, was good law. *See Dubrin v. People of California*, 720 F.3d 1095, 1098–99 (9th Cir. 2013) (“[W]hen a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained.”); *McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009) (“We have recognized the [*Lackawanna*] plurality’s second exception as good law.” (citing *Broomes v. Ashcroft*, 358 F.3d 1251, 1254 (10th Cir. 2004))).

In conflict with those courts, the Seventh Circuit has recognized only a single exception—a failure to provide trial counsel as required by *Gideon*. *Martin v.*

extended sentence “may well prove unduly restrictive.” 532 U.S. at 392 (internal quotation marks and brackets omitted).

Deuth, 298 F.3d 669, 672 (7th Cir. 2002) (affirming denial of habeas petition because petitioner failed to argue that prior conviction was obtained in violation of *Gideon*); *see also Grigsby v. Cotton*, 456 F.3d 727, 730 (7th Cir. 2006) (stating that “the Court recognized a single exception”). The Fifth Circuit has also indicated that it only considers the *Gideon* exception good law. *Campbell v. Tanner*, No. 16-30831, 2017 WL 4773261, at *1 (5th Cir. June 6, 2017) (denying motion for certificate of appealability because “[t]o date, the Supreme Court has recognized an exception to this rule only where the prior conviction ‘was obtained [because of] a failure to appoint counsel in violation of the Sixth Amendment’”); *Godfrey v. Dretke*, 396 F.3d 681, 686 (5th Cir. 2005) (noting that district court found that the petitioner did not qualify for the *Gideon* exception, but noting that the issue was not before the court).

The Eleventh and Sixth Circuits have reached yet further inconsistent decisions. The Eleventh Circuit has held, in an unpublished opinion, that only the first exception is good law. *Hamm v. Comm’r, Alabama Dep’t of Corr.*, 620 F. App’x 752, 769 (11th Cir. 2015) (“But the biggest problem for Hamm is that the ‘actual innocence’ exception language in *Coss* was joined by only three Justices and has not been embraced by a majority of the Supreme Court as an exception to the general rule established in [*Lackawanna*].”); *see also Jackson v. Sec’y for Dep’t of Corr.*, 206 F. App’x 934, 936 (11th Cir. 2006) (“We have noted that the *Daniels/Lackawanna* exception is not implicated where a defendant was represented by counsel during the proceedings related to his prior conviction underlying the expired sentence.”) However, in a published opinion it has acknowledged

the possibility of a second exception but has not decided the issue. *See Hubbard v. Haley*, 317 F.3d 1245, 1256 n.20 (11th Cir. 2003) (acknowledging that “Justice O’Connor also recognized that a possible exception might exist when a state court has, without justification, refused to rule on a properly presented constitutional claim or when the defendant has obtained compelling evidence of innocence after the time for direct or collateral review has passed,” but finding it did not apply under the circumstances); *see also Birotte v. Sec’y for Dep’t of Corr.*, 236 F. App’x 577, 579 (11th Cir. 2007) (stating that there is a second exception to *Lackawanna* when “no channel of review was available with respect to the prior conviction, through no fault of the petitioner,” but finding that it did not apply to petitioner).

The Sixth Circuit has denied a certificate of appealability because “[t]he only exception to this [*Lackawanna*] rule is if the state obtained the prior conviction in violation of the petitioner’s Sixth Amendment right to counsel.” *Sweet v. Howes*, No. 16-2247, 2017 WL 2385274, at *3 (6th Cir. June 1, 2017). However, in other decisions it has suggested that additional exceptions exist. *See, e.g., Bowling v. White*, 694 F. App’x 1008, 1016–17 (6th Cir. 2017) (acknowledging the possibility of second exception but stating that even if it exists, it does not apply in the instant case); *Abdus-Samad v. Bell*, 420 F.3d 614, 630 (6th Cir. 2005) (same); *Steverson v. Summers*, 258 F.3d 520, 524–25 (6th Cir. 2001) (same).

The other circuits have not decided the issue, but some have provided various interpretations of the scope of the exceptions to *Lackawanna*’s general rule. *See, e.g., Brackett v. United States*, 270 F.3d 60, 66 (1st Cir. 2001) (observing that the Court “did leave open the possibility” of an additional exception where

the prisoner “is prevented by no fault of his own” from challenging his conviction earlier), *abrogated on other grounds by Johnson v. United States*, 544 U.S. 295 (2005) (vacatur of prisoner’s prior state convictions was a matter of fact, which could start renewed one-year limitations period for attacking federal sentence under AEDPA); *United States v. Napolitan*, 830 F.3d 161, 165 n.6 (3d Cir. 2016) (finding that no exception to *Lackawanna*’s rule existed because the petitioner failed to show either new evidence discovered “after the ‘time for direct or collateral review has expired,’” or “a state court’s refusal without justification ‘to rule on a constitutional claim that has been properly presented to it’” (citing *Lackawanna*, 532 U.S. at 405)); *Lyons v. Lee*, 316 F.3d 528, 533 (4th Cir. 2003) (describing, after assuming that the plurality’s exception exists, that the exception was not satisfied because the prisoner’s actual innocence claim “[did] not rest on evidence that could not have been discovered earlier through the exercise of due diligence”); *cf. Lyons*, 316 F.3d at 535 (Gregory, J., concurring) (interpreting *Lackawanna* more broadly than the majority’s interpretation to apply “to situations where there is a Sixth Amendment violation so substantial that it is as if a defendant never had the benefit of legal representation”).

Since *Lackawanna*, this Court has commented on this issue only once, and, as the Second Circuit noted, Pet. App. at 7a–8a, did not then provide clear guidance. In *Johnson v. United States*, the Court observed that the general rule in *Daniels* and *Lackawanna* was subject to an “exception for *Gideon* claims” and that the case before it did “not call for further exploration of” the second “no fault” exception. 544 U.S. 295, 304 & n.4 (2005).

Not only is there a lack of uniformity with respect to whether a second *Lackawanna* exception exists, but there is also a lack of clarity regarding exactly what the “no fault” exception encompasses. *See Venson v. Killina*, Civ. A. No. 07-1569, 2009 WL 1228444, at *8 n.3 (W.D. Pa. May 5, 2009) (“The contours of this second exception are not as clear as the first exception . . .”). Indeed, courts that have considered such an exception have not interpreted it consistently. Some courts have interpreted the exception broadly to include cases where the defendant cannot be faulted for failing to obtain timely review of the defendant’s constitutional claim. *See, e.g., Dubrin*, 720 F.3d at 1098–100; *McGinn v. People of Colorado*, No. 10-CV-01511-BNB, 2010 WL 4318564, at *3 (D. Colo. Oct. 25, 2010); *Venson*, 2009 WL 1228444, at *8 n.3. Other courts have found that an exception exists either where (1) the state court unjustifiably refused to rule on a properly presented constitutional claim or (2) the petitioner presents compelling evidence of actual innocence. *See, e.g., Harrison v. Griffin*, No. 13-CV-4641 (NGG), 2014 WL 3490917, at *4 (E.D.N.Y. July 11, 2014); *Valdez v. Hulihan*, 640 F. Supp. 2d 514, 516 (S.D.N.Y. 2009). Still other courts have interpreted the exception even more narrowly, finding that it only applies in cases of actual innocence. *See, e.g., Runnels v. Warden, Tensas Par. Det. Ctr.*, No. 2:13-CV-209, 2014 WL 3378667, at *3 (W.D. La. July 7, 2014); *Scofield v. California*, No. 1:08-cv-00154-LJO-TAG HC, 2008 WL 2622833, at *3 (June 30, 2008), *adopted by*, 2008 WL 4186042 (E.D. Cal. Sept. 10, 2008).

These substantial intra- and inter-circuit conflicts regarding the interpretation of *Lackawanna* will only become more pronounced with each passing year. Due to the split, a petitioner’s ability to challenge an

expired conviction that is being used to enhance the conviction he or she is currently serving hinges on where in the United States the petitioner is incarcerated or was convicted. To ensure that all defendants are on equal footing, this Court should grant certiorari to definitively resolve the now long-standing confusion among the lower federal courts.

B. The Court Should Hold That a Petitioner Can Challenge a Prior Conviction if He Previously Failed to Do So Through No Fault of His Own

The Court should clarify that a habeas petitioner can challenge a prior conviction that was used to enhance a current sentence if the petitioner previously failed to challenge the conviction through no fault of his own. That would be consistent with the position of the majority of the Justices, six altogether, in *Lackawanna* and *Daniels* and the underlying rationale of those cases.

The argument that *Gideon* is the only exception to *Lackawanna* and *Daniels* is based on a misunderstanding of the fractured decisions in those cases.

As described *supra*, each of the eight Justices to consider this issue in *Lackawanna* were in agreement that certain exceptions to the general rule did exist. Six Justices endorsed protections beyond challenges to a prior conviction based on a *Gideon* violation. Three members of the majority concluded that a challenge to a prior expired conviction could be appropriate where the petitioner failed to obtain timely review of an earlier conviction through no fault of his own. *Lackawanna*, 532 U.S. at 405. Three dissenting Justices went even further, concluding that a petitioner's ability to challenge a

prior conviction should not be limited to any particular constitutional violation. *Id.* at 408 (incorporating *Daniels* dissent).

Because it was not necessary under the facts of *Lackawanna* and *Daniels* to hold that *Gideon* was the only exception, the position of the concurrence is not binding precedent. Indeed, only the two concurring Justices—Justices Scalia and Thomas—took the position that challenges to expired convictions that enhance current sentences were generally prohibited subject only to the single exception for *Gideon* violations. By contrast, *six Justices* would have allowed challenges to prior convictions where the petitioner lost his opportunity to challenge the earlier conviction “due to no fault of his own,” *Daniels*, 532 U.S. at 383: three Justices in the plurality along with the three dissenting Justices, who would have allowed *all* constitutional challenges of prior convictions, which would include challenges based on the “no fault” exception. *Lackawanna*, 532 U.S. at 405, 408.

Not only is the second “no fault” exception consistent with the position taken by the majority of the Justices in *Daniels* and *Lackawanna*, it is consistent with the underlying rationale behind the general prohibition against challenging prior convictions through habeas petitions as the Ninth Circuit explained in *Dubrin*, 720 F.3d at 1096–97. In *Dubrin*, the petitioner filed a state post-conviction challenge to his prior conviction, that was erroneously dismissed on the basis that he was not in custody. *Id.* at 1096. The Ninth Circuit held that the two prudential considerations articulated by this Court as justification for the *Lackawanna* rule—administrability and the need for finality of convictions—“carry little or no weight” where a

criminal defendant is prevented from challenging the constitutionality of an earlier expired state conviction through no fault of his own. *Id.* at 1098. The court, relying on similar rules relating to claim and issue preclusion, noted that there is a diminished interest in finality when the litigant did not have a “full and fair opportunity to litigate in a prior forum.” *Id.* (citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480–81 & n.22 (1982) (claim preclusion); *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (issue preclusion)).

Second, relying on its experience with a similar rule allowing habeas petitions based on Fourth Amendment claims that the petitioner was not able to litigate, the court reasoned that the second *Lackawanna* exception would not be unreasonably burdensome to administer. *Id.* at 1099 (citing *Stone v. Powell*, 428 U.S. 465 (1976)). The court concluded that “when a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained.” *Id.* This Court should explicitly adopt the *Dubrin* court’s holding in order to resolve the confusion concerning the scope of *Lackawanna*.

C. This Case Is an Ideal Vehicle To Resolve This Circuit Split

This case not only provides the Court with the ability to determine the validity of the second *Lackawanna* exception, but also presents an opportunity to clarify its scope. There is no dispute about the critical facts in this case: Calaff is serving an extended sentence that was enhanced by his prior

1993 conviction that he is challenging as unconstitutional. He did not previously challenge that prior conviction, because—without the benefit of counsel—he mistakenly believed that an unsuccessful appeal was taken. He was unaware that the appeal, although noticed by his trial attorney, had not been perfected. It was not until the appeal of an unrelated 2004 conviction that Calaff “began to *wonder* whether his 1993 case really had been appealed.” Pet. App. at 77a (emphasis added). Calaff did not know at that point that he had been denied counsel in 1993. Thus, Calaff began to write a series of letters to determine the status of the appeal of his 1993 conviction. *Id.* at 77a–79a, 81a–86a. It was not until he wrote a letter to the Center for Appellate Litigation in 2012 that he discovered that the appeal of his 1993 conviction was never perfected. *Id.* at 79a. Once Calaff made that discovery, he promptly sought relief in state court, which was denied on the basis that he had abandoned his appeal. *Id.* at 80a.

The Second Circuit avoided grappling with Calaff’s petition by determining that, even if the second *Lackawanna* exception was good law, it would not apply in this situation because Calaff could have challenged his 1993 conviction during the sentencing phase for his current 2004 conviction. Pet. App. at 9a. However, contrary to the Second Circuit’s assertion, Calaff’s current challenge to his 1993 conviction is “effectively . . . the first and only forum available for review of the prior conviction.” *Lackawanna*, 532 U.S. at 406 (plurality opinion). Calaff could *not* “have challenged his 1993 conviction when he received an enhanced sentence in 2004 based on that prior conviction,” Pet. App. at 9a, because, based on the unrefuted evidence, he did not

know at that time that his 1993 appeal had not been taken. Although the Second Circuit noted that Calaff “began to wonder” whether his 1993 conviction was actually appealed during the *appeal* of his current conviction, *id.* (emphasis added), the appeal of his 2004 sentence necessarily occurred after he was *sentenced* for that conviction. Therefore, Calaff did not even begin to “wonder” about his 1993 conviction until his purported opportunity to challenge that conviction (i.e., his 2004 sentencing) had passed.

Nor is there any support in the record for the proposition that Calaff could have challenged the constitutionality of his conviction anytime between 2004, when he was sentenced for his current conviction, and 2012, when he brought this challenge. Although Calaff successfully obtained counsel for an unrelated 2004 appeal, the unrefuted evidence in the record shows that Calaff’s appointed trial attorney in that case provided him with limited assistance for that appellate process: counsel did no more than send Calaff the notice of appeal and a *completed* motion for poor person’s relief. *Id.* at 77a. Calaff then simply submitted the motion for poor person’s relief that had been prepared for him. There is no evidence to suggest that Calaff realized then—or was told then—that he needed to perfect a separate appeal from eleven years earlier. Calaff was still unaware that his 1993 appeal was not perfected and had no reason to think that in 1993 his prior attorney had not filled out the necessary forms, just as counsel in 2004 had. To find otherwise would require an inference that Calaff both deduced that no form such as the one in 2004 was filed in 1993 and that his 1993 appeal must never have been perfected. Such an inference is not only unsupported by the record, it is also far from the kind of notice necessary to protect the constitutional rights of indigent defendants. The right

to counsel at issue here can only be waived knowingly and the court must make “every reasonable presumption against waiver of fundamental constitutional rights.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation and internal quotation marks omitted); see also *id.* at 465 (“[T]he guaranty [of counsel] would be nullified by a determination that an accused’s ignorant failure to claim his rights removes the protection of the Constitution.”).

Indeed, neither the courts below nor the State cited any authority suggesting that proceedings in an unrelated case could put a defendant on notice of his need to act in a different case or risk being unrepresented during a critical stage of the proceeding. Lay people retain counsel precisely because non-lawyers—not the least indigent defendants—lack the professional expertise required to navigate the legal system and comply with its complex procedural rules. There is simply no justification for concluding that because Calaff’s 2004 counsel successfully perfected his 2004 appeal, Calaff was then suddenly enlightened as to the intricate New York State Appellate procedures that the District Court in this case described as “unreasonably confusing,” “deficient,” and a “meaningless ritual,” *Calaff*, 215 F. Supp. 3d at 251–53, and that then-Chief Judge Jonathan Lippman described as “not a coherent system,” Trs. of Oral Arg. at 45, *People v. Perez*, Nos. 2014-CV-55, -56, -57, -58 (N.Y. Feb. 20, 2014).² Holding petitioners to such a high standard of legal awareness is inappropriate—particularly

² Available by searching “Calaff” on the New York Court of Appeals website, https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx.

when the situation was created by the State's denial of Calaff's constitutionally required counsel. Here, that denial in violation of the Fourteenth Amendment resulted in a fundamental defect that undermined the integrity of Calaff's 1993 conviction. As this Court has noted, "a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." *Douglas v. People of State of Cal.*, 372 U.S. 353, 355 (1963) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

Calaff was deprived of the ability to challenge the constitutionality of his 1993 conviction in state court, not through any fault of his own, but rather because of the very constitutional violation of which he complains: his lack of appellate counsel due to the State's unconstitutional procedures for appointment of appellate counsel to indigent defendants. Indeed, this case is a prime example of the importance of the second *Lackawanna* exception because, just like a *Gideon* violation, the prejudice arising from Calaff's having been denied appellate counsel is clear. *See Custis v. United States*, 511 U.S. 485, 496 (1994) (noting that "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order"); *Daniels*, 532 U.S. at 378 (citing *Custis*, 511 U.S. at 490–97). The denial of appellate counsel causes the same harm as the denial of trial counsel; it is a fundamental defect that undermines the integrity of the prior conviction. A pro se defendant is no better equipped to deal with the complexities of an appeal than those of a trial. Without appellate counsel to help him navigate the process, Calaff was deprived of the ability to litigate his prior conviction. *See Dubrin*, 720 F.3d at 1097.

The mere existence of a procedure that could be used to challenge a conviction is insufficient if, as was

the case here, the petitioner was unaware that the procedure should be used and did not benefit from advice of counsel. The second *Lackawanna* exception should apply in such cases because habeas will provide the petitioner with the first opportunity to *actually* challenge the prior conviction, even if earlier opportunities may have theoretically been available to the ignorant petitioner.

Once Calaff, with the assistance of counsel, knew that his appeal had not been perfected, he promptly sought to perfect it. Calaff should be allowed an opportunity to challenge his prior conviction because the very nature of the constitutional violation—denial of appellate counsel—is what prevented him from raising this issue earlier.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: February 5, 2018

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of November, two thousand seventeen.

Present:

DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
DENNY CHIN,
Circuit Judges.

16-4048-pr

2a

IVAN CALAFF,

Petitioner-Appellant,

—v.—

MICHAEL CAPRA, SUPERINTENDENT,
SING SING CORRECTIONAL FACILITY,

Respondent-Appellee.

For Petitioner-Appellant:

DANIEL F. KOLB (Shahira D. Ali, Matthew Cormack, Sarah Breslow, Ronald Krock, *on the brief*), Davis Polk & Wardwell LLP, New York, New York.

For Respondent-Appellee:

DAVID M. COHN (Hilary Hassler, Katherine Kulkarni, *on the brief*), for Cyrus R. Vance, Jr., District Attorney, New York County, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Sweet, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Petitioner-Appellant Ivan Calaff appeals from a November 3, 2016 judgment of the United States District Court for the Southern District of New York (Sweet, *J.*) denying Calaff's petition for a

writ of habeas corpus. We presume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

I. Background

In 2004, Calaff was sentenced as a persistent violent felony offender pursuant to New York Criminal Procedure Law sections 400.15 and 400.16, receiving an enhanced sentence because of prior convictions, including a 1993 New York state conviction. The 1993 conviction, where Calaff was charged with second-degree burglary and pleaded guilty to a lesser-included charge of attempted second-degree burglary, is the subject of this appeal. At sentencing on March 24, 1993, Justice Harold Rothwax instructed Calaff's attorney "[c]ounsel, please advise [Calaff] of his Appellate rights and advise me that you have done so." J.A. 149. In response, counsel stated on the record, "[l]et the record reflect I am handing my client written notice of his right to appeal, which indicates th[e] steps he can take to perfect that appeal." *Id.*

Calaff's trial counsel timely filed a notice of appeal. However, because Calaff did not follow the steps required to perfect his appeal and obtain appointed appellate counsel, Calaff was never assigned an appellate attorney. Calaff's sentence expired in 1999. Calaff was convicted of new crimes in 2000 and 2004, both times receiving enhanced sentences due to the 1993 conviction. As relevant here, Calaff's 2004 conviction was for second-degree burglary. At Calaff's 2004 sentencing, the court adjudicated Calaff as a persistent violent

felony offender. Unlike in 1993, Calaff moved for assignment of appellate counsel by following the required procedures. The Center for Appellate Litigation was appointed as appellate counsel. The 2004 conviction was unanimously affirmed on appeal. *People v. Calaff*, 30 A.D.3d 193 (1st Dep’t 2006). Calaff made no effort during this period to perfect the appeal from his 1993 conviction or obtain appellate counsel for that appeal.

II. Procedural History

In 2012, again represented by the Center for Appellate Litigation, Calaff finally pursued his 1993 appeal. The Appellate Division, First Department, following briefing and oral argument, dismissed Calaff’s appeal, noting the 19-year-delay and finding that Calaff’s excuse for the delay—that his 1993 trial counsel had promised to take care of the appeal—was refuted by the 1993 sentencing minutes. *People v. Calaff*, 103 A.D.3d 500 (1st Dep’t 2013), *aff’d sub nom.*, *People v. Perez*, 23 N.Y.3d 89 (2014). The New York Court of Appeals unanimously affirmed the dismissal order and, in response to a constitutional argument from Calaff, upheld the constitutionality of a New York state rule of criminal procedure that Calaff asserted had deprived him of his constitutional right to appellate counsel. *See People v. Perez*, 23 N.Y.3d 89 (2014). The U.S. Supreme Court denied Calaff’s certiorari petition. *See Calaff v. New York*, 135 S. Ct. 273 (2014).

Calaff then brought the habeas petition at issue in this appeal, collaterally attacking the 1993 conviction, primarily marshaling the same constitutional claim, *i.e.*, that the Appellate

Division, First Department’s procedures for assigning appellate counsel run afoul of the U.S. Constitution. Although Calaff maintains that the First Department’s procedures for assigning appellate counsel are confusing, he successfully complied with the same procedures in 2004. On October 18, 2016, the district court denied Calaff’s petition on this basis, reasoning that Calaff’s “failure to prosecute his appeal between 2004 [when Calaff was aware of and complied with the First Department’s procedures for assigning appellate counsel] and 2012 was a valid ground for dismissal by the New York Court of Appeals.” *Calaff v. Capra*, 215 F. Supp. 3d 245, 256 (S.D.N.Y. 2016).

III. Discussion

Calaff is in custody pursuant to a 2004 sentence that was enhanced as a result of his earlier, allegedly unconstitutional 1993 conviction.¹ As a result, he confronts the general rule that

¹ If Calaff challenged solely the 1993 conviction (as opposed to the 2004 sentence as enhanced by the 1993 conviction), we would lack subject matter jurisdiction because Calaff is no longer serving his 1993 sentence and thus “cannot bring a federal habeas petition directed solely at” that conviction. *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 401 (2001). Here, it is not obvious that Calaff, who is represented by counsel, challenges the 2004 sentence as enhanced by the 1993 conviction as opposed to the 1993 conviction. *Compare* J.A. 6 (citing only the 1993 judgment of conviction as the basis of Calaff’s challenge), *with id.* at 18 (checking a box noting that he is challenging the 2004 sentence). We nonetheless construe Calaff’s petition liberally to challenge the 2004 sentence as enhanced by the 1993 conviction, and thus conclude that we have subject matter jurisdiction to hear this appeal.

once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Lackawanna Cty. Dist. Attorney v. Coss, 532 U.S. 394, 403–04 (2001) (internal citation omitted).

The Supreme Court has recognized at least one exception to this general rule: where a prior conviction was obtained in violation of a defendant’s Sixth Amendment right to trial counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), a defendant can use that violation to attack a sentence that was enhanced because of the prior conviction. *Lackawanna Cty. Dist. Attorney*, 532 U.S. at 404. Because Calaff’s constitutional claim concerns the right to appellate counsel under the Fourteenth Amendment, the *Gideon* exception does not apply.

Calaff argues, however, that a second exception is available where a petitioner through no fault of his own did not have an opportunity to challenge the earlier conviction. He suggests that six *Lackawanna* justices—three in the majority, three in the dissent—would have endorsed such an exception. *See id.* 405 (opinion of O’Connor, *J.*) (noting that “another exception to the general rule

... might be available” when “a defendant can[not] be faulted for failing to obtain timely review of a constitutional claim”); *id.* at 408 (Souter, *J.*, dissenting) (incorporating his dissent from *Daniels v. United States*, 532 U.S. 374 (2001), which would permit review of sentence-enhancing conviction regardless of constitutional violation alleged). The plurality in *Lackawanna* provided a non-exhaustive list of two examples that could qualify for this second exception: first, when “a state court . . . without justification[] refuse[s] to rule on a constitutional claim that has been properly presented to it,” 532 U.S. at 405; or second, after the limitations period for direct or collateral review has expired, when a defendant “obtain[s] compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner,” *id.* (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

We have cited *Lackawanna* only a handful of times and have never decided whether the second *Lackawanna* exception is good law. See *Triumph v. Connecticut*, 308 F. App’x 550, 551 n.2 (2d Cir. 2009) (summary order) (noting that, based on that case’s facts and posture, we “need not . . . decide whether to validate that exception”). For its part, the Supreme Court in *Johnson* suggested that it has not yet recognized the second *Lackawanna* exception when it remarked, with respect to the Armed Criminal Career Act, that “[w]e recognized *only one* exception to this rule that collateral attacks were off-limits, and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel, an exception we

thought necessary to avoid undermining *Gideon*.” *Johnson v. United States*, 544 U.S. 295, 303 (2005) (emphasis added). However, in a footnote later in *Johnson*, the Supreme Court used language that was less conclusive about the existence (or lack of existence) of the second *Lackawanna* exception, writing that it had “allowed that there *may* be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own,” whereby “a prisoner *might be able to . . .* challenge the prior conviction as well as the federal sentence based on it,” but “the circumstances of this case do not call for further exploration of that *possibility*.” *Id.* at 304 n.4 (emphases added).²

We need not decide whether this second exception is available, because even assuming that it is, Calaff does not qualify for it. Neither of the examples provided in *Lackawanna* applies to Calaff, as the New York Court of Appeals addressed and rejected Calaff’s constitutional claim on the merits and nobody argues that, in this case, Calaff has obtained compelling evidence of his actual

² Among the courts of appeals, there is no consensus as to whether courts must (or should) recognize the second *Lackawanna* exception. In published opinions, the Seventh and Eleventh Circuits have not recognized the exception. *See, e.g., Grigsby v. Cotton*, 456 F.3d 727, 730 (7th Cir. 2006); *Hubbard v. Haley*, 317 F.3d 1245, 1256 n.20 (11th Cir. 2003). However, the Ninth and Tenth Circuits, in published opinions, and the Fifth Circuit, in an unpublished opinion, have recognized the second *Lackawanna* exception as good law. *See, e.g., Dubrin v. People of California*, 720 F.3d 1095, 1098–99 (9th Cir. 2013); *McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009); *Brattain v. Cockrell*, 281 F.3d 1279 (5th Cir. 2001) (unpublished).

innocence. And here, the federal habeas court was not “effectively . . . the first and only forum available for review of the prior conviction.” *Lackawanna Cty. Dist. Attorney*, 532 U.S. at 406 (plurality opinion). Calaff could have challenged his 1993 conviction when he received an enhanced sentence in 2004 based on that prior conviction. *See, e.g., People v. Brewington*, 127 A.D.3d 1248, 1248–49 (3d Dep’t 2015) (vacating enhanced sentence upon showing that predicate conviction had been unconstitutionally obtained). He offers no persuasive reason for why he failed to do so. He acknowledges that, at that time, he learned “about the forms that needed to be filed with the court for an appeal to be taken” and “began to wonder whether [his] 1993 case really had been appealed.” J.A. 196–97. In spite of those concerns, and despite being represented by counsel on appeal, he did not challenge his enhanced sentence on the ground he now asserts. Therefore, Calaff’s invocation of the second *Lackawanna* exception must fail.³

Because Calaff does not qualify for an exception under *Lackawanna*, he is barred from challenging his expired conviction that was used to enhance his 2004 sentence. Even though the district court reached the opposite conclusion on this issue, concluding that Calaff qualified for a *Lackawanna* exception, we ultimately agree (albeit on a different ground) with the judgment below, denying Calaff’s petition. *See, e.g., Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (“In the review

³ Because Calaff’s failure to pursue his appeal in 2004 is sufficient to dispose of his petition, we need not address whether Calaff should have pursued his appeal in 1993.

of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.”). Accordingly, we **AFFIRM** the judgment of the district court.⁴

FOR THE COURT:

/s/

Catherine O’Hagan Wolfe, Clerk

[SEAL]

⁴ Since we affirm solely on the ground that Calaff does not qualify for an exception under *Lackawanna*, we have no occasion to discuss the merits of the remainder of the district court’s judgment, including its determination that the First Department’s procedures at issue for assigning appellate counsel are “unconstitutional as an unreasonable precondition on the right to appellate counsel.” *Calaff*, 215 F. Supp. 3d at 253. Without taking a position on the matter, we note that at least two other courts have reached a different result on this question. *See West v. Breslin*, No. 06-cv-4167 (PKC), 2008 WL 110947 (S.D.N.Y. Jan. 2, 2008), *aff’d*, 410 F. App’x 393 (2d Cir. 2011) (summary order); *People v West*, 100 N.Y.2d 23 (2003) (Wesley, *J.*), *cert. denied*, 540 U.S. 1019 (2003).

11a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IVAN CALAFF,

Petitioner,

—v.—

MICHAEL CAPRA, SUPERINTENDENT,
SING SING CORRECTIONAL FACILITY,

Respondent.

15 Civ. 7868 (RWS)

OPINION

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By: David M. Cohn, Esq.

Sweet, D.J.

Petitioner Ivan Calaff (“Petitioner” or “Calaff”) has petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that the New York criminal procedure requiring indigent defendants to apply for appellate counsel violated his constitutional right to counsel. For the reasons set forth below, the petition is denied.

The Petitioner seeks habeas relief based on his loss of his constitutional right to appointed counsel and consequent loss of his right to appeal a 1993 conviction. The State seeks denial of the writ because the Petitioner is not in custody under his 1993 conviction, the state court did not violate established Supreme Court precedent, and the Petitioner failed for 19 years to prosecute his appeal.

The issues presented are unique and significant. It is concluded that the State's procedures unreasonably apply the constitutional right to counsel, that the Petitioner is in custody under *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394 (2001), and that the state court decision that Petitioner failed to prosecute his appeal did not constitute a constitutional violation.

I. Prior Proceedings

Petitioner's state custody arises from a 2004 conviction for second-degree burglary. Petitioner's sentence for this conviction was enhanced because it was Petitioner's third violent felony conviction, and he was sentenced to a term of 16 years to life imprisonment as a persistent violent felony offender, in part, based on a 1993 conviction for attempted second-degree burglary to which he pled guilty.

On February 24, 1993, Petitioner pled guilty to an attempted-second degree burglary that took place on January 14, 1993. According to the criminal complaint, the resident of an apartment came home and discovered two burglars in her apartment, who then ran out of the apartment with cash and jewelry. (Respondent's Appendix ("RA"), Ex. A.) Petitioner and a co-defendant, William Martinez, were apprehended within blocks of the apartment only 10 minutes after the burglary took place. (RA, Ex. E at 1.) The victim identified both men in a "show-up" at the scene. Each of the defendants were in possession of jewelry belonging to the victim. (RA, Ex. A.)

Petitioner pled not guilty to second-degree burglary at his arraignment on February 9, 1993. (Defendant's New York Court of Appeals Appendix "A" – 107-108.) Robert Dorff, Esq. appeared as Petitioner's appointed counsel. (A-107.) At the next court appearance on February 24, 1993, Mr. Dorff was not present. (A-110). The Court asked if anyone had seen or heard from Mr. Dorff. (A-110.) When a court officer told the Court, "I haven't see [sic] Mr. Dorf [sic], Your Honor," the trial judge assigned Bruce Klang, Esq. ("Klang") to represent Calaff. (A-110.) No one objected to the substitution. (A-110.) The case was then adjourned for a second call, at which point Calaff accepted the People's plea deal to a reduced charge of attempted second degree burglary. (A-6, 8-11, 16-18.)

Calaff was sentenced one month later. At his sentencing the trial judge instructed Klang to advise Calaff of his "Appellate rights and advise me that you have done so." (A-26.) On the record, Klang stated that he was "handing my client written notice of his right to appeal, which indicates th[e] steps he can take to perfect that appeal." *Id* . Klang thereafter timely filed a notice of appeal on Petitioner's behalf. (A-30.)

The appellate Notice of Right to Appeal ("Rights Notice") that Klang handed to Calaff at his sentencing requires the Court to give the form to the defense attorney and stated as follows:

The defense attorney must then give it to his/her client and state on the record that the defendant has been given written notice of his/her right to appeal. (A-29.)

The Rights Notice explained, “You have a right to appeal a conviction” and that “you must file a notice of appeal within 30 days.” (A-29.) The Rights Notice provided Petitioner with the option of have his “present attorney” file the notice, then provided “[i]f you have appeared pro se . . .” which described how pro se litigants could file a notice of appeal without counsel. (A-29.) The Rights Notice further stated “If you are without funds, after the notice of appeal has been filed, you must write to the Appellate Division requesting that counsel be assigned to you for the purpose of the appeal” and this letter should “request that you be granted permission to appeal upon the original record” and “mention that you are without funds with which to retain counsel or to purchase a transcript of the proceedings.” (A-29.) The Rights Notice instructed that, “You must write this letter yourself.” (A-29.) The Rights Notice did not include information about whether a “present attorney” would be involved in the filing of such a letter with the Appellate Division.

On September 30, 2004, Petitioner was convicted in a new case of burglary in the second degree. At his sentencing for the 2004 conviction, Petitioner was adjudicated a violent persistent felony offender, based in part on his 1993 conviction and was sentenced to 16 years to life imprisonment.

Petitioner obtained counsel and appealed his 2004 conviction. In 2006, the Appellate Division, First Department, affirmed Petitioner’s conviction of his 2004 conviction, and on August 15, 2006, the New York Court of Appeals denied leave for that 2004 conviction. *People v. Calaff*, 30 A.D.3d

193 (1st Dep’t 2006), *lv. denied*, 7 N.Y.3d 810 (2006).

In 2012, Petitioner with the help of the Center for Appellate Litigation, challenged his 1993 conviction on the grounds that the trial Justice had improperly replaced Calaff’s assigned counsel and appointed new counsel. The People argued that after 19 years, Calaff had abandoned his appeal and that the appeal also failed on the merits. The appeal was unanimously dismissed on February 19, 2013 by the Appellate Division, First Department. *People v. Calaff*, 103 A.D.3d 500 (1st Dep’t 2013). Petitioner sought leave to the Court of Appeals, which was granted on September 6, 2013. *People v. Calaff*, 21 N.Y.3d 1072 (2013). The Court of Appeals decided four consolidated cases and affirmed the Appellate Division’s dismissal of Calaff’s appeal. *People v. Perez et al.*, 23 N.Y. 3d 89 (2014).

Petitioner sought a writ of certiorari to the United States Supreme Court, which was denied on October 6, 2014. *Calaff v. New York*, 135 S.Ct. 273 (2014).

On October 2, 2015, Petitioner filed this petition for a writ of habeas corpus. The petition was heard and marked fully submitted on April 21, 2016.

II. Standard of Review

Section 2254 of the 1996 Antiterrorism and Effective Death Penalty Act (“AEDPA”) provides a federal remedy for state prisoners if their continued custody is in violation of federal law. Pub.L. No. 104-132, 100 Stat. 1214, codified at 28

U.S.C § 2254(a); *see Chandler v. Florida*, 449 U.S. 560, 571, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981). (“This Court has no supervisory authority over state courts, and, in reviewing a state court judgment, we are confined to evaluating it in relation to the Federal Constitution.”). Errors of state law are not cognizable on federal habeas review. *Estelle v. McGuire*, 502 U.S. 62, 71-72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Petitioners bear the burden of proving violations of federal law by a preponderance of the evidence. *See Jones v. Vacco*, 126 F.3d 408, 415 (2d Cir. 1997).

A state court’s adjudication may be overturned only if it either:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

8 U.S.C. § 2254(d)(1-2); *see Williams v. Taylor*, 529 U.S. 362, 375-76, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

With respect to the “contrary to” clause, the writ may issue in two circumstances: first, if the state court decision “applies a rule that contradicts the governing [Supreme Court] law”; and second, if the state court decision addresses a set of facts “materially indistinguishable” from a relevant Supreme Court case and arrives at a result different

to that reached by the Court. *Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), (quoting *Williams*, 529 U.S. at 405-06). The “clearly established Federal law” refers to Supreme Court holdings, as opposed to the dicta, as of the time of the relevant state court decision. *See Williams*, 529 U.S. at 412. A state court decision involves an “unreasonable application” of Supreme Court precedent when the state court either “identifies the correct governing legal rule” from the Supreme Court’s cases but “unreasonably applies it to the facts” of the case, or “unreasonably extends a legal principle from [the Court’s] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Id.* at 407.

Under the “unreasonable application” clause, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 411. “Rather, it is the habeas applicant’s burden to show that the state court applied [Supreme Court precedent] to the facts of his case in an objectively unreasonable manner.” *Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002). Any determination of a factual issue made by a state court must be presumed correct unless the petitioner can show by clear and convincing evidence that such presumption should not apply. *See* 28 U.S.C. § 2254(e)(1).

In addition, the Supreme Court’s jurisprudence on the “unreasonable application” clause of § 2254(d)(1) makes “clear that whether a state

court's decision was unreasonable must be in light of the record the court had before it." *Holland v. Jackson*, 542 U.S. 649, 652, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004). In *Cullen v. Pinholster*, the Court recently emphasized that, "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas Petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." 563 U.S. 170, 184, 131 S. Ct. 1388, 1400, 179 L. Ed. 2d 557 (2011).

III. The Procedure Requiring Petitioner to Apply for Appellate Counsel Is an Unreasonable Restriction of His Right to Appellate Counsel

a. An Indigent Criminal Defendant Must Be Provided Counsel on Their First Appeal

"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

The United States Supreme Court applied this concept to the right to counsel on criminal appeals, holding that a state cannot administer criminal appeals in a manner that "discriminate[s] against some convicted defendants on account of their poverty." *Douglas*, 372 U.S. at 355 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)). *Griffin* held that "to

deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.” *Griffin*, 351 U.S. at 19.

Douglas and its progeny have held that “the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal if the state has provided such an appeal as of right.” *Taveras v. Smith*, 463 F.3d 141, 147 (2d Cir. 2006) (New York does provide a first appeal as of right, so *Douglas* applies to defendants in New York). *Griffin* required the poor to pay for and furnish a copy of the trial transcript in order to appeal, which violated the Due Process and Equal Protection Clauses because this was a form of “invidious discrimination.” *Griffin*, 351 U.S. at 17-18. *Douglas* applied *Griffin* to hold that appointment of appellate counsel to the indigent could not depend on a *pro se* preliminary determination of whether the appeal had merit. *Douglas*, 372 U.S. at 355.

Douglas established in 1963 that criminal defendants are entitled to counsel on appeal (as long as the state provides for a first appeal as of right). Today 48 states, the federal government, and New York’s Second Appellate Department all provide indigent defendants with appointed counsel on appeal or provide them counsel to assist in obtaining appointed appellate counsel. (See, Petitioner’s Br. at 1, n. 1.) Michigan and New York’s First, Third, and Fourth Appellate Departments are the only jurisdictions that do not provide counsel to assist in the appellate process. *Id.*

**b. The First Department's Procedures
for Appointing Appellate Counsel to
Indigent Defendants Are Unreasonable
Preconditions**

The Respondent contends that an appellate court may require Petitioner to satisfy “reasonable preconditions on her right to appeal.” *Goeke v. Branch*, 514 U.S. 115, 119-120 (1995). While there can be reasonable preconditions on the right to appellate counsel, the preconditions in this case were unreasonable because the Rights Notice Petitioner’s attorney handed him during his 1993 sentencing was confusing and deficient in describing what he needed to do to obtain appellate counsel.

Here, neither the trial judge nor the Rights Notice adequately explained Petitioner’s right to appellate counsel, which functioned as an unreasonable precondition on Calaff’s right to appellate counsel. At the sentencing hearing, the trial judge directed Klang to “advise him of his Appellate rights and advise me that you have done so.” (A-26.) Klang replied to the trial judge that he was “handing my client written notice of his right to appeal, which indicates th[e] steps he can take to perfect that appeal.” *Id.* Calaff was not advised that he would be unrepresented after counsel noticed his appeal, and the steps Calaff would need to take in order to obtain appellate counsel were not explained, except as set forth in the Rights Notice. (A-29.)

Calaff was not advised that: (1) he would no longer have an attorney after Klang noticed his appeal; and (2) he would need to draft a notarized letter describing his financial circumstances in

order to obtain new appellate counsel to perfect that appeal. (A-29.) These steps violated clearly established Supreme Court precedent because “the Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings.” *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (quoting *United States v. Wade*, 388 U.S. 218, 227-228 (1967)). As the Tenth Circuit has found, counsel was required for Calaff at this critical step in the criminal process after sentencing as he begins the appeals process. *Baker v. Kaiser*, 929 F.2d 1495, 1499 (10th Cir. 1991) (“The right to counsel is required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated.”).

The Rights Notice was unreasonably confusing for a *pro se* indigent defendant because it did not clarify that Petitioner was no longer represented by counsel. In describing how to file a notice of appeal, the Rights Notice provided Petitioner with the option of have his “present attorney” file the notice. Even discrediting the self-serving affidavit in which Petitioner claims that Klang promised that he would “take care of” the appeal, Klang did file the notice of appeal. (A-72, A-30.) Pursuant to the First Department’s procedures Calaff lost his counsel as soon as Klang noticed his appeal (See N.Y. Comp. Codes, R & Regs. Tit.22, § 606.5 (2015)). The Rights Notice failed to make clear that he was then unrepresented and needed to complete additional steps to obtain appellate counsel and to perfect his appeal. (A-29.) The

result of this procedure was that Petitioner was effectively denied the right to counsel at a “critical stage” of his case. *Baker v. Kaiser*, 929 F.2d at 1499. It is not surprising that 48 states and New York’s Second Department all provide counsel at this critical stage between noticing and perfecting an appeal (or at least until the defendant obtains counsel to perfect the appeal) because to deny a criminal defendant counsel at this critical stage violates the appellate due process rights guaranteed by *Griffin* and *Douglas*.

For defendants without a “present attorney,” the Rights Notice provided information “[i]f you have appeared pro se . . .” describing how *pro se* litigants can file a notice of appeal without counsel. (A-29.) The Rights Notice next explained “If you are without funds, after the notice of appeal has been filed, you must write to the Appellate Division requesting that counsel be assigned to you for the purpose of the appeal.” (A-29.) However, the Rights Notice did not state that this section also applied to defendants with a “present attorney.” Unlike the reasonable precondition in *Goeke* merely requiring the defendant not to flee while an appeal is pending, it was unreasonable to require Petitioner, who could have incorrectly believed he was represented by counsel, to know he too needed to submit the letter proving his indigency. *Goeke*, 514 U.S. at 119-120.

Even if Calaff understood the Rights Notice, he would have needed to draft a notarized letter on his own in order to prove his indigency. The Rights Notice’s instruction to write a notarized

letter was unreasonable because in *Halbert* the Court noted that U.S. prison populations are plagued by substantial literacy problems. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (finding that 68% of the state prison population did not complete high school and “many lack the most basic literacy skills”). In fact, *Halbert* found that “seven out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill.” *Id.* Even further, many inmates “have learning disabilities and mental impairments.” *Id.* Despite the challenges for inmates identified by the Supreme Court in *Halbert* with basic reading and writing skills, in New York’s First Department criminal defendants are expected to read and comprehend the confusing Rights Notice, then draft a letter in order to obtain the appellate counsel guaranteed to them under the Court’s decision in *Douglas*.

Next, the Rights Notice directs defendants that, “You must write this letter yourself.” (A-29.) A criminal defendant should have a lawyer at such a critical stage in their appeals process. “Navigating the appellate process without a lawyer’s assistance is a perilous endeavor for a layperson,” a task even more challenging for the “many [state prisoners who] lack the most basic literacy skills.” *Halbert v. Michigan*, 545 U.S. at 621.

While a lawyer may be able to discern that this Rights Notice requires an indigent person to draft a letter regardless of the option they chose for how to notice the appeal, it is unreasonable to require a *pro se* defendant to understand that they were

no longer represented by counsel and must follow this two-step process in order to obtain a new lawyer to perfect their appeal. *Goeke*, 514 U.S. at 119-120. It was at this critical stage that Calaff needed counsel to navigate the appellate process. *Baker v. Kaiser*, 929 F.2d at 1499. Calaff's due process rights were violated when he was required to complete "a meaningless ritual, while the rich has a meaningful appeal." *Douglas*, 372 U.S. at 358. Here it was a meaningless ritual for the First Department to require Petitioner, *pro se*, to understand based on the Rights Notice that he needed to write the notarized letter proving indigency and requesting appellate counsel, just as the preliminary merits review procedure in *Douglas*. Therefore, the First Department's procedure as articulated in the Rights Notice was unconstitutional as an unreasonable precondition on the right to appellate counsel.

IV. The Petitioner Was "In Custody" for His 1993 Conviction

In order to bring a habeas action, the petitioner must be "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). This requirement means that the petitioner in a habeas action must be in state custody pursuant to the "conviction or sentence under attack." *Maleng v. Cook*, 490 U.S. 488, 490 (1989). Respondent argues that this requirement bars the instant action since Petitioner is in custody for his 2004 conviction and has already "fully served" the sentence for his 1993 conviction. *United States ex rel. Myers v. Smith*, 444 F.2d 75, 76-77 (2d Cir. 1971).

The general rule that has been adopted by the Supreme Court is that:

“[i]f . . . a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant . . . may not collaterally attack his prior conviction through a motion under § 2255.”

Lackawanna Cty. Dist. Attorney v. Coss, 532 U.S. at 402 (citing *Daniels v. United States*, 532 U.S. 374, 382 (2001)). In *Lackawanna*, the Supreme Court extended the rule applied in *Daniels* (a habeas case brought under § 2255) to habeas petitions brought under § 2254. *Lackawanna*, 532 U.S. at 382.

However, this action is not barred by the “in custody” requirement because the Supreme Court in *Lackawanna* provided for several exceptions to the ability of petitioners to challenge a prior conviction used to enhance a state sentence. The majority opinion provided for an exception “where there was a failure to appoint counsel in violation of the Sixth Amendment.” *Id.* at 404. A majority of the Court provided for other exceptions. Justice Souter’s dissent incorporated his dissent from *Daniels*, which found that “there is no excuse for picking and choosing among constitutional violations” instead finding that a defendant should be able to challenge any sentencing enhancement based on a constitutional violation in a prior case. *Daniels*, 532 U.S. at 391 (Souter, J. dissenting)

(incorporated in *Lackawanna*, 532 U.S. at 408 (Souter, J. dissenting)).

In addition to those three Justices who would allow a challenge to a prior conviction on any constitutional ground, three members of the majority in *Lackawanna* further found that, “It is not always the case, however, that a defendant can be faulted for failing to obtain timely review of a constitutional claim.” 532 U.S. at 405. The plurality provided examples when this might be the case, though there is no indication in the opinion that the list of examples, which was dicta, was exhaustive. *Id.* This is just such a case in which Calaff did not bring a timely appeal for no fault of his own because requiring Calaff to properly interpret the confusing Rights Notice was an unreasonable precondition on his right to appellate counsel. *Goeke*, 514 U.S. at 119-120.

V. The State Court Determination on Waiver Does Not Raise a Constitutional Issue

Respondent argues that Petitioner waived his appellate rights by waiting 19 years to perfect his appeal, which amounted to willful neglect and a conscious choice not to appeal his conviction. Respondent argues this was waiver because “a defendant who is properly informed of his appellate rights may not let the matter rest and then claim he did not waive the right to appeal.” *People v. West*, 100 N.Y.2d 23, 26 (2003). However, Petitioner argues that he did not “intelligently and understandingly waive the assistance of counsel” because when “the assistance of counsel is a constitutional requisite, the right to be furnished

counsel does not depend on a request.” *Carnley v. Cochran*, 369 U.S. 506, 513 (1962).

Between 1993 and 2004, Petitioner did not knowingly and intelligently waive his right to the appointment of appellate counsel. He could not have waived this right because he evinced his desire to appeal by requesting his trial counsel to notice his appeal. The Supreme Court has held that:

When a defendant whose indigency and desire to appeal are manifest does not have the services of his trial counsel on appeal, it simply cannot be inferred from defendant’s failure specifically to request appointment of appellate counsel that he has knowingly and intelligently waived his right to the appointment of appellate counsel.

Swenson v. Bosler, 386 U.S. 258, 260 (1967). Here, the parties dispute whether Petitioner manifested his desire to appeal, in light of the long delay between when he noticed his appeal in 1993 and perfected it in 2012.

Petitioner did not waive his right to counsel between 1993 and 2004 because his rights were not “simply and directly” explained to him. *Halbert*, 545 U.S. at 624. Petitioner manifested his desire to appeal when his trial counsel noticed his appeal. *Mackenzie v. Marshall*, No. 07 Civ. 4559 (SJF), 2009 WL 3747128, at *3 (E.D.N.Y. Nov. 5, 2009); *U.S. ex. rel. Edwards v. Follette*, 281 F.Supp. 632, 636 (S.D.N.Y. 1968). Calaff’s indigency and manifest intent to appeal are established and therefore “it simply cannot be

inferred from defendant's failure specifically to request appointment of appellate counsel that he has knowingly and intelligently waived his right." *Swenson*, 386 U.S. at 260.

However, in 2004 Petitioner was convicted of a new count of second-degree burglary. (A-47.) Petitioner was adjudicated as a violent persistent felony offender because it was his third conviction for a violent felony. (A-47.) Petitioner successfully requested appellate counsel and was assigned the Center for Appellate Litigation for his 2004 case. (A-47.) Respondent argues that after Petitioner successfully obtained counsel in this 2004 matter, he could no longer claim that he did not understand how to obtain counsel for his 1993 case.

The New York Court of Appeals correctly determined that Calaff abandoned his appeal by waiting too many years to prosecute and perfect it, citing its decision in *People v West*, 100 N.Y.2d 23, 28 (2003). *People v. Perez*, 23 N.Y.3d at 99. As in *West*, here the "defendant was adequately informed of his right to appeal, he failed to perfect it in a timely manner and therefore abandoned any right to an appeal he may have had." *West*, 100 N.Y.2d at 28. In *West*, the petitioner incorrectly filed habeas corpus actions in state court before exhausting his state court appeals. *Id.* at 25. The petitioner in *West* attempted to seek some relief from a court, even if it was the wrong court. In this case, Calaff made no effort to pursue his appeal until 2012.

While interpreting the Rights Notice's requirement to draft a letter was not a reasonable precondition on the right to appeal, "Documentary requirements and timely filing schedules" are

“reasonable preconditions” on the right to appeal. *Taveras v. Smith*, 463 F.3d at 149. In this case, Calaff took no action to perfect his appeal from the 1993 conviction after he obtained appellate counsel for his 2004 burglary case until 2012. Calaff abandoned his claim because he did not take any actions to prosecute the appeal of his 1993 case between 2004 and 2012. *West*, 100 N.Y.2d at 28.

Petitioner points to two letters he wrote to Klang as evidence that he sought to pursue his appeal between 2004 and 2012. These letters requested a copy of Petitioner’s case file, any motions filed by his previous attorney, and Klang’s recollections about their discussions concerning whether Petitioner should plead guilty in 1993. (A-80-82.) However, neither letter requested information about the status of Petitioner’s appeal of his 1993 conviction, which had been noticed, but not perfected. (A-80-82.) Instead, Petitioner’s first attempt to perfect his appeal of his 1993 occurred in 2012, when an attorney who had represented Petitioner in the appeal of his 2004 conviction, made a motion to be assigned as Petitioner’s counsel for the 1993 conviction. (A-31-33.)

New York law allows appellate courts to dismiss appeals that are not properly or timely perfected. In this case, there is no dispute that Calaff’s appeal was not timely perfected. New York’s Criminal Procedure Law provides, “At any time” before an appeal is decided that the appellate court may “dismiss such appeal upon the ground of . . . failure of timely prosecution or perfection thereof, or other substantial defect, irregularity or

failure of action by the appellant with respect to prosecution or perfection of such appeal.” N.Y. Crim. Proc. Law § 470.60(1). The New York appellate courts in this case properly exercised their “broad discretion” to dismiss the appeal for failure to prosecute and perfect this claim in a timely fashion. *People v. Taveras*, 10 N.Y.3d 227, 244 (2008).

For these reasons, the state court decision was correct in holding that “the delays were extremely long, and the defendants did not have a good excuse for them.” *People v. Perez*, 23 N.Y.3d at 101. While the delay between 1993 and 2004 was not Petitioner’s fault, his failure to prosecute his appeal between 2004 and 2012 was a valid ground for dismissal by the New York Court of Appeals. *West*, 100 N.Y.2d at 28.

VI. Conclusion

For the reasons stated above, Petitioner’s petition for writ of habeas corpus is denied.

It is so ordered.

New York, NY
October 18, 2016

/s/
ROBERT W. SWEET
U.S.D.J.

32a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[STAMP]

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DOCUMENT
ELECTRONICALLY FILED
DOC # _____
DATE FILED: 11/3/16

IVAN CALAFF,

Petitioner,

—v.—

MICHAEL CAPRA, SUPERINTENDENT,
SING SING CORRECTIONAL FACILITY,

Respondent.

15 CIVIL 7868 (RWS)

JUDGMENT

Petitioner Ivan Calaff (“Petitioner” of “Calaff”) having filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that the New York criminal procedure requiring indigent defendants to apply for appellate counsel violated his constitutional right to counsel, and the matter having been submitted to the Honorable Robert W. Sweet, United States District Judge, and the Court, on October 18, 2016, having rendered its Opinion denying the petition for a writ of habeas corpus, it is,

ORDERED, ADJUDGED AND DECREED:
That for the reasons stated in the Court’s Opinion dated October 18, 2016, Petitioner’s petition for a writ of habeas corpus is denied.

DATED: New York, New York
November 3, 2016

/s/
RUBY J. KRAJICK
Clerk of Court

By:

/s/
K. Mango
Deputy Clerk

STATE OF NEW YORK
COURT OF APPEALS

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

No. 55
The People &c.,
v. Respondent,
Reynaldo Perez,
Appellant.

No. 56
The People &c.,
v. Respondent,
Ivan Calaff,
Appellant.

No. 57
The People &c.,
v. Respondent,
Alexander Dockery,
Also Known as John Harris,
Appellant.

No. 58
The People &c.,
v. Respondent,
Teofilo Lopez,&c., Appellant.

Case No. 55:
Howard R. Birnbach, for appellant.
Noah J. Chamoy, for respondent.

Case No. 56:
Claudia Trupp, for appellant.
David M. Cohn, for respondent.

Case No. 57
Barbara Zolot, for appellant.
Deborah L. Morse, for respondent.
Youth Represent, amicus curiae.

Case No. 58:
Kerry Elgarten, for appellant.
David M. Cohn, for respondent.

SMITH, J.:

These four cases involve criminal appeals that were not pursued for more than a decade—in one case more than two decades—after the filing of a notice of appeal. In each case, the Appellate Division dismissed the appeal on the People’s motion. We hold that the dismissals in People v Perez, People v Calaff and People v Dockery did not violate defendants’ constitutional rights and were proper

exercises of discretion. We remit the fourth case, People v Lopez, to the Appellate Division so that counsel can be appointed to represent Lopez in opposing the dismissal of his appeal.

I

Perez

Reynaldo Perez was convicted of murder and manslaughter in 1996, and was sentenced to consecutive terms totalling 33¹/₃ years to life. On August 1, 1996, he filed a notice of appeal. In 1997, Perez's mother retained a lawyer whom we will call John Johnson to represent Perez on appeal, paying him a retainer of \$30,000. Johnson did not prepare or file a brief.

The Departmental Disciplinary Committee for the Appellate Division, First Department began an investigation of Johnson in 2001. In 2003, the Committee notified Perez's mother that Johnson had been admonished for neglecting Perez's case. Apparently, Johnson continued to represent Perez after 2003, but he still did not pursue the appeal. In 2008, Johnson filed a motion in Supreme Court to set aside Perez's conviction under CPL 440.10. The motion was unsuccessful.

On August 22, 2012, Perez retained new counsel, who moved in the Appellate Division to enlarge the time to perfect Perez's appeal. The People cross-moved to dismiss the appeal. The Appellate Division granted the motion to dismiss on February 5, 2013, more than 16 years after the notice of appeal was filed. A Judge of this Court granted leave to appeal (21 NY3d 946 [2013]).

Calaff

Ivan Calaff was convicted of burglary, on his plea of guilty, in 1993, and sentenced to 3 to 6 years. At sentencing, he was handed a printed form explaining the need to file a notice of appeal and describing the steps to be taken “[i]f you are without funds” to request the assignment of counsel. On April 15, 1993, the lawyer who represented Calaff at sentencing filed a notice of appeal. Calaff did not request the assignment of appellate counsel. He served his time and was released from prison in 1996.

Calaff was later convicted of several other crimes. Eventually, in 2004, he was adjudicated a persistent violent felon on a burglary charge and was sentenced to 16 years to life. An appeal from the 2004 conviction was unsuccessful (People v Calaff, 30 AD3d 193 [1st Dept 2006]).

On May 9, 2012, the Center for Appellate Litigation, which had represented Calaff on the appeal from the 2004 conviction, moved to be appointed as his counsel on the appeal that had begun in 1993, and sought poor person relief. The People moved to dismiss the appeal. In an affidavit submitted in opposition to the People’s motion, Calaff asserted that the lawyer who represented him at sentencing had told him in 1993, in response to a question about the appeal: “Don’t worry about that, I’ll take care of it.” In 2008, according to Calaff’s affidavit, he began to make inquiries about the appeal from his 1993 conviction, but got no helpful response until the Center for Appellate Litigation agreed in 2012 to take the case.

The Appellate Division assigned counsel, granted poor person relief, and enlarged the time to perfect the appeal. The People moved to dismiss the appeal. On February 19, 2013, the Appellate Division granted the motion to dismiss, saying that defendant's attempt "to explain his failure to follow the instructions he received at sentencing . . . is refuted by the sentencing minutes and otherwise without merit" (People v Calaff, 103 AD3d 500 [1st Dept 2013]). A Judge of this Court granted leave to appeal (21 NY3d 1072 [2013]) and we now affirm.

Dockery

In 1986, Alexander Dockery, then 16 years old, was convicted of robbery and committed to the New York State Division for Youth for a term of 2 to 6 years. The lawyer who represented him at trial and sentencing filed a notice of appeal on his behalf on February 28, 1986. Nothing was done to pursue the appeal for 22 years. Meanwhile, Dockery, like Calaff, served his time, was released, and committed more crimes. In 2000, under the name John Harris, he was convicted of burglary and sentenced as a persistent violent felony offender to 25 years to life. His appeal from that conviction was unsuccessful (People v Harris, 304 AD2d 839 [2d Dept 2003]).

In 2008, Dockery moved pro se in the Appellate Division for poor person relief on his 1986 appeal. The People cross-moved to dismiss that appeal, and the Appellate Division granted the cross-motion. In 2011, Dockery, now represented by the Center for Appellate Litigation, moved to reinstate the 1986 appeal on the ground that he did not

have the assistance of counsel at the time of the People's previous motion, and that service of that notice was defective. The appeal was reinstated, the People again moved to dismiss it, and that motion was granted on June 21, 2012, more than 26 years after the notice of appeal was filed. A Judge of this Court granted leave to appeal (21 NY3d 912 [2013]), and we now affirm.

Teofilo Lopez, having absconded before trial, was convicted in absentia of several counts of robbery in 1999. He was sentenced to concurrent terms of imprisonment, the longest of which was 15 years. The record contains a form dated August 23, 1999, apparently signed on Lopez's behalf by his attorney, addressed "TO MY ATTORNEY/OR THE COURT CLERK," which says: "Please file a timely notice of appeal on my behalf." The parties agree that this document may be considered a timely notice of appeal.

Lopez remained a fugitive for approximately 11 years; nothing was done in that time to prosecute his appeal. In 2010, he was rearrested and returned to court. He was then resentenced to correct his original sentence, which had omitted a term of postrelease supervision (see People v Sparber, 10 NY3d 457 [2008]). The Legal Aid Society was assigned to represent him on appeal from the resentencing.

In 2012, Legal Aid moved on Lopez's behalf to amend the order assigning counsel so that it applied to the 1999 conviction rather than the sentence, for "leave to file and serve a brief in support of reversing the judgment on direct appeal," and for other relief. The People moved to

dismiss the appeal from the 1999 conviction for failure to prosecute. Legal Aid submitted an affirmation in opposition to this motion, making arguments on the merits and arguing, in the alternative, that the motion was premature because Legal Aid had not yet been assigned to the 1999 appeal, had not seen the trial record, and did not know what issues Lopez would raise.

The Appellate Division granted the People's motion to dismiss on October 25, 2012, more than 13 years after the notice of appeal was filed. A Judge of this Court granted leave to appeal (21 NY3d 1017 [2013]), and we now reverse and remit for further proceedings.

* * *

Defendants formulate their arguments on appeal differently, but we think all can be interpreted as making two arguments: that their constitutional rights to a fair appellate process were violated, and that, even if there was no constitutional violation, the Appellate Division abused its discretion in dismissing their appeals. Lopez also argues, as he did below, that the Appellate Division acted prematurely, and in his case we do not reach any other issue.

II

Defendants are correct in asserting that they have a constitutional right to a fair appellate procedure that provides them “with the minimal safeguards necessary to make an adequate and effective appeal” (People v West, 100 NY2d 23, 28 [2003]). That right includes a right to “receive the

Careful advocacy needed ‘to insure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over’” (*id.*, quoting *Penon v Ohio*, 488 US 75, 85 [1988])—i.e., a right to counsel. The *West* case establishes, however, that the procedure followed in *Perez*, *Calaff* and *Dockery* did not deprive the defendants in those cases of any constitutional right.

West bears a distinct resemblance to the cases now before us. The defendant there filed a notice of appeal but “failed to perfect his appeal for more than 14 years” (100 NY2d at 24). We held that the appeal was abandoned, and that the Appellate Division did not abuse its discretion in dismissing it. Noting that West had been given “clear instructions on how to apply for poor person relief” (*id.* at 28), we rejected his argument that he was constitutionally entitled to appointment of counsel to assist in preparing a poor person application.

Calaff’s and Dockery’s constitutional claims here are essentially identical to West’s. They, like West, were given clear notice of how to obtain a lawyer at state expense, but failed year after year to ask for one. They, like West, suffered no constitutional deprivation when none was appointed. We reject Calaff’s argument that *West* should be overruled.

Dockery seeks to distinguish his case from *West* on the ground that Dockery was only 16 when he first failed to request the assignment of counsel to represent him on appeal. The distinction might be more persuasive if the failure had not continued until Dockery was 38. But even if we assume that youthful defendants are constitutionally entitled

to some relaxation of the rule that defendants who want to obtain appellate counsel must follow the simple instructions given them for requesting that relief, they are not entitled to 22 years of indulgence. Dockery was an adult during the great majority of the time in which he failed to seek counsel to pursue his appeal, and his situation is not constitutionally distinct from that of other adults. Dowd v United States ex rel. Cook (340 US 206 [1951]), on which Dockery relies, is not in point. The State in Dowd had enforced an unconstitutional rule forbidding a prisoner from filing appeal papers; the Supreme Court held that a long lapse of time in which the prisoner took no action after the rule was rescinded was not a waiver of his constitutional claim. Here, the State did nothing to prevent Dockery from pursuing his appeal until the People moved in 2008 to dismiss it.

Perez's constitutional claim is more colorable than Calaff's and Dockery's, because Perez had a lawyer—one who was undoubtedly ineffective in failing to perfect the appeal that he was hired to pursue. We have held that a client who was victimized by his appellate lawyer's procedural errors has been deprived of his constitutional right to the effective assistance of counsel (see People v Syville, 15 NY3d 391, 397-398 [2010] [counsel ineffective for disregarding a timely request to file a notice of appeal]). But the long delay in Perez's appeal—from the notice of appeal in 1996 to the motion for an extension of time in 2012—cannot be attributed solely to Johnson's ineffectiveness. Perez knew at least by 2013, when Johnson was admonished by the Departmental Disciplinary Committee, that his lawyer was

neglecting his case. At any time in the following nine years, if not sooner, he could have obtained another lawyer. His counsel said in a 2012 affirmation that Perez was “without funds to retain another attorney,” but Perez has offered no explanation of why he failed to seek assigned counsel. West establishes that it is not unconstitutional to require a defendant to take some minimal initiative to assure himself adequate representation on appeal. The dismissal of Perez’s appeal after his own lengthy neglect of it did not deprive him of any constitutional right.

III

Nor can we conclude that the Appellate Division abused its discretion in dismissing Perez’s, Calaff’s and Dockery’s appeals. Two compelling facts stand out in all three cases: the delays were extremely long, and the defendants did not have a good excuse for them. Delays like this are inconsistent with an orderly and efficient system of appellate procedure, and if tolerated can bring a system into disrepute. Even if we assume—a large assumption—that the People can show no specific prejudice from the delays, the Appellate Division was not required as a matter of law to permit these appeals to proceed.

In Calaff and Dockery, there are other reasons supporting the exercise of the Appellate Division’s discretion in the People’s favor. Both Calaff and Dockery, having served their original sentences, continued to ignore their pending appeals until after they were adjudicated predicate felons—and then sought counsel to challenge the long-ago

convictions. The facts permit an inference that these defendants did not simply neglect their appellate rights, but consciously chose not to exercise them until they acquired a reason to do so. The inference is particularly strong in Calaff's case, because his 1986 conviction was based on his guilty plea—a plea with which he was presumably satisfied when he entered it, and with which he may still have been satisfied until the earlier conviction became a problem in future cases. Appellate courts are not required to accommodate such belated changes of strategy by entertaining stale appeals (*cf. West*, 100 NY2d at 27 [appeal held abandoned where the defendant “repeatedly attempted to bypass the state appellate process”]).

Perez has a more sympathetic case. There is no obvious strategic reason for his delay, and his mother did hire, at great expense, a lawyer who failed in his duty. But an unfortunate choice of lawyer does not entitle Perez, as a matter of law, to perfect his appeal 16 years after it was taken, where nine of those years elapsed after the lawyer's failure had been made the subject of a formal sanction, and where no reasonable excuse for that nine-year delay was offered.

IV

We decide *Lopez* on a narrower ground: The Appellate Division should not have dismissed his appeal before assigning him counsel on that appeal and giving counsel a chance to review the record. *Taveras v Smith* (463 F3d 141 [2d Cir 2006]) is directly in point. Taveras, like Lopez, had failed to appear for his trial, had been tried

and convicted in absentia, and had remained a fugitive for years. Taveras’s trial attorney, like Lopez’s, filed a notice of appeal on his behalf, and the appeal remained dormant until Taveras was returned to court. The Appellate Division denied Taveras poor person relief and dismissed his appeal, without assigning counsel.

The United States Court of Appeals for the Second Circuit, considering Taveras’s federal habeas corpus petition, found the Appellate Division dismissal to be “contrary to or an unreasonable application of settled Supreme Court precedent” (463 F3d at 143)—specifically Douglas v California (372 US 353 [1963]), which held that an indigent criminal defendant has a federal constitutional right to court-appointed counsel on his first appeal if the state has provided such an appeal as of right. The Second Circuit reasoned that since, under New York law, a decision to dismiss an appeal by a former fugitive is discretionary, Taveras was entitled to a lawyer to argue that the court should exercise its discretion to retain the appeal (see also People v Kordish, 22 NY3d 922 [2013] [following the Second Circuit holding in Taveras]).

There is no meaningful difference between this case and Taveras, except that Lopez, unlike Taveras, was not completely without counsel when his appeal was dismissed—counsel had been appointed on Lopez’s 2010 appeal from his resentencing. But Lopez did not have counsel on the 1999 appeal, and that is a fact of practical, not just technical, significance: his counsel had not reviewed, or even seen, the record of his 1999 trial. A right to the assistance of appellate counsel

has not been honored where counsel has not looked at the record. We therefore remit the Lopez case to the Appellate Division, which should appoint counsel for Lopez and then consider de novo, after receiving counsel's submissions, whether Lopez's appeal should be dismissed or retained.

Accordingly, in People v Perez, People v Calaff and People v Dockery the order of the Appellate Division should be affirmed. In People v Lopez, the order of the Appellate Division should be reversed and the case remitted to the Appellate Division for further proceedings in accordance with this opinion.

People v Reynaldo Perez
People v Ivan Calaff
People v Alexander Dockery a/k/a John Harris
People v Teofilo Lopez a/k/a Garcia Lopez
a/k/a Isidoro Garcia

No. 55, 56, 57, 58

RIVERA, J. (dissenting):

For the reasons stated by the majority I agree that the facts and law support affirmance of the Appellate Division's dismissal in People v Calaff, and that reversal and remittal is required People v Lopez, in order to permit counsel to review the record and make any warranted submissions on behalf of defendant Lopez (see majority op at 13). However, I part ways with the majority in People v Perez and People v Dockery and would reverse in both cases.

In People v Perez, the defendant's right to pursue a timely appeal was effectively thwarted by appellate counsel's violations of the professional duties and obligations he owed the defendant. Despite the defendant's years-long struggle to secure his attorney's services in furtherance of the appeal from his conviction, today's decision leaves him subject to possible life imprisonment without any appellate review of the merits of his claims. In People v Dockery, the record is bereft of any indication that the Appellate Division took into consideration that defendant was a juvenile when he was convicted and the impact of his age on the defendant's ability to seek assistance with his appeal. Unlike the majority, I would expressly hold the Appellate Division must consider age

when deciding whether to dismiss an appeal for failure to timely perfect.

Today's majority opinions in Perez and Dockery violate the defendants' fundamental rights to appeal their appellate convictions and, as a consequence, the Court's decisions in these cases undermine public confidence in the legal profession and our system of justice. I dissent.

I.

"[A] defendant has a fundamental right to appellate review of a criminal conviction" (People v Yavru-Sakuk, 98 NY2d 56, 59 [2002]) [citing People v Harrison, 85 NY2d 794, 796 [1995]; People v Montgomery, 24 NY2d 130, 132 [1969]; CPL 450.10]). A defendant's inexcusable delay in pursuing an appeal is grounds for dismissal (*see* CPL 470.60[1] [appellate court may "dismiss such appeal on the ground of . . . failure of timely prosecution or perfection thereof"]), but as we recognized in People v Taveras, the Appellate Division has broad authority to permit an appeal that is otherwise untimely to proceed (10 NY3d 227, 233 [2008] [citing CPL 470]). In fact, there is no legal impediment to the Appellate Division granting such permission in appropriate cases, regardless of the length of delay.

We have also recognized that "[t]he invariable importance of the fundamental right to an appeal, as well as the distinct role assumed by the Appellate Divisions within New York's hierarchy of appellate review (*see* NY Const., art VI, § 5; *see e.g.* CPLR 5501[c]), makes access to intermediate

courts imperative” (People v Ventura, 17 NY3d 675, 680-81 [2011]). As a consequence, the Appellate Division’s broad statutory authority to dismiss pending appeals

cannot be accorded such an expansive view as to curtail defendants’ basic entitlement to appellate consideration. As a matter of fundamental fairness, all criminal defendants shall be permitted to avail themselves of intermediate appellate courts as “the State has provided an absolute right to seek review in criminal prosecutions

(*id.* at 681-82 [citation omitted]); *see also* CPL 470.60[1]). Where the Appellate Division exceeds acceptable bounds in the exercise of this authority, it abuses its discretion in dismissing the appeal (*see e.g. id.* at 679).

II.

People v Perez

Following his sentencing in 1997, the defendant’s family retained an attorney to prosecute the appeal and paid him \$30,000 as payment in full for his services. After taking some initial steps on behalf of the defendant this attorney failed to perfect the appeal, and, as the record reflects, violated his professional obligations by neglecting the defendant to work on other clients’ cases.

The attorney’s failures were so egregious as to be grounds for the defendant’s complaint to the Departmental Disciplinary Committee for the

Appellate Division, First Department. As a result of its investigation, the Disciplinary Committee formally admonished the defendant's attorney for violation of the Lawyer's Code of Professional Responsibility, Disciplinary Rule 6-10(a)(3). In its 2003 letter to the defendant's mother, the Committee informed her that it had admonished the attorney for neglecting the defendant's case based on the attorney's admission that he performed "no work" on the appeal "for long periods of time, because he was working on other cases."

Even though the attorney did not complete the work he was paid for, he continued to represent the defendant, apparently because the defendant lacked funds to hire new counsel. Unfortunately for the defendant, this attorney failed to move for an enlargement of time to perfect his appeal. Instead, on September 12, 2008, the attorney moved to vacate the conviction, pursuant to CPL § 440.10(1)(h), wholly avoiding presenting to the court his own professional failures and ineffectiveness in representing the defendant, and arguing instead that the trial counsel was ineffective for failing to challenge the legal sufficiency of the reckless/depraved indifference murder count. The People opposed, arguing that defendant had received overall meaningful representation at trial.

In December 2009, Supreme Court denied the motion in a one paragraph decision stating, in part, that any alleged omission at trial by counsel "could have been raised as an issue on direct appeal [had defendant filed and perfected such an appeal]." In March, 2010, the attorney filed leave to appeal the denial of the 440 motion to the Appellate Division, which the Appellate Division

denied in April 2010. No further action was taken by the attorney.

Then, in 2012, the defendant is newly retained counsel filed a motion to enlarge the time within which to perfect defendant's appeal and attached a proposed brief for filing. The People cross-moved, pursuant to CPL § 470.60, to dismiss the appeal for failure to timely prosecute. The Appellate Division, without opinion, denied the defendant's motion and granted the People's motion to dismiss the appeal.

In this case, it cannot be disputed that the first appellate counsel's failure to perfect the appeal within the time limit set forth in the First Department's rules (*see* Rules of App Div, 1st Dept [22 NYCRR] § 600.B[b]) and his subsequent ineffectiveness, placed defendant in peril of losing his right to appeal for failure to prosecute, and set in motion the events which ultimately resulted in the dismissal of the defendant's appeal. The attorney's neglect resulted in years of delay that the defendant could have spent seeking to appeal his conviction, and the money spent on the attorney could have been used to pay for actual services rendered by new counsel. Moreover, the defendant's efforts to secure the attorney's professional paid-for services required the expenditure of time and resources pursuing a complaint before the Disciplinary Committee. While the complaint resulted in the attorney's admonishment, this was insufficient to undo the damage already done to the defendant, who by then had no funds to retain new counsel. Expecting his paid-for legal services, the defendant again relied on his attorney. However, when the

attorney had the opportunity he failed to pursue a direct appeal. Moreover, the attorney ignored one of the strongest arguments in favor of a motion for enlargement of time to perfect the defendant's appeal; attorney neglect as found by the Disciplinary Committee.

The defendant's conduct, under the circumstances of this case, does not support dismissal of his appeal. First, the defendant does not bear any blame for the initial delay in seeking to perfect his appeal because it was his attorney who failed to work on the case. As the majority acknowledges, up to 2003 the defendant cannot be blamed for the delay in perfecting his appeal because the defendant's attorney "was undoubtedly ineffective in failing to perfect the appeal that he was hired to pursue" (majority op at 9 [citing People v Syville, 15 NY3d 391, 397-398 [2010]]). Second, the defendant took action against his attorney in order to secure proper representation. The record shows that the defendant and his family paid counsel, and when it appeared the attorney was derelict in his obligations to his client, he was reported to the Disciplinary Committee, which acknowledged and thanked "the initiative and forthrightness" displayed in reporting the attorney to the Committee. Third, the defendant's conduct throughout the years does not evince an abandonment of his right to appeal. Quite the opposite. For years, the defendant took all the appropriate steps to pursue his rights as provided for by our legal system: he retained an attorney to appeal his conviction; he complained to the appropriate professional disciplinary body about his attorney's

failures which, as the Committee noted, makes it possible “to improve the quality of legal representation available to the public”; and he filed a motion to request an enlargement of time to perfect his appeal and briefed the merits in support of his motion. Fourth, nothing in the record suggests that the defendant sought to “game the system” by manipulating events or circumstances surrounding his conviction and appeal.

The majority, nevertheless, concludes that once the Disciplinary Committee informed the defendant in 2003 that his lawyer was neglecting his case, he should have acted to perfect his appeal, and having failed to do so until 2012, he cannot complain that the Appellate Division dismissed his appeal (majority op at 9-10). Thus the majority concludes that the delay attributable to the defendant is the type of extremely long delay that “can bring a system into disrepute” (*id.* at 10). I disagree that the defendant’s actions were of such character that despite his own attorney’s ineffectiveness, the defendant should be foreclosed from a direct appeal. This is not the case where the defendant sat back for years and allowed an opportunity to appeal to pass, and with it caused prejudice to the People.

While placing blame on the defendant, the majority too easily discounts the impact of the attorney’s professional neglect, and continued representation of the defendant, his family and the viability of his appeal. For example, the defendant and his family were in a financially worse position from when they first retained a lawyer in 1997, having paid him thousands of dollars for undelivered services and having no

additional financial resources to retain new counsel. The majority minimizes the significant financial hardship in which the defendant found himself because, according to the majority, the defendant could simply have requested assigned counsel. However, having already waited so long for his retained attorney to act, it was not unreasonable for the defendant to expect that once admonished the attorney would comply with his professional obligations. This choice seems even more plausible given that the Disciplinary Committee stated that the attorney had “initially performed some work on” the defendant’s appeal. Thus, the defendant could have found that the lawyer would be able to quickly act on his case, and since the Disciplinary Committee concluded that the lawyer had neglected the defendant, not that he was incompetent, the defendant could have expected the proper level of legal services would finally be provided.

“The right to appeal a criminal conviction is fundamental and cannot be lost because the defendant was unaware of its existence or because counsel failed to keep a promise to file or prosecute an appeal” (People v Melton, 35 NY2d 327, 329 [1974] [citing People v Montgomery, 24 NY2d 130, 131 [1969]]). I would not deny the fundamental right to appellate review because the defendant, now facing a lifetime of incarceration, entrusted his future to counsel who failed him (*see generally* Maples v Thomas, 132 S Ct 912, 924 [2012] [“a client cannot be charged with the acts or omissions of an attorney who has abandoned him”]).

III.

People v Dockery

In 1986, Alexander Dockery, then 15 years-old and in the ninth grade, was charged with robbery in the first and second degree (Penal Law § 160.15; Penal Law § 160.10). After a jury trial, the defendant was convicted of both counts and, now 16 years-old, sentenced as a juvenile offender to an aggregate of 2 to 6 years imprisonment in a youth facility. The sentencing minutes reflect that defendant acknowledged receipt of the notice to appeal, and answered affirmatively when asked if his counsel advised him of his right to appeal.

In 1992, the defendant pled guilty to attempted criminal possession of a weapon in the third degree (Penal Law § 265.02). The defendant waived his right to appeal, but in adjudicating him a second violent felony offender the court inquired about the 1986 conviction. Defendant's assigned counsel requested time to review the file from 1986, and he prosecutor stated that the "[1986 case] would have been appealed by now." That, apparently, ended the discussion of the 1986 conviction.

In 2008, while incarcerated on another conviction, the defendant wrote a letter to the Appellate Division, First Department, requesting a copy of the notice of appeal filed in the 1986 case, a copy of the brief, and a copy of any other relevant documents. "Basically," the defendant wrote, "I would like to know what the outcome of the appeal was." The First Department responded by sending the defendant an *in forma pauperis* form. The defendant

immediately filed an affidavit attesting to his indigency, and, apparently based on his own misunderstanding, stating incorrectly that he was represented by the Legal Aid Society in 1986.

The People opposed the defendant's motion to appeal as a poor person and cross-moved for dismissal. The Legal Aid Society was served a copy of the People's motion but filed no response. On December 30, 2008, the Appellate Division denied the defendant's motion and granted the People's motion to dismiss.

In 2011, the defendant wrote to the Center for Appellate Litigation which then moved, on the defendant's behalf, for reinstatement of the appeal and assignment of counsel. The Appellate Division reinstated the appeal without prejudice to the People to move for dismissal, which the People did and which the defendant opposed. In 2012 the Appellate Division again dismissed the appeal, without opinion.

The defendant contends that the Appellate Division abused its discretion by dismissing his appeal on the grounds of inaction and speculative claims of prejudice to the People. The defendant further argues that he believed his lawyer would "handle things"—which the defendant argues was a reasonable way for a defendant who was 15 at the time of conviction and 16 at the time of sentencing, to view his situation and his attorney's role. He argues that minors should not be expected to understand and appreciate the appeals process and should have assistance of counsel in applying for poor person relief.

It is generally accepted and well established that young people and adults mature at different rates and that children simply do not have the capacity to fully appreciate the world and the consequences of their actions and choices. As the United States Supreme Court stated in 2011 in JDB v. North Carolina, “[t]he law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” (131 S Ct 2394, 2397 [2011]). “(C)hildren ‘generally are less mature and responsible than adults’ . . . [and] ‘often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them’” (*id.* at 2303 [citations omitted]). Moreover, “children are more vulnerable or susceptible to . . . outside pressures than adults” (*id.* at 2403 [2011] [citing Roper v Simmons, 543 US 551, 569 [2005]; *see also Johnson v Texas*, 509 US 350, 367 [1993] [“A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions”])). The inescapable conclusion is that children are unable to understand life’s challenges or exercise judgment as would adults.

The defendant's argument that minors simply cannot be expected to make their own informed choices about conduct that may carry significant legal consequences is supported by data. Studies have established that juveniles are unable to fully understand and appreciate their legal rights (*see*

e.g. Graham v Florida, 550 US 48, 68 [2010] “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds’]). The neuroscience research data confirms juveniles do not possess the maturity necessary to make decisions that, in the case of criminal convictions, carry life-long consequences (*see e.g.* Nitin Gogtay et al., Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood, 101 Proc. Nat’l Acad. Sci. 8174, 8177 [2004]; Linda Spear, The Behavioral Neuroscience of Adolescence, 108-111 [2009]). The inescapable conclusion is that the inherent differences between young people and adults impact on a defendant minor’s ability to appreciate and respond to the requirements of the appellate review process (*see e.g.* Laurence Steinberg et al., Age Differences in Future Orientation and Delay Discounting, 80 Child Dev. 28, 30, 35-36 [2009])).

A conviction and a criminal record can impose severe lifetime consequences before the child develops the capacity to appreciate fully the meaning of negative life choices (*see* Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Developmental Rev. 1, 28-29 (1991)). The collateral consequences that accompany a criminal conviction are far reaching and can include the loss of the right to vote; loss of public benefits; exclusion from public housing; deportation for non-citizens; exclusion from jury service; and loss or exclusion from public employment (*see generally* Legal Action Center, After Prison: Roadblocks to Reentry, a Report on State Legal

Barriers Facing People with Criminal Records [2004], available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf [accessed Mar. 20, 2013]). Moreover, a criminal record undermines efforts to redirect a youth in a positive, life affirming direction (*see generally* Devah Pager, The Mark of a Criminal Record [2003], available at https://www.princeton.edu/~pager/pager_ajs.pdf [accessed Mar. 21, 2014]). Given the potential impact on a young life, access to appellate review for this class of defendants is of critical importance. The stakes are simply too high to risk the future of a young person without at least considering how age may have affected the minor defendant’s conduct.

We ignore what science and experience tells us at our own peril. As related to the specific issues involved in this case, there is simply no reason not to acknowledge the scientific reality of differences based on age in cases involving requests to extend the period of time to appeal. The United States Supreme Court’s conclusion in the context of sentencing that “criminal procedure laws that fail to take defendants’ youthfulness into account at all [are] flawed” (Graham, 560 US at 76), is no less true in cases involving minor children and their right to appellate review (see People v Rudolph, 21 NY3d 497, 506 [2013] [Grafteo, J., concurring] [“Young people who find themselves in the criminal courts are not comparable to adults in many respects—and our jurisprudence should reflect that fact”]).

Therefore, I would hold that before dismissing for failure to prosecute an appeal from a conviction imposed upon a minor defendant, the Appellate

Division must consider the impact of the defendant's age in determining whether the delay in pursuing the appeal is inexcusable, and failure to do so is an abuse of discretion. Accordingly, I would vote to remit back to the Appellate Division for such consideration.

IV.

I share the majority's concern that an extensive delay in the appellate process has an adverse impact on our criminal justice system. During any given year, the Appellate Division can hear and decide thousands of appeals. Indeed, our current legal system is plagued by many delays not attributable to defendants or the courts themselves, but due to the sheer volume of cases or other matters beyond the control of the People or the defendants.

Concern over the potential impact of untimely appeals on the criminal justice system, however, must not outweigh our responsibility to ensure the rights of defendants. For, as justice delayed lessens public confidence in our legal system, so do denials of rights to appellate review of defendants failed by their attorneys, and defendant's whose youth impacts their ability to understand and appreciate the appellate process. I dissent.

* * * * *

For Case Nos. 55 and 57: Order affirmed. Opinion by Judge Smith. Judges Graffeo, Read and Pigott concur. Judge Rivera dissents in an opinion in which Chief Judge Lippman concurs. Judge Abdus-Salaam took no part.

For Case No. 56: Order affirmed. Opinion by Judge Smith. Chief Judge Lippman and Judges Graffeo, Read, Pigott and Rivera concur. Judge Abdus-Salaam took no part.

For Case No. 58: Order reversed and case remitted to the Appellate Division, First Department, for further proceedings in accordance with the opinion herein. Opinion by Judge Smith. Chief Judge Lippman and Judges Graffeo, Read, Pigott and Rivera concur. Judge Abdus-Salaam took no part.

Decided April 3, 2014

62a

Sentence

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK :
CRIMINAL TERM : PART 56

IND. NO. 524-93

PREDICATE FELONY
ARRAIGNMENT SENTENCE

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

IVAN CALAFF and WILLIAM MARTINEZ,

Defendants.

100 Centre Street
New York, New York 10013
March 24, 1993

B E F O R E:

HONORABLE HAROLD ROTHWAX, Justice

A P P E A R A N C E S:

ROBERT M MORGANTHAU, ESQ
District Attorney, New York County
(for the People)
One Hogan Place
New York, New York 10013
BY: KENNY GREESHON,, ESQ.
Assistant District Attorney

BRUCE KLANG, ESQ.
(For the defendant Calaff)
LEGAL AID SOCIETY

–by–

MATSOUR KARIMIPOUR, ESQ.
(For defendant Martinez)

KAREN FAUNTLEROY, SR. COURT
REPORTER, AS TRANSCRIBED BY
JOANN SOKOL, C.S.R.,
SR. COURT REPORTER

COURT CLERK: Calendar number seventy-five,
Ivan Calaff and William Martinez. Indictment
number 524 of 1993.

MR. KLANG: Bruce Klang for defendant Ivan
Calaff.

MR. KARIMIPOUR: Matsour Karimipour, Legal
Aid Society.

MR. GREESHON: Kenny Greeshon for the
People.

(Bench conference held off record)

THE COURT: Let's arraign the defendant, please.

COURT CLERK: Ivan Calaff, stand up, please.

Ivan Calaff, the district attorney has filed a statement with the Court alleging that you have a predicate violent felony conviction.

MR. KLANG: I believe he has already been adjudicated.

THE COURT: No. I don't believe we did do it.

Please continue.

COURT CLERK: The statement alleges that on March 3, 1992, in the Supreme Court of Bronx County in the State of New York you were convicted of criminal possession of a weapon in the third degree.

You may at this time controvert any allegation in this statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in this matter will be considered as a waiver on your part of any allegation of unconstitutionality.

You may also controvert this allegation on other grounds as well. But, you must specify the particular allegation that you wish to controvert. Any uncontroverted allegation will be deemed as being admitted by you.

Please confer with your attorney.

(Defendant Calaff confers with his attorney, Mr. Klang)

COURT CLERK: Ivan Calaff, having been informed of your rights and having conferred with your attorney, do you now wish to controvert any allegation in this statement on the grounds that the conviction was unconstitutionally obtained?

MR. KLANG: Judge—

COURT CLERK: Do you admit that you are the same person so named and that the allegations are true?

DEFENDANT CALAFF: I'm requesting—

MR. KLANG: My client says there was a serious search and seizure problem during the litigation of this matter I wanted toring to the Court's attention.

THE COURT: Fine.

MR. KLANG: That's the only allegation of unconstitutionality.

COURT CLERK: Does the Court find the defendant to be a predicate felony offender?

THE COURT: I do.

COURT CLERK: Ivan Calaff, you are before the Court for sentencing following your conviction by confession to the crime of attempted burglary in the second degree.

Before the Court imposes sentence the district attorney, your attorney and you yourself will be afforded the opportunity to address the Court on any matter relevant to the question of sentence.

Counsel for the People?

MR. GREESHON: I have nothing to add, Your Honor.

COURT CLERK: Counsel for the defendant?

MR. KLANG: Judge, this is an agreed-upon sentence. The Court was promising the defendant minimum of three, maximum of six years.

There is an indication in the pre-sentence investigation that a violation of probation was filed in the Bronx. I would ask the Court to recommend that any violation of probation be run concurrent with the present sentence to be imposed today.

THE COURT: Alright. Mr. Calaff, is there anything you wish to say before I impose sentence?

MR. CALAFF: I'd just like on the record the sentences are going to be concurrent.

THE COURT: I am going to recommend concurrent, but I couldn't bind the Bronx judge.

It is the judgement of this Court that the defendant be sentenced to an indeterminate sentence, the minimum of which shall be no less than three years, and the maximum of which shall be no more than six years, and the Court recommends that the sentence run concurrently with the violation of probation pending against him in the Bronx.

Counsel, please advise him of his Appellate rights and advise me that you have done so.

MR. KLANG: Let the record reflect I am handing my client written notice of his right to

appeal, which indicates the steps he can take to perfect that appeal.

THE COURT: You may go in, sir. A brief court visit for the defendant.

COURT CLERK: William Martinez, is that your attorney standing beside you?

DEFENDANT MARTINEZ: Yes.

COURT CLERK: Mr. Martinez, you are before the Court for sentencing following your conviction by confession to the crime of attempted burglary in the second degree.

Before the Court imposes sentence the district attorney, your attorney and you yourself will be afforded an opportunity to address the Court on any matter relevant to the question of sentence,

For the People?

MR. GREESHON: I have nothing to add, Your Honor.

COURT CLERK: Counsel for the defendant?

MR. KARIMIPOUR: Your Honor, I have handed you a letter from the defendant's high school, Judge, and I ask Your Honor to take that into consideration.

Beyond that I have nothing to add.

COURT CLERK: William Martinez, would you like to address the Court before sentencing?

DEFENDANT MARTINEZ: No.

THE COURT: It is the judgement of this Court that the defendant be sentenced to an indeterminate

sentence, the minimum of which shall be no less and one year, and the maximum of which shall be no more than three years.

Please advise the defendant of his Appellate rights, Mr. Karimipour, and advise me when you have done so.

MR. KARIMIPOUR: I have advised him of his right to appeal and and now handing him his written notice of his right to appeal.

THE COURT: You may go in, sir. (End of sentence)

Certified to be a true accurate transcription of the stenographic notes of Karen Fauntleroy, Sr. Court Reporter, as transcribed by Joann Sokol, C.S.R., Sr. Court Reporter

/s/
JOANN SOKOL, C.S.R.
SR. COURT REPORTER

NOTICE OF RIGHT TO APPEAL
(SUPREME COURT)

Immediately after the pronouncement of sentence, where there has been a conviction by plea, or after trial, this form is to be given to the defense attorney. The defense attorney must then give it to his/her client and state on the record that the defendant has been given written notice of his/her right to appeal.

Upon the refusal of the Court to grant a writ of Habeas Corpus or upon denial of a writ of Habeas Corpus brought on behalf of a defendant in a criminal action, this form must be made available to the defense attorney.

TO THE DEFENDANT:

You have a right to appeal a conviction and/or sentence; and you have a right to appeal the refusal of the Court to grant a writ of Habeas Corpus, or a judgment denying a writ of Habeas Corpus.

In order to exercise this right, you must file a Notice of Appeal **within thirty (30) days**.

If you desire your present attorney to file this notice, you must fill out and give or mail to him the bottom part of this page.

If you have appeared pro se (without counsel) you may request the Clerk of the Court to file the NOTICE OF APPEAL on your behalf.

If you intend to file the notice of appeal yourself, you must send **two (2)** copies of the NOTICE OF APPEAL to the Clerk of the Supreme Court in the

County in which you were convicted or the County in which your writ was denied. You must also send one (1) copy to the District Attorney's office. The addresses of the Courts and District Attorneys' Offices are listed below. Be sure to choose the correct County.

If you are without funds, after the notice of appeal has been filed, you must write to the Appellate Division requesting that counsel be assigned to you for the purpose of appeal. Send this sworn letter to the Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010. The letter must be notarized.

You should request that you be granted permission to appeal upon the original record. You should mention that you are without funds with which to retain counsel or to purchase a transcript of the proceedings. State fully your financial circumstances, explaining why you cannot afford to hire an attorney for an appeal or purchase a transcript of the proceedings. You must write this letter yourself.

MANHATTAN

Supreme Court	District Attorney
Appeals Bureau	New York County
100 Centre Street	1 Hogan Place
New York, NY 10013	New York, NY 10013

BRONX

Supreme Court	District Attorney
Appeals Bureau	Bronx County
851 Grand Concourse	851 Grand Concourse
Bronx, NY 10451	Bronx, NY 10451

TO MY ATTORNEY/OR THE COURT CLERK

I wish to appeal my conviction and/or sentence; or
the denial of my writ of Habeas Corpus. Please file
a timely notice of appeal on my behalf.

Your Name _____ DIN/ID # _____

Your Indictment Number or Docket Number _____

Date _____

72a

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 56

NOTICE OF APPEAL
Ind. # 524-93

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,
—against—
IVAN CALAFF,
Defendant.

NOTICE OF APPEAL

Please be advised that the defendant herein intends to appeal the judgement and order of Justice Harold Rothwax of Supreme Court Part 56 issued on March 24, 1993 sentencing him upon a plea of guilty rendered on February 24, 1993 and the proceedings therein.

NYSID 6163195Y
BOOK & CASE 3499301202

73a

Manhattan House of Detention
125 White Street
New York, New York 10013

/s/

BRUCE H. KLANG

Attorney at Law

[STAMP]

FILED

APR 15 1993

SUPREME COURT
NEW YORK COUNTY
APPEAL BUREAU

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION; FIRST DEPARTMENT

AFFIDAVIT

N.Y. Co. Ind. No. 524/93

THE PEOPLE OF THE STATE OF NEW YORK,
—v.— *Respondent,*
IVAN CALAFF,
Defendant-Appellant.

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

IVAN CALAFF, being duly sworn, deposes and
says:

1. I am the petitioner in the above-captioned case,
and I make this affidavit in support of the attached
opposition to the People's motion to dismiss. I am
submitting this affidavit to explain why I did not
perfect an appeal in my case before this point.

2. I was convicted after a plea of attempted second degree burglary and sentenced to a three-to six-year term before Judge Rothwax on March 24, 1993. I was 25 years old at the time.

3. Bruce Klang was my appointed attorney during my plea and sentencing. My original attorney was Robert Dorff, but he did not show up on February 24, 2012 for calendar call. Mr. Klang happened to be in court that day and the judge immediately appointed him to be my new lawyer.

4. Mr. Dorff and I had talked about going to trial in this case, but Mr. Klang told me that he felt uncomfortable doing so in front of Judge Rothwax. I argued with him for a long time but in the end, I agreed to plead guilty because Mr. Klang kept assuring me that we would win on appeal. He never explained to me exactly what an appeal was, but I understood his statement to mean that I would eventually win my case. I relied on that understanding to plead guilty.

5. From the sentencing minutes, which I have reviewed, I know that my lawyer handed me a notice explaining the right to appeal. I do not recall being given this notice after I was sentenced.

6. At the time I was sentenced, I was completely unfamiliar with the appeals process. Up until that point, I had never appealed a case and I had never had an appellate attorney. I did not know anything about the possibility of filing for poor persons' relief, or about asking the court to assign an appellate attorney. I did not think these were things I needed to do, because I did not know that these services existed.

7. Mr. Klang never told me what an appeal entailed. Nor did he ever explain to me that I needed to do something in order for my appeal to move forward and to have an attorney assigned to my case.

8. In fact, his statements to me after I was sentenced led me to believe that I did not need to do anything for my appeal. I remember asking him immediately after I was sentenced, "What happens now about the appeal thing you mentioned?" He responded, "Don't worry about that, I'll take care of it." I took his statement to mean that he would do my appeal and that I did not need to do anything further. I trusted my attorney to do what he had to do for my appeal, and to contact me later to let me know if we had won the case.

9. I was transferred upstate in May of 1993. I never heard from my attorney again. I did not contact him about my appeal while I was in prison because I assumed he would contact me about the case. It was my first time in state prison and I was too overwhelmed by the experience to think about my appeal. I had previously been convicted of criminal possession of a weapon in the third degree, my only other felony at the time, but I had received probation for that offense, not prison time.

10. I was released from custody in January of 1996. My mother passed away from a long sickness a few months later. I did not contact my trial lawyer or the court once I was released because I was having a difficult time dealing with her death and assumed the appeal was taking place on its own. I thought that if any change in the case occurred, I would be contacted. I also did not think that I could talk to anyone about my appeal

because my previous attorney, Mr. Dorff, had warned me not to talk to anyone about my case. My family was not sophisticated about these matters and made no inquiries.

11. I was still thinking about my 1993 plea and was still bothered by how it occurred. I did not know what happened to my appeal since I never heard from Mr. Klang.

12. For years I did not know that I had to ask for poor person relief and assignment of counsel in order to take an appeal. I was convicted of bail jumping in the second degree in 2000, but in that case, I pleaded guilty and waived my right to appeal. I did not appeal that case and did not learn the process of seeking an appeal.

13. I was subsequently convicted in 2004 of burglary in the second degree and was sentenced as a persistent violent felony offender to 16 years' to life imprisonment. In connection with that case, I learned for the first time about the forms that needed to be filed with the court for an appeal to be taken. In that case, my appointed trial attorney sent me a notice of appeal and a completed motion for poor persons' relief and instructed me to sign it and send it to the Appellate Division.

14. Now knowing for the first time that an appeal did not happen automatically, I began to wonder whether my 1993 case really had been appealed. I remembered Mr. Klang's statements to me during sentencing, assuring me that he would take care of my appeal. It was improbable to believe that my attorney had misled me or lied to me, so I thought that perhaps he had filled out the forms on my behalf. I did not have his contact information

so I could not write to him to ask. I did not know that I could contact the court or anyone else to ask about my appeal. I also did not have my trial file. I did not think there was anything I could do. Because so many years had passed and I never heard from Mr. Klang, I believed that he had appealed my case and lost.

15. While I was incarcerated in 2004, I learned from a fellow inmate that I could file something called a petition for coram nobis in order to challenge my 1993 conviction. This was the first time I had heard that I could challenge that case. Wanting to do so, I sent a letter to my attorney at the time, Mr. Dale Frederick. He wrote back saying that he could not help me with my coram nobis petition.

16. I also sent a letter to the Legal Aid Society in May 2008, asking them for a copy of my court file in the 1993 case. I had heard that the Legal Aid Society represented criminal defendants for free and hoped they would be able to assist me. A paralegal wrote me back informing me that she could not release my file, but that she had forwarded my letter onto Mr. Klang. She gave me Mr. Klang's contact information. The August 15, 2008 letter from the Legal Aid Society is annexed to this affidavit.

17. I waited for Mr. Klang to write me back but he did not. I then wrote him a letter in September of 2008 asking him if he remembered me. I carefully described what happened during my plea and asked him what he remembered about my case. I asked him again for my complete trial file so that I could look it over. The September 9, 2008 letter is annexed to this affidavit.

18. Mr. Klang did not respond to my letter. In November of 2008, I wrote to him again, imploring him only to send me my case file if he did not feel comfortable telling me what he remembered about my case. The November 12, 2008 letter is annexed to this affidavit.

19. Mr. Klang never responded to any of my letters. I did not know what else to do or who else to contact about the case. I thought that if there was a meritorious issue in my 1993 case, Mr. Klang would have written me back. The lack of response made me believe that there was no issue I could challenge.

20. Nevertheless, I tried again in 2012. I wrote letters to the Legal Aid Society and to the Center for Appellate Litigation seeking their advice on whether a constitutional error had been made in my case because the judge improperly discharged my attorney, Mr. Dorff, and substituted new counsel. I hoped that one of those organizations would take on my case for free. The Center for Appellate Litigation wrote back, stating that they might be able to assist me.

21. An attorney at that office, Claudia Trupp, came to Sing Sing Correctional Facility to see me a few weeks later and I explained my situation to her. The Center contacted the court to find out whether I had appealed my case. I finally learned this year that Mr. Klang had filed a notice of appeal in my case but that no appeal had ever been taken.

22. I recognize that many years have passed since my 1993 conviction. However, I never abandoned my appeal, as the People have assumed. My lawyer never told me about the forms I would

need to fill out to get an appeal, never explained the notice of appeal form he handed me, never told me about any deadlines, and never told me that he would not be handling my appeal. His statements to me led me to believe that he would take care of doing my appeal and that I did not need to do anything further. I thought the appeal happened automatically and that I would be told something if and when that became necessary. In the years that have passed since then, I thought the appeal had happened and was over. There was no reason for me to think otherwise. My letters from 2008 and 2012 show that I had never abandoned the idea of challenging my 1993 conviction. Not being able to get in touch with my original attorney and not having my court file to inspect, I did not know what I could do about that case. As soon as I learned that Mr. Klang never appealed my case, I took steps to begin the appeal process.

/s/ _____
 Ivan Calaff
 Defendant-Appellant

Sworn to before me
 this 29 day of June, 2012

/s/ _____
 Arthur M Wolpinsky

[STAMP]
 ARTHUR M WOLPINSKY
 Notary Public, State of New York
 No. 01WO4332230
 Qualified in Westchester County
 Commission Expires June 30, 2015

81a

LEGAL AID SOCIETY
LETTERHEAD

August 15, 2008

Ivan Calaff
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

Re: People v. Ivan Calaff
Indictment# 00524/93

Dear Mr. Calaff:

This letter is in response to your letter dated May 19, 2008, in which you requested a copy of your entire case file. At that time you were not represented by The Legal Aid Society. Since you were not a client of ours the Supreme Court Clerk's Office would not allow us to copy your file. However, they did provide me with information regarding your attorney. His name is Mr. Bruce Klang; and his address is 321 Broadway, New York, NY 10007. His telephone number is 212-233-0727.

I will forward a copy of your letter to Mr. Klang for you. In addition, you may want to contact Mr. Klang directly and ask for your file. Enclosed you will find a copy of the Notice of Appearance. Please direct any future questions and concerns regarding the above mentioned case with Mr. Klang.

My apologies for not responding to you in a timely manner.

82a

Yours,

/s/

Nykia Leigh

Paralegal

The Legal Aid Society

49 Thomas Street

New York, NY 10013

83a

PRIVILEGED & CONFIDENTIAL

Bruce Klang, Esq.
321 Broadway
New York, N.Y. 10007

september 9, 2008

Greetings;

Please allow me a few minutes out of your busy schedule and I promise to be as brief as possible.

You represented me back in 1993 in the case People v. Calaff, Ind# 524/03 out of New York County. Enclosed you will find a copy of the plea transcripts for the above referenced case. I realize that it's been many years since, but I'm praying that you have some recollection of what transpired on that date.

On February 24, 1993, you had just been assigned to my case by the court because my attorney had neglected to show up on time. You informed that a plea offer of 2½ to 5 years was being offered to me, which I adamantly refused to accept. You and I went back and forth for about 20 minutes. I wanted to proceed to trial; you wanted me to accept the plea. You honestly told me that you were not very familiar with the facts of my case, but that you were very familiar with Judge Rothwax and that you were not comfortable going to trial in his courtroom. Finally after some serious convincing on your part, I reluctantly agreed to accept the plea.

My case was second called and I entered a plea of guilty to Attempt Burg 2°. After accepting my plea and going through all the procedures, Judge Rothwax stated that he was sentencing me to a violent felony

to 3 to 6 years in prison. You immediately jumped up and objected, but the Judge denied that any offer of 2½ to 5 years had ever been offered to me. You and the Judge went at it for about five minutes but, he just spazzed out and started yelling.

I implore you to please read the transcripts I've annexed to this letter so you can better appreciate what I'm telling you. One thing I remember clearly is that Judge Rothwax was one scary dude. he started yelling, "He can take the back and go to trial if he doesn't want it."

He did give us a few minutes to discuss my options. I clearly remember telling, "You said 2½ to 5 and that I should get work release in about 6 months." You just kept shaking your head saying, I can't believe this Judge." I refused to accept anything else but the original 2½ to five. You and I got in a heated debate when I refused to budge. The last thing you said to me was, "Listen, I don't know what the hell is going on. The judge told me that an offer of 2½ to five was on the table and I should advise my client. The Judge says he never said that to me. There is nothing I can do about that. I'll try one more time, but believe me, this Judge is not the easiest person to work with. I very seriously advise you to take the 3 to 6."

Basically what I need from you is an acknowledgment that you do or don't recall what transpired on the above date, and if it is possible, please tell me what you recall in your own words.

Lastly, would you please provide me with a complete copy of my trial folder. I had most of the stuff, but I had an unfortunate accident, the details of which I don't want to burden you with.

85a

I sincerely apologize for bothering you with this mess.

Thank you wholeheartedly for your time and I pray to hear from you shortly. Until then, take care and God bless.

Respectfully,
Ivan Calaff Sr.
04A5476
354 Hunte St.
Ossining, NY 10562

86a

PRIVILEGED & CONFIDENTIAL

Bruce Klang, Esq.
321 Broadway
New York, N.Y. 10007

November 12, 2008

Greetings;

I pray that this letter finds you doing well and in fine spirits. I'm afraid that you were not too impressed with the importance of my request in my last letter. It could be that that my request was somewhat ambiguous, or as my experience has shown, that not too many people are willing to lend any assistance to prisoners. Whatever the reason, I have to keep trying for the sake of my sanity and the sake of my children.

Annexed to this letter you will find a copy of my first letter to you. I only ask that you read both letters carefully, and then if both your conscience and work schedule allows, please provide me with whatever information and assistance you can.

If you feel hesitant about making any statements regarding your recollection of my case, I simply implore you to send me a copy of my entire case file, including any motions filed by my previous attorney.

Thank you for your time and consideration, and no matter what you decide to do, may you and your loved ones enjoy the holidays and each other.

Respectfully,

Ivan Calaff Sr.
04A5476
354 Hunte St.
Ossining, NY 10562