No. ____________________.

In The

Supreme Court of the United States

October Term, 2017.

MIGUEL A. JARAMILLO,
Pro Se Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK, *et al.*,
Respondents.

ON NOTICE OF APPEAL TO THE NEW YORK STATE COURT OF APPEALS.

BRIEF FOR PETITIONER.

Miguel A. Jaramillo
DIN 11B0722
Attica Correctional Facility
639 Exchange Street
P.O. Box 149
Attica, New York
14011-0149
Pro Se Petitioner.

QUESTIONS PRESENTED

1. Whether Petitioner Was Denied the Right to Have an Impartial Judge in the Lower Court.

2. Whether Petitioner Was Denied the Right to Effective Assistance of Appellate Counsel on Direct Appeal.

3. Whether the Prosecutor's Response Submitted to the State Supreme Court in Opposition to Petitioner's Notice of Motion for a Writ of Error Coram Nobis Denied Him Due Process of Law.

LIST OF PARTIES

The *pro se* petitioner is Miguel A. Jaramillo, who is currently imprisoned at Attica Correctional Facility, New York.

The respondents are Andrew M. Cuomo, Governor of the State of New York, and Eric T. Schneider man, Attorney General of the State of New York.

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ON NOTICE OF APPEAL TO THE NEW YORK STATE
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BRIEF FOR PETITIONER.

ORDERS BELOW

The order of the New York State Court of Appeals entered September 28, 2017 (App. A), is reported at 30 N.Y.3d 950. A Reargument denied January 15, 2018 (App. B), is reported at Slip Copy 2018 WL 94742. The order of the New York State Supreme Court, Appellate Division, Fourth Department entered June 9, 2017 (App. C), is reported at 15 A.D.3d 1782. A Reargument denied September 29, 2017 (App. D), is reported at 153 A.D.3d 1674.

JURISDICTION

The order of the New York State Court of Appeals was entered on September 28, 2017. A motion for reargument was denied on January 15, 2018. The jurisdiction of your Honorable Court rests on Article III, §2, cl. 1, of the Federal Constitution, as this matter is a controversy between a citizen of the State of California and the People of the State of New York, 28 U.S.C. §§1251(3), 2102, 2104, Durham v. United States, 401 U.S. 481 (appeals are a matter of right).

CONSTITUTIONAL PROVISION INVOLVED

1. Federal Constitution, Article in Amendment XVI:

"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

The jurisdiction of the state supreme court was invoked for a Writ of Error Coram Nobis (App. E) upon the ground that petitioner was denied the Federal right to have an impartial judge in the lower court, overlooked or misapprehended by appellate counsel during direct appeal. He moved the state supreme court for an automatic reversal of the judgment under Federal law (App. G). The courts below denied coram nobis relief without opinion (App. A, C)

He was found guilty by a jury on January 26, 2011, in the Jefferson County Court, New York on three counts of a five-count indictment charging him with Assault in the First Degree, Criminal Possession of a Weapon in the Fourth Degree, and Perjury in the First Degree (App. H; Ex. 172). He was sentenced to imprisonment on March 7, 2011, for fourteen years, plus five years post-release supervision, one year concurrent, and one and one-third to four years consecutive, and directed to pay restitution in the amount of Eight Thousand Eighteen Dollars and Sixty-three Cents ($8,018.63) and a surcharge of Three Hundred Twenty-five Dollars ($325.00) (App. H; Ex. 173).

Petitioner, a professional tattoo artist, was alleged to have stabbed a man named Lloyd P. Little, who was in the business of bouncing patrons from bars and restaurants. The State's version of the facts, accepted by the jury, was that in the pre-dawn hours of October 18, 2009, Little encountered petitioner and his girlfriend Sonya Raven in a physical altercation outside Tico's Bar and Restaurant, Watertown, New York, intervened, and stabbed with a knife in the abdomen area by petitioner.

Petitioner's version of the facts, unaccepted by the jury, was that he was outside talking to Raven, Little followed petitioner outside with a knife and petitioner lunged at Little, who fell to the floor, following his initial aggression towards petitioner inside Tico's Bar and Restaurant.

SUMMARY ARGUMENT

The gist of this appeal is that during the course of a pre-trial hearing to determine whether Little's report of a stabbing to the investigating officer existed and whether there had been a preservation violation, the trial judge told the prosecutor that "[i]t looks like there might be some cutting and pasting going on" (App. H; Ex. 163). In other words, the trial judge managed false evidence (App. J) through the prosecutor and contrived the conviction through the pretense of trial as a means of depriving petitioner of liberty through the deliberate deception of the jury by the presentation of evidence known to be false.

When state supreme court was alerted, the prosecutor sought to place the whole blame on the investigating officer responsible for introducing false evidence here and made falsehoods in the affidavit submitted to the appellate court judges, even when faced with contrary evidence submitted by the prosecutor herself (App.I; Ex.D.p.40). This was done with the evident design of influencing its future judicial action pending before them to conceal from the appellate court and the American public that the trial judge subverted his impartial obligations upon which petitioner based his motion.

The courts below failed to provide any corrective judicial process by which petitioner's conviction was obtained in the lower court, by which appellate counsel executed the direct appeal, and by which the prosecutor responded to petitioner's motion of a Writ of Error Coram Nobis, and is therefore a special case.

If petitioner's final argument is correct, he asks for an automatic reversal of the judgment and that there be reinstated the right of all Americans to have an impartial judge. If petitioner's final argument is not correct, he respectfully thanks your Honorable Court for its time.

ARGUMENT

ISSUE

1. Whether Petitioner Was Denied the Right to Have an Impartial Judge in the Lower Court.

LAW

It is well settled, in view of Tumey v. Ohio, 273 U.S. 510, that there is a distinct, separate, and independent Federal "right to have an impartial judge" (id., *supra* at 535). In other words, if a state renders judgment against a criminal defendant in which he is denied the right to have an impartial judge, the state deprives the individual of liberty with "due process of law," in violation of the Fourteenth Amendment of the Federal Constitution. As to this, your Honorable Court laid down the law in Edwards v. Balisok, 520 U.S. 641, 647:

> "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him."

See, also, Arizona v. Fulminate, 499 U.S. 279, 308; Vasquez v. Hillery, 474 U.S. 254, 263; Chapman v. California, 386 U.S. 18, 23 n. 8.

Thus, the remedy you Honorable Court has embraced for nearly a century — the only effective remedy for this violation — requires your Honorable Court's continued adherence to a rule of automatic reversal.

APPLICABLE LAW

During the course of a pre-trial hearing to determine whether the victim's statements made to the investigating officer linking petitioner to a stabbing sixteen months earlier existed and whether there had been a *Rosario* violation (*see*, People v. Rosario, 9 N.Y.2d 286, *cert. den.* 386 U.S. 866), the trial judge told the prosecutor that:

"It looks like there might be some cutting and pasting going on" (App. H; Ex. 163).

In other words, the trial judge suggested to the prosecutor that Little's statement to police (App. H; Ex. 1-2) could be acquired on the basis of "cutting and pasting" *Rosario* material and police evidence with the eventual introduction of false evidence relating to the alleged incident to disable petitioner from presenting a defense on that aspect of the case. Petitioner submits that was a constitutional error, the rationale being a prosecutor's use of false or misleading evidence not only is unethical (*see*, American Bar Association, Criminal Justice Standards §3–6.6(a)), but "such misconduct may impair a defendant's due process rights and require a reversal of the conviction" (People v. Pelchat, 62 N.Y.2d 97, 105; *see, also,* Mooney v. Holohan, 294 U.S. 103, 112-113). His "plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge" (Tumey, *supra* at 535).

If he is right as to the trial judge's oral decision order, the law automatically calls for reversal of the judgment, "even if no particular prejudice is shown and even if the defendant was clearly guilty" (Chapman, *supra* at 43).

How, it is asked, could the trial judge help the prosecutor so much, and do so little to help petitioner? Where was the cutting and pasting of Little's statement for petitioner, who wished for due process and a fair and impartial trial? Is not cutting and pasting enough evidence of partiality?

With regard to collusion, petitioner cannot improve upon the language of the prosecutor:

"That's correct" (App. H; Ex. 163).

Petitioner submits this agreement between the trial judge and the prosecutor implies much more than "deceit or collusion" (*see,* New York Judiciary Law §487(1)); it indicates the trial judge had as much sympathy for the prosecutor, as much as he had a fanatical prejudice for the petitioner. The trial judge is discovered to have occupied "two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law" (Tumey, *supra* at 534) in the pre-trial hearing of petitioner charged with crimes before him.

If he is right as to the trial judge's collusion, the law automatically calls for reversal (*see*, Balisok, *supra* at 647; Fulminante, *supra* at 308).

During the course of a subsequent pre-trial conference, the prosecutor went to some lengths to explain fully the police department's justification for its policy turning over Little's statement taken sixteen months earlier (App. I; Ex. B, p. 3-4) and offered the court and petitioner false or misleading evidence (App. H; Ex. 169-171) as outlined by petitioner (App. J).

In other words, the trial judge contrived false evidence through the prosecutor and managed the conviction through the pretense of trial which in truth was but used as a means of depriving petitioner of liberty through the deliberate deception of the jury by the presentation of *Rosario* material and a police incident report known to be false.

Petitioner submits "the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review and we must presume that due process was impaired" (Vasquez, *supra* at 263).

If he is right as to the judgment of conviction, the law automatically calls for reversal. "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." (Balisok, *supra* at 647; Tumey, *supra* at 535).

ISSUE

2. The Question Is Whether the Petitioner Was Denied the Right to Effective Assistance of Appellate Counsel on Direct Appeal.

In the interest of brevity, petitioner submits if your Honorable Court makes the determination that he was not denied the right to have an impartial judge in the lower court, your Honorable Court cannot hold appellate counsel ineffective on direct appeal for failure to raise a claim your Honorable Court determines frivolous. On the other hand, if your Honorable Court makes the determination that he was in fact denied the right to have an impartial judge, then appellate counsel's performance on direct appeal is irrelevant or not subject for analysis, the rational being "[a] criminal defendant tried by a partial judge is entitled to have his conviction set aside, no mater how strong the evidence against him"(Balisok, *supra* at 647; *see, also,* Fulminante, *supra* at 308).

LAW

Assuming *arguendo*, it is well settled, in view of Evitts v. Lucey, 469 U.S. 387, and Strickland v. Washington, 466 U.S. 668, that there is a Federal right to effective assistance of counsel on direct appeal. This mandates appellate counsel to act as an advocate, not merely *amicus curiae*, and to marshal legal arguments on the appellant's behalf in order that he might have a "full consideration and resolution" of the direct appeal (Anders v. California, 386 U.S. 738, 743-744). Appellate counsel's "role of advocate requires that he support his client's appeal to the best of his ability" (id. *supra*, at 744), and the brief appellate counsel submits must reflect more than a "detached evaluation of the appellant's claim" (Evitts, *supra* at 394). Although appellate counsel is not bound to raise every non-frivolous issue on direct appeal (*see*, Jones v. Barnes, 463 U.S. 745, 751), however, an issue which has the likelihood of being reversed or modified should be raised (*see,* Mayo v. Henderson, 13 F.3d 528, 533-534, *cert. den.* 573 U.S. 820).

APPLICABLE LAW

Petitioner submits appellate counsel completely failed to marshal the Federal claim during direct appeal that he was denied the right to have an impartial judge in the lower court, even though, based upon Federal laws, he could have.

Familiarity with the relevant facts of law, perhaps the most important aspect of an "impartial judge" (Tumey, *supra* at 535; Chapman, *supra* at 23, fn. 8) demonstrates was far stronger than the three frivolous claims appellate counsel actually pursued, as evidenced in the State's unanimous rejection of those claims (*see*, People v. Jaramillo, 97 A.D.3d 1146, *lv. den.* 19 N.Y.3d 1026). Comparing the grounds offered to support his Federal claim, petitioner submits there is a "reasonable probability" that but for appellate counsel's mistake, an automatic reversal of the judgment would have been obtained (*see*, Strickland, *supra* at 694) on direct appeal.

Petitioner emphasizes, to begin with, that his immediate concern for appellate counsel had directly taken her to the trial judge's oral decision order "cutting and pasting" that captured her attention, in pertinent part:

> "As per your letter of July 14, 201 1 , you again raise the issue of the missing paragraph in the police report of Officer Davis. I agree that this may have constituted a Rosario violation, but the more important question is what your remedy is for such a violation. Sanctions are more severe for a willful violation than an inadvertent one. I will research this and discuss it with you further in the future" (App. H; 174-176).

While appellate counsel carefully avoided implicating the trail judge's oral decision order in issue here, there is no doubt she was fully aware of: 1) Petitioner's concern, 2) the missing paragraph in the investigating officer's incident report linking petitioner to a stabbing, 3) a *Rosario* violation, 4) sanctions for a willful violation, and 5) assuring research.

In other words, appellate counsel knew the exact route used by the trial judge, as well as dates of the "willful violation" of the *Rosario* rule. With these advantages, it was easy for appellate counsel to access her skill and knowledge and hand over the trial judge to the state supreme court for his willful disregard of his "impartial" obligations (Tumey, *supra* at 535) to accord petitioner "ample opportunity to meet the case of the prosecution" on direct appeal to which he was entitled (*see*, Strickland, *supra* at 685).

Even if appellate counsel determined "the missing paragraph in the police report of Officer Davis" was irrelevant, it was relevant. For example, it was directly tied to the trial judge's oral decision order, "cutting and pasting." The trial judge's partiality should have been obvious to appellate counsel from even a casual reading of the record on appeal and no justifiable reason exists for not raising that Federal claim on petitioner's behalf on direct appeal (*see*, Evitts, *supra* at 392).

Appellate counsel's mistake, misapprehension, or error "resulted in actual and substantial disadvantage to the course of his defense" on direct appeal (Strickland, *supra* at 682). Petitioner submits appellate counsel "fell below an objective standard of reasonableness" (Strickland, *supra* at 688) and the facts relating to appellate counsel's letter demonstrate the absence of a strategic or other legitimate explanation for not raising on direct appeal the partial judge claim "which ha[d] the likelihood of being reversed" (Mayo, *supra* at 533-534). Consequently, petitioner was not accorded "a full consideration and resolution of his appeal to which he was entitled" (Anders, *supra* at 743) and there is a "reasonable probability" that but for appellate counsel's mistake or misapprehension, the outcome of direct appeal would have resulted in automatic reversal (*see*, Strickland, *supra* at 694). *How, it is asked, could appellate counsel ignore the willful violation that captured her attention?*

If petitioner is right as to appellate counsel's performance, the law requires a new appeal.

ISSUE

3. Whether the Prosecutor's Response Submitted to the State Supreme Court in Opposition to Petitioner's Notice of Motion for a Writ of Error Coram Nobis Denied Him Due Process of Law.

LAW

In view of New York State Judiciary Law §487, it is well settled that an attorney "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" (id., *supra* at (1)) and misrepresenting facts to the court is not only unethical (*see*, A.B.A. Criminal Justice Standards §3–6.6(a)) but also prosecutorial misconduct (*see*, A.B.A. Code of Professional Responsibility, DR 7–102(A)(3), (5), and (8)).

APPLICABLE LAW

The affidavit submitted to the state supreme court by the prosecutor in opposition to *coram nobis* relief did not keep with the law (*see*, Judiciary Law §487(1)) and sense of professional ethics (*see*, A.B.A. Criminal Justice Standards §3–6.6(a)), and its language requires your Honorable Court's condemnation. It was aimed at the judges, and was written with the evident design of influencing its future judicial action in the proceeding pending before them. The prosecuter characterized petitioner's motion for coram nobis relief as "an absolute fabrication" (App. I; Point 18), and was endeavoring to conceal from the state supreme court and the American public the trial judge's disregard of his impartial obligations from being revealed upon which he based his motion. This is a serious charge to make, but the prosecutor went further. In reference to the trial judge's oral decision order then pending and undecided, the prosecutor said:

> "The court, by way of explanation for these missing words attributed it to possible cutting and pasting when Officer Davis wrote the report" (App. I, Point 18).

In other words, the prosecutor sought to place the whole blame on the investigating officer responsible for falsifying *Rosario* material and police evidence, even when faced with contrary evidence submitted by the prosecutor herself (App. I; Ex. D, p. 40). What, it is asked, was the prosecutor afraid of? Despite petitioner's protests (App. J; M), the courts below failed to provide any corrective judicial process by which the prosecutor responded to petitioner's Federal claim in his *coram nobis* application.

Petitioner submits the prosecutor's affidavit is vitiated by the fallacy. If he is right as to the prosecutor's deceit and the courts below inaction, he has been denied due process of law in a constitutional dimension. *How, it is asked, could the courts below do so much to help the trial judge and prosecutor and do so little to help petitioner? Did petitioner have a right to have impartial appeal judges in the Coram Nobis proceeding? How, it is asked, could the Court of Appeals overlook the prosecutor's fallacy and flout constitutional due process?*

CONCLUSION

In essence, petitioner submits the courts below were in error for failure to provide any corrective judicial process by which his conviction was obtained in the lower court. It is against practical reason and judgment to conclude under these facts that the trial judge was impartial. The courts below were in error to conclude that an impartial judge in the lower court did not apply and bring your Honorable Court within its power.

The courts below disregarded Fundamental Constitutional principles relating to an impartial judge laid down by your Honorable Court in the landmark case of Tumey v. Ohio.

Intervention by your Honorable Court is required so that there be reinstated once again the right of *all* Americans to have an impartial judge.

For the foregoing reasons the notice of appeal should be granted.

Respectfully Submitted,

MIGUEL A. JARAMILLO
Pro Se Petitioner