UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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RICARDO WALTERS,

Petitioner,

-against-

DALE ARTUS, Superintendent,
Attica Correctional Facility

Respondent.
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PETITION PURSUANT TO 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK:

COMES NOW Petitioner, RICARDO WALTERS, a person incarcerated in the State of New York pursuant to a judgment of conviction and sentence thereon, by and through his attorney, Patrick Michael Megaro, Esq., alleging as follows:

1. This Petition, made pursuant to 28 U.S.C. § 2254, respectfully requests that this Court issue a writ of habeas corpus as specified in the prayer for relief below.

2. Petitioner is currently incarcerated within the New York State Department of Correctional Services, serving an aggregate determinate term of imprisonment of two hundred three years, pursuant to a judgment of conviction and an order of commitment entered in the New York State Supreme Court, Nassau County, under Indictment # 436N-08. He is currently in custody at the Attica Correctional Facility, located within the State of New York.

3. Petitioner has exhausted all of his state direct appeals.

4. There are no other petitions or appeals pending in any state or federal court relating to the judgment under attack herein, other than those listed herein. At this time, Petitioner has a

motion for post conviction relief pending in the Nassau County Court, and a petition for a writ of error coram nobis pending in the Appellate Division, Second Department on the underlying criminal case. Petitioner is filing this application at this time to ensure compliance with the applicable statute of limitations and requests that this Petition be held in abeyance pending resolution of those two matters.

5. Petitioner was represented by Dennis Lemke, Esq., of 114 Old Country Road, Suite 200, Mineola, New York 11501, at all pre-trial proceedings, at trial upon the aforementioned Indictment, and at the sentencing proceeding. This attorney was replaced by Gail Gray, Esq., of 770 Broadway Second Floor, New York, New York 10003 on appeal and on post-conviction relief.

6. Petitioner has no additional or other sentence to serve once he completes the sentence pursuant to the judgment under attack.

PROCEDURAL HISTORY

7. Petitioner was arrested on September 9, 2007 by police officers from the Hempstead Village Police Department. Petitioner was indicted for four counts of Robbery in the First Degree pursuant to Penal Law § 160.15(2); four counts of Kidnapping in the Second Degree pursuant to Penal Law § 135.20; four counts of Sexual Abuse in the First-Degree pursuant to Penal Law § 130.61(1); two counts of Criminal Sexual Act in the First Degree pursuant to Penal Law § 130.50(1); one count of Rape in the First Degree pursuant to Penal Law § 130.35(1), and one count of Kidnapping in the Second Degree as a Sexually Motivated Felony pursuant to Penal Law § 130.91.

8. The prosecution moved to consolidate these indictments over defense counsel's objections. The trial court granted the prosecution's motion to consolidate petitioner's three indictments into Indictment # 436N-08, pursuant to Criminal Procedure Law § 200.20(2).

9. Petitioner unsuccessfully moved to suppress statements made to law enforcement upon his arrest. A suppression hearing was held on the motion on April 15, 2008.

10. Petitioner was tried before this Court and a jury with trial beginning on October 29, 2008 and concluding with a guilty verdict on November 13, 2008.

11. Prior to the final jury charge, the court dismissed two counts of Kidnapping in the Second Degree. Petitioner was acquitted of Kidnapping in the Second Degree as a Sexually Motivated Felony, but convicted of Robbery in the First Degree, four counts of Sexual Abuse in the First Degree, two counts of Criminal Sexual Act in the First-degree, one count of Rape in the First Degree, one count of Kidnapping in the Second Degree, and one count of Attempted Kidnapping in the Second Degree.

12. Petitioner was sentenced on January 13, 2008, without objection by counsel, to an aggregate term of imprisonment exceeding two hundred (200) years.

13. Petitioner filed a timely Notice of Appeal, and prosecuted an appeal to the New York Supreme Court, Appellate Division, Second Department, Docket # 2009-01523. On December 20, 2011, the court affirmed the judgment. Petitioner timely moved for rehearing which was granted, and a new written decision was substituted for the first opinion on March 2, 2011. That subsequent decision is reported at People v. Walters, 90 A.D.3d 958, 934 N.Y.S.2d 722, 2011 N.Y. Slip Op. 09357 (2d Dept. 2011) (amended by unreported motion dated Mar. 2 2012, 2012 NY Slip Op 66225(U)). Petitioner thereafter filed an application for leave to appeal to the New

York Court of Appeals which was denied in a written decision dated April 5, 2012. See People v. Walters, 18 N.Y.3d 999, 968 N.E.2d 1009, 945 N.Y.S.2d 653 (Table) (2012).

14. Through the same appellate counsel, Petitioner then filed a motion for post-conviction relief pursuant to New York Criminal Procedure Law § 440.10 on or about July 3, 2013 (1 year and 89 days), which was opposed by the Nassau County District Attorney. Petitioner subsequently amended and supplemented the motion on or about

15. While the 440 motion was pending, on November 4, 2013, Petitioner filed a petition for a writ of error coram nobis in the Appellate Division, Second Department, alleging ineffective assistance of appellate counsel, and sought to vacate the decision on his direct appeal. That application is pending at this time.

STATEMENT OF FACTS[1]

Arrest

16. On September 9, 2007 at approximately 5:00 a.m. Hempstead Village Police Officer Eugene Este observed a Hispanic female, Sara Sandoval, run into the intersection of Greenwich and Trotten Streets in the Village of Hempstead. Sandoval was yelling in Spanish and motioned with her hands by pulling her hair and pointing at her chest with a gun. Officer Este did not understand what she was yelling, and asked Petitioner "What's going on here?" Petitioner replied, "Nothing, I was just trying to talk to her." When Este exited his vehicle Petitioner began to run. Este got in front of Petitioner and ordered him to stop. The Petitioner complied and while being handcuffed stated "I'm on the job."

[1] The facts set forth herein are made upon information and belief after review of the record of the proceedings in the New York state courts, and after consultation with Petitioner and others with knowledge of the facts of the case.

17. Hempstead Village Police Officer Dale Jones arrived at the scene shortly thereafter. Upon arrival, Officer Jones observed Officer Este standing over the Petitioner who was handcuffed and lying on the ground. Este left Officer Jones with the Petitioner and Jones began to pat down the Petitioner. During the pat down, Jones recovered a legally-owned firearm from Petitioner, a holster, and a wallet that contained a New York City Department of Corrections badge bearing Petitioner's name.

18. Officer Este returned to where Sara Sandoval was standing to question her, encountered a language barrier as Sandoval did not speak English. Este radioed for a Spanish speaking officer. At some point later Officer Arcilla arrived. Sandoval told Arcilla she had been robbed at gunpoint by the Petitioner.

19. Another Hempstead Village Police Officer arrived and observed a red Mitsubishi automobile parked approximately forty feet from where Petitioner was arrested. This officer recognized the vehicle from a prior unrelated shooting at Petitioner's home.[2] When Officer Este approached the automobile he observed a uniform shirt hanging in the back seat and a slapper.

20. At approximately 6:00 a.m., Petitioner was transported to the Hempstead Police Department. Upon arrival, Hempstead Police Officer Almanzar searched the Petitioner's clothing and retrieved eleven one dollar bills and a piece of paper with the name "Maria Reyes" written on it from Petitioner's right front pants pocket. Almanzar asked the Petitioner "Who's Maria Reyes?" and Petitioner replied, "…that's the girl that I met up in Rye, New York," explaining that he was "into Spanish chicks." At no time prior to this questioning were Miranda warnings administered.

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[2] Petitioner had previously been involved in a shooting incident at his home that was ruled justifiable self-defense; as a result he was not prosecuted by the Nassau County District Attorney.

21. At 7:45 a.m., Detective Sheila Wimberley of the Nassau County Police Department's Third Squad arrived at the Hempstead Police Department and obtained the details of the Petitioner's arrest from Officers Este, Jones, Arcilla and the female complainant. After Detective Wimberley met the Petitioner, she learned he was diabetic and offered him orange juice. When the Petitioner finished drinking the orange juice, Wimberley removed the container, placed it in a brown paper bag, and forwarded it to the Police Department's Forensic Evidence Bureau for testing. In addition to the orange juice container, Wimberley secured for evidence a black do-rag, a Glock 26 nine-millimeter gun, eleven one dollar bills, and a piece of notebook paper with the name "Maria Reyes" written on it. After medical screening, Detective Wimberley asked the Petitioner pedigree questions. According to Wimberley she never questioned the Petitioner about the events surrounding his arrest, but that he offered those facts freely. During this forty-five minute questioning, Detective Wimberley repeatedly left the processing room to take notes of her and the Petitioner's conversation and further informed NYC DOC that an employee was currently under arrest. Detective Wimberley's reduced her notes to a two-page "statement of admissions", which the Petitioner refused to sign and requested an attorney. Wimberley then read the Petitioner his Miranda rights and warnings.

22. At approximately 4:00 p.m., Captain Gregory Navoy of the NYC DOC Investigation Division met with Corrections Officer Benevolent Association Attorney Peter Troxler at the Hempstead Village Police Department. Peter Troxler, Esq. was there to represent Petitioner with respect to action being taken against him by the New York City Department of Correction. Captain Navoy confiscated Petitioner's weapons and issued a notice of suspension from duty pursuant to NYC DOC policy. While at the Hempstead police station, Captain Navoy learned

one of Petitioner's weapons had been placed into evidence based on the incident, and the Petitioner's wife was on her way to the police department to turn over the combination to the safe where the Petitioner's other weapons were located in his home. Petitioner's wife arrived at the police station, and escorted Captain Navoy and Attorney Troxler to Petitioner's home, but was unable to open the safe. It was believed there were two weapons located in that safe (D-8). However, Captain Navoy was able to retrieve a Smith & Wesson gun and shotgun located in a closet. Captain Navoy left the residence with the two guns and the Petitioner's shield and identification.

23. On September 12, 2007, Investigator Thomas Lynch of the NYC DOC Investigations Unit met Mr. Troxler, members of the Hempstead and Nassau County Police Departments at Petitioner's home to open the safe via a locksmith and confiscate any additional weapons in the Petitioner's possession. After the safe was opened, Investigator Lynch verified the make, model, and serial numbers of two additional firearms with the information on file at NYC DOC. Once the identity of the firearms was confirmed, Lynch confiscated the two firearms and provided a receipt to Mr. Troxler.

The Photo Lineup

24. On September 11, 2007, Detective Danielle Perez and two other detectives of the Nassau County Special Victims Squad met with an unknown rape victim concerning an incident which allegedly occurred on December 1, 2006. Detective Perez met the female at her home to translate while the victim was shown the photo lineup pack. Petitioner's September 9, 2007, arrest photo was one of six photos shown to the victim. The other filler photos were from the Nassau County Police Department's rogue photo database. The female identified photo number

one, Petitioner, as the person who had robbed and raped her on December 1, 2006. The female victim signed under the photo with the date and time identified. Perez also signed the photo lineup.

25. On February 7, 2008, Detective Perez provided another photo lineup to the victim of a sexual assault which occurred on November 28, 2005. Again, Perez met the female, Delsey Sanchez, at her home to translate because she only spoke Spanish. This photo pack contained the same photos shown to the female on September 11, 2007, and Petitioner's photo in this pack was also number one. Sanchez identified photo number one as the person who had raped her. Sanchez initialed under the photo she chose.

26. Detective John Lavelle and Detective Boyle of the Nassau County Robbery Squad arrived at one of the Morales sister's home unannounced on September 18, 2007. She was one of the victims of the robbery that occurred on November 9, 2006. Ms. Morales did not speak English and her daughter translated for the Detectives. Again, Petitioner was number one of the photo pack taken at his arrest and Ms. Morales identified Petitioner as the person who robbed her on November 9, 2006. Morales signed, dated, and placed the time under the Petitioner's photo.

The Indictments

27. On November 2, 2007, the Nassau County Grand Jury returned Indictment # 2512N/07, charging Petitioner with one count of Predatory Sexual Assault pursuant to Penal Law § 130.95(1)(b); one count of Rape in the First-Degree pursuant to Penal Law § 130.35(1); three counts of Kidnapping in the Second-Degree pursuant to Penal Law § 135.20; two counts of Robbery in the First Degree pursuant to Penal Law § 160.15(4); one count of Robbery in the First Degree pursuant to Penal Law § 160.15(2); one count of Criminal Sexual Act in the First-

Degree pursuant to Penal Law § 130.50(1); and one count of Kidnapping in the Second-Degree as a Sexually Motivated Felony pursuant to Penal Law § 135.20. This indictment charged the alleged crimes committed against three separate victims on December 1, 2006, November 9, 2006, and September 9, 2007.

28. On February 21, 2008, the Nassau County Grand Jury returned Indictment # 406N/ 2008, charging Petitioner with one count of Robbery in the First Degree pursuant to Penal Law § 160.15(4); one count of Kidnapping in the Second Degree pursuant to Penal Law § 135.20; one count of Criminal Sexual Act in the First Degree pursuant to Penal Law § 130.50(1); and two counts of Sexual Abuse in the First Degree § 130.65(1). This indictment charged the alleged crimes committed against one additional victim on April 17, 2005.

29. On February 25, 2008, the Nassau County Grand Jury returned Indictment # 406N/ 2008 charging Petitioner with one count of Robbery in the First Degree pursuant to Penal Law § 160.15(4); one count of Rape in the First-Degree pursuant to Penal Law § 130.35(1); one count of Kidnapping in the Second-Degree pursuant to Penal Law § 135.20; one count of Criminal Sexual Act in the First-Degree pursuant to Penal Law § 130.50(1); two counts of Sexual Abuse in the First Degree § 130.65(1). This indictment included the alleged crimes committed against one additional victim on November 28, 2005.

The Court Ordered Lineup

30. On February 29, 2008, Detective Dunn of the Special Victims Squad of the Nassau County Police Department collected a buccal swab sample from the inside of the Petitioner's mouth for DNA testing. The Nassau County Police Department provided five fillers, which had similar characteristics as the Petitioner, to participate in the line-up. After Petitioner chose seat

number four, each person was given a knit cap to shield their hair style and a sheet was held up to conceal their body types and clothing. (D-12). One photo was taken by the crime scene search unit while the Petitioner was seated in chair number four, and another photo was taken after the Petitioner requested to be moved to seat number five. (D-12).

31. The four individuals that viewed the line-up were held in a conference room in the front of the Robbery Squad building. (D-12). The individuals were picked up separately by different detectives as each viewed the line-up. (D-12). Those present in the line-up room included the victim, Petitioner's attorney, detectives, and an assistant district attorney. (D-12).

32. Detective Perez transported the victim of the December 1, 2006 rape to the line-up. (D-13). Perez allegedly did not reveal who she thought the perpetrator was, but told her that "it would be similar to the photo pack." (D-13). Perez brought this woman to the conference room where two other women were already waiting. (D-13). One of the women waiting Perez recognized as someone she had also showed the photo pack line-up too. (D-13). She told the three women not to speak to each other about why they were there or what had happened to them in the past. (D-13).

33. After some time, Perez escorted the woman from the November 28, 2005 rape from the conference room to the line-up room. (D-13). The woman identified the person seated as number four as the man who raped her, and Perez prepared a statement reflecting her identification of the Petitioner. (D-13). Perez then escorted the woman from the December 1, 2006 rape who identified the person seated as number two as the man who had sexually molested her. (D-14). Perez did not prepare a statement based on the woman identifying number two as the perpetrator of the crime committed against her. (D-14).

34. Detective Raphael Morales of the Nassau County Police Department transported the two sisters, from the November 9, 2006 robbery, to the Nassau County Robbery Squad for the line-up conducted on February 29, 2008. (D-14). Both women were picked up separately from their place of business. (D-14). The first sister identified the person seated as number four, and Morales prepared a statement in Spanish reflecting her identification. (D-15). Morales returned the first sister to her place of business and picked up the second sister for transportation to the line-up. (D-15). Morales did not observe a conversation between the sisters during the drop off and pick up. (D-15). This sister was escorted to the conference room prior to viewing the line-up where another woman was waiting. (D-15). When this sister viewed the line-up she was unsure if she recognized anyone. (D-15). After she left the line-up room she told Morales "I couldn't figure out who it was, but I think it was number five, but I'm not sure." (D-15).

The Consolidation of the Indictments

35. On July 16, 2008, the prosecution moved to consolidate the indictments, over defense counsel's objections. The prosecutor argued that joinder would serve judicial economy and save resources, and that under New York law, proof of one or more offenses was material and admissible as evidence in chief in the trial of the other offenses. The prosecutor argued that Petitioner's modus operandi of gunpoint robberies, restraining of the victim, the fact that the robberies escalated into sexual attacks, and the fact that four out of the five female victims were of Hispanic heritage was so distinctive so as to permit this joiner.

36. The prosecution also argued that every criminal transaction occurred within two miles of each other and Petitioner's home and that each complainant provided a description of the

perpetrator which matched Petitioner's physical characteristics of being a male, black, from 5'9" to 6'0", with a stocky build." The prosecution also identified Petitioner's uniformed employment, hairstyle and his statement indicating an attraction to Spanish women was evidence admissible under the statute. Since the Petitioner was arrested wearing his uniform, which is dark colored, would be relevant in the cases where he is described as wearing clothes that resembled a uniform, or dark clothing. Since the Petitioner wore his hair in dreadlocks, and was arrested wearing a do-rag this evidence was relevant to the perpetrator's description as wearing a hood or do-rag over his hair. Since, the Petitioner stated during his arrest that he liked Spanish women, this evidence proved his identity where four of the five victims in this case were Hispanic. Finally, the silver gun seized from Petitioner's home after his arrest and the DNA evidence obtained while he was in police custody were proffered to establish Petitioner's identity as the perpetrator.

37. Defense counsel opposed the prosecution's motion to consolidate, arguing that the statute relied upon by the District Attorney was inapplicable, a point conceded by the prosecution. Counsel further argued that the prosecution failed to make the requisite showing of the existence of a unique "modus operandi" asked the trial court to use its discretionary authority to deny consolidation because Petitioner would suffer prejudice if criminal transactions of unequal evidentiary merit were stacked together in a single trial. Petitioner posited that compelling him to stand trial in one proceeding on all charges under all indictments would be inherently prejudicial, and there was a substantial likelihood that, regardless of the merit of the proof as to any one single count, a jury would convict Petitioner solely because of the sheer

number of counts. Furthermore, the cumulative weight of in-court identifications of Petitioner would more than compensate for the weakness of proof in any case standing alone.

38. Counsel cross-moved for partial severance in the event consolidation were granted with respect to the counts pertaining to Ms. Sandoval. He asserted that he intended to testify as to the allegations made by Sandoval, but did not intend to testify as to the charges pertaining to the remaining victims, electing to exercise his right to remain silent and raise other defenses to those charges. He argued that consolidation would put him in the position of forfeiting his right to testify, or forfeiting his right against self-incrimination with respect to the other counts.

39. The trial court granted the prosecution's motion to consolidate, and all charges pertaining to all victims were joined in Indictment # 436N-08.

40. Petitioner was tried in the Nassau County Court before a jury with trial beginning on October 29, 2008.[3]

The Trial

45. The People's opening included remarks of modus operandi and implications that this evidence would confirm Petitioner's identity as the perpetrator. Furthermore, the People relied on uncharged hate crimes, and specifically identified four of the five complainants as 'Hispanic." Trial counsel's opening previewed a misidentification defense with respect to Dottin, Sanchez and the Morales sisters.

46. Police Officer Eugene Ester of the Hempstead Village Police Department was the first witness to testify for the prosecution. On September 9, 2007, at about 5:20 a.m., he was on

[3] The first trial ended in a mistrial after the prosecution disclosed a number of DNA documents after jury selection that had previously not been turned over to the defense.

duty patrolling the vicinity of Totten and Greenwich Streets. He heard a scream and saw Sara Sandoval as he approached Trotten Street. Petitioner was standing four feet behind her. Petitioner was wearing cargo pants, a blue shirt, and a do-rag. Officer Este asked Petitioner what was going on, and he replied he was just trying to talk to her. Due to Sandoval motioning with her finger that Petitioner had a gun, Petitioner was handcuffed and arrested without any violence.

47. Officer Este left Petitioner with Officer Dale Jones, and went to speak with Sandoval. However, he had to wait for an officer to arrive that spoke Spanish because Sandoval did not speak English. During this time, he discovered that Petitioner was a Correction Officer for the City of New York. After Petitioner was transported to the police station, Officer Este testified that Officer Jones recovered eleven dollars in single bills in Petitioner's left pocket, a white piece of paper with the name Maria M. Reyes wrote on it, and Petitioner's do-rag. During the search, but prior to Mirandizing, Petitioner stated, "I am into Spanish chicks." On cross-examination, Officer Este testified at no time during the arrest did he witness Petitioner with his face covered, using a gun, or verbally or physically attack anyone at the scene.

48. OFFICER DALE JONES of the Hempstead Village Police Department was the second witness to testify for the prosecution. Upon arrival at the scene, he conducted a search of Petitioner and found a wallet in his front right pocket and a handgun in his left rear pocket. The gun was licensed to the Petitioner and had not been discharged. Officer Jones also found a shield and ID card from the New York City Department of Corrections. Once the Petitioner was transported to the police precinct, another search was conducted. Officer Jones did not locate two cell phones or $120 dollars even though he searched Petitioner and found other pieces of

evidence. He did not make note of or a record of his findings while conducting the search and seizure although the inventory receipt includes these pieces of property.

49. DETECTIVE SHEILA WIMBERLY assigned to the Third Squad of the Nassau County Police Department was the third witness to testify for the prosecution. She testified to taking Petitioner's orange juice container to conduct DNA examinations. The hospital also sent her a pineapple juice container, but she did not actually see Petitioner drink from it. Both containers were put in separate envelopes, but had the same identification number. The do-rag was given a separate identification number.

50. SARA SANDOVAL testified that on September 9, 2007, nine months after the Morales sister's attack and more than two and a half years after the Dottin incident, Sara Sandoval testified she was robbed by Petitioner. He had a black gun and demanded money, yet she repeatedly testified she does not understand, speak, or write in English. The man did not request, demand, or discuss anything sexual in nature. She further testified that she handed him nine single dollar bills with her sister's name, Maria M. Reyes, on a piece of paper. (T2-594, 632). The paper was used by her to sign her sister's name to her employment checks and paperwork because she was not able to work under her name legally. Although she was continuing to commit a felony tax law violation the prosecution indicated they would not file charges against her.

51. DETECTIVE SERGEANT ROBERT NEMETH, a Supervisor and Examiner of the Firearms Identification Section of the Nassau County Police Department testified he tested a Glock semi-automatic pistol he received in connection to this case, and determined the firearm was operable; it had an extended clip, and night sights.

52. INVESTIGATOR RICHARD LOMBARDI, of the New York City Department of Corrections was next to testify on behalf of the prosecution. He testified that more than 8000 correction officers for Rikers Island wear a uniform that consisted of navy blue pants with a stripe down the middle, a shirt with an orange patch, and black loafer type shoes. The NYPD wears the same exact uniform, except the insignia patch is a different color. The jacket was similar to a reefer coat with patches and a series of pockets.

53. He also identified the time cards for Petitioner for the years 2005, 2006, and 2007. The time cards reflected Petitioner was scheduled off on April 16 and April 17, 2005. On November 28 and November 29, 2005 Petitioner called in sick, and Petitioner was on sick leave for the entire 2006 year. On September 9, 2007, the time card reflected the Petitioner was suspended. On cross-examination, Lombardi testified Petitioner was not absent from work for more than two days at a time which would otherwise require documentation.

54. ROSA IMELDA PORTILLO, a former employee of McDonald's, testified she spoke to Delsey Sanchez on November 28, 2005, and she told her a man attacked her. Ms. Sanchez left the McDonald's via taxi cab.

55. DETECTIVE ROBERT DUNN of the Special Victims' Squad with the Nassau County Police Department testified next on behalf of the prosecution. After the Petitioner was arrested, Sergeant Dorsey notified him there was an existing pattern of sex crimes in the Hempstead area that consisted of rapes and robberies by a Black male, with dreads, and a stocky build. The victims were Hispanic females. Dunn also testified the fillers chosen for the lineup were picked from a homeless shelter in Brooklyn. The only criteria used to select the fillers was that he had to be a Black male with facial hair, around the same age as Petitioner. However, the

selections were not made in consideration of weight, height, facial features such as face or eye shape, nose, or lip structures.

56. DETECTIVE JOHN LAVELLE of the Robbery Squad of the Nassau County Police Department testified that the Morales sisters' reported that the perpetrator was a black male, approximately six feet tall, wearing blue jeans, sneakers, and a baseball cap. On cross-examination, counsel pointed out that Petitioner's height is actually 5'10" and that the attack occurred in the morning, when the lighting was good, which implied that this discrepancy in height should have been realized. Lavelle also testified that the Morales sisters' had not mentioned that the man had dreads or a beard, only that he had a mustache.

57. OFFICER RAFAEL MORALES of the Bureau of Special Operations of the Nassau County Police Department testified he was requested to assist the Robbery Squad to transport and translate, to the line-up, the Morales sisters' who did not speak English. Delmy Morales identified a number at the line-up window and Ilsa Morales did not.

58. DELSEY SANCHEZ, a witness for the prosecution, testified on November 28, 2005, nine months after the Dottin attack, Sanchez was confronted by an African-American man near a white van. She could not give a height or weight description, only that he was medium build. However, she had told police he was medium build, and did not know whether the perpetrator had facial hair or what type of hair, if any, he had. The perpetrator had worn a ski mask, blue pants, and a black jacket cropped at the waist and wrists. She testified that she thought the man was possibly a mechanic because of his clothing. The perpetrator had restrained her with a gun, stole her money, and touched her intimate body parts before placing his penis into her mouth and

vagina. He then penetrated her vagina with his penis. He did not discuss his method for selecting her or comment on her performance.

59. SHAMIKA DOTTIN, a witness for the prosecution, testified on the early morning of April 17, 2005, Dottin was walking home alone when an African-American man followed her in a red van. The van pulled into the gas station, and the man inside motion for her to come to him. She refused his non-verbal communication and lost sight of him. Shortly thereafter, she was confronted by an African-American man who was medium build, and had a stocking covering his head and face. He wore sweatpants, boots, and a black jacket with orange lining. Dottin could not tell if this was the same man in the red van. Dottin repeatedly stated she could not see who the man was, and only saw his lips and chin for a brief period of time. The perpetrator had a black gun with blue lights, forcibly stole her money, forced her to perform oral sex, touched and sucked her breast, and inserted his fingers into her vagina. The man indicated he had travelled to Long Island in search of a victim, and commented favorably on her sexual performance. She reported the assault to Hempstead Police Department, and went to the hospital for examination.

60. ILSA MORALES, a witness for the prosecution, testified her and her sister were robbed, November 9, 2006, in the mid-morning while parked on the street. An African-American man forcibly entered their parked vehicle and demanded their money. He possessed a silver gun, wore blue jeans, a sweatshirt with a hood, and the hood covered his hair. There was not a baseball cap as suggested by the description in the police statement, and Ilsa Morales testified that she did not tell the police he had on a baseball cap or blue jeans. Thus, either Ilsa Morales's memory was questionable, or the police were incorrect. At this incident, the man did

not command, request, or comment about anything sexual in nature. During the line-up, she remained irresolute, but selected Petitioner after leaving the line-up room.

61. ALLYSON DAVILAR, a former sexual assault nurse examiner (SANE) of the North Shore Manhasset Hospital, testified she conducted a sexual assault examination on Shamika Dottin. She documented Dottin's recollection of the assault, retrieved an oral swab, a dry secretion swabs from her breasts, fingernail and buccal swab; a pulled head hair and a public hair, which were turned over to Detective Moran

62. SANDRA DOTTIN MCCAIN, Shamika Dottin's mother, testified the morning of the assault Shamika Dottin told her a man with dreads made her "suck his dick."

63. DETECTIVE CHRSITOPHER FERRO of the Third Squad Nassau County Police Department testified he investigated the scene where Delsey Sanchez was assaulted. He retrieved two body fluid samples from the area and sent them to the Forensic Evidence Bureau.

64. DELMY MORALAS, a witness for the prosecution, testified she was robbed with her sister on the street by an African American man that was wearing blue jeans, a hooded sweat shirt, and a baseball cap with the hood over the cap, and sneakers. She was unable to see his hair, but it did not appear his hair was pulled back because there was not a lump in the hood. The perpetrator pointed a silver gun at her, and demanded her money.

65. DETECTIVE EDMUND MORAN assigned to the Special Victim's Squad of Nassau County Police Department testified he questioned Shamika Dottin at the hospital. She described the perpetrator as a black male with dreadlocks, wearing a black jacket, sweatpants, and boots. She was unable to describe his face, but he had a black gun with lights. The SANE nurse gave him the rape kit to transport to police headquarters, and he received Dottin's jacket to have tested

for DNA. Moran testified he reviewed, but did not preserve, the gas station's surveillance tape where Dottin said the van pulled in and motioned to her, but "there was no information on that tape to aid [him] in the case." However, he chose not review the surveillance tape from the beauty salon that Dottin walked passed when she was followed.

66. ANNA FERNANDEZ, a Forensic Geneticist I of the Nassau County Medical Examiner's Office, testified as an expert in forensic science and examination. She testified the hat retrieved from Delsy Sanchez was tested and received a positive result for semen, but no male DNA was present.

67. SANDRA HAYN, a Forensic Geneticist II of the Nassau County Medical Examiner's Office, testified as an expert in forensic evidence examination and DNA analysis. She testified the jacket received from Shamika Dottin was tested and received a negative result for semen. Dottin's oral swab test also indicated no male DNA. The swabs taken from her breast indicated the Petitioner's DNA. However, the Petitioner's DNA profile was modified to add additional information. Furthermore, Hayn was not the analyst who performed the DNA examination, instead the examination was performed based on a multiple analyst rotation system to achieve efficiency. Hayn further testified she did not observe the performance of these examinations.

Motion for Trial Order of Dismissal

68. Trial counsel rested without calling Petitioner or any other witnesses. Counsel stated on the record that Petitioner was not testifying as a result of the trial court's decision upon the District Attorney's consolidation motion:

> MR. LEMKE: Your Honor, if I may, before I make an application regarding the trial order of dismissal, **we have rested**. I just want to place on the record that although it has been now a matter of law for the case that the indictment has been consolidated, part of my application in denying and opposing the People's application to consolidate the indictment was, in part, and as I specified in my opposition, was that I expected then in a case such as this, that my client would be able to defend himself and to testify regarding three of the separate dates of incidences other than the September 9th of 07' robbery and attempted kidnapping or kidnapping as it stands now. That the dates that had been recorded as November 9th, November 28th of 05' and I believe 4/17/05, my client would have testified or would have intended to testify had they been severed from the September 9th of 07'…
>
> And so I just want to place on the record, for further appellate review down the road, that again, what I allege and argued in my application to oppose I think became very clear during the consolidation of these counts and for this trial here today and that was the basis for my client not testifying here today, your Honor.

69. Trial counsel sought dismissal or reduction of the kidnapping counts based on the merger doctrine, but did not seek dismissal of all counts involving Dottin, Sanchez and the Morales sisters based on the prosecution's failure to present legally sufficient evidence to prove identity by means of a signature modus operandi, including the so-called targeting of "Hispanic" women. Prior to the closing remarks, the court dismissed two counts of Kidnapping in the Second Degree.

70. At the close of the trial, Petitioner was found guilty of five counts of Robbery in the First Degree pursuant to Penal Law § 160.15(2); one count of Kidnapping in the Second Degree pursuant to Penal Law § 135.20; four counts of Sexual Abuse in the First Degree pursuant to Penal Law § 130.61(1); two counts of Criminal Sexual Act in the First Degree pursuant to Penal

Law § 130.50(1); one count of Attempted Kidnapping in the Second Degree as a Sexually Motivated Felony pursuant to Penal Law § 130.91.

Sentencing

71. Petitioner was sentenced on January 13, 2008, without objection by counsel, to an aggregate term of imprisonment exceeding two hundred (200) years. During the sentencing proceeding, the lower court made unilateral, unsupported findings of fact regarding hate crimes and characteristics of the criminal transactions that Petitioner was not charged with or that was presented to the jury for its consideration based on proof beyond a reasonable doubt.

The Direct Appeal to the Appellate Division, Second Department

72. Represented by Gail Gray, Esq., Petitioner perfected a direct appeal to the New York Supreme Court, Appellate Division, Second Department (Docket # 2009-01523). On appeal, Petitioner raised three issues: (1) he received ineffective assistance of counsel in that trial counsel failed to properly oppose the prosecution's motion for consolidation; (2) Petitioner's conviction was against the weight of the evidence and was tainted by allegations of uncharged hate crimes committed against Hispanic women; and (3) Petitioner's sentence was illegal based upon unfounded factual determinations made by the sentencing court that he targeted Hispanic women because of their immigration status and national origin.

73. The conviction was affirmed in a written opinion on December 20, 2011. Petitioner timely moved for rehearing which was granted, and a new written decision was substituted for the first opinion on March 2, 2011. That subsequent decision is reported at People v. Walters, 90

A.D.3d 958, 934 N.Y.S.2d 722, 2011 NY Slip Op 09357 (2d Dept. 2011) (amended by unreported motion dated March 2, 2012, 2012 NY Slip Op 66225(U)).

The Motion for Leave to Appeal to the New York Court of Appeals

74. Petitioner then sought leave for discretionary review in the New York Court of Appeals, which was denied in a written decision dated April 5, 2012. See People v. Walters, 18 N.Y.3d 999, 968 N.E.2d 1009, 945 N.Y.S.2d 653 (2012).

The 440 Motion to Vacate the Judgment of Conviction in the Nassau County Court

75. On July 3, 2013, represented by Gail Gray, Esq., Petitioner filed a motion for post-conviction relief pursuant to Article 440 of the New York Criminal Procedure Law seeking to vacate the judgment of conviction entered against him.

76. Petitioner subsequently retained the services of the undersigned, and amended his 440 motion on October 18, 2013. The motion, as amended, alleged that Petitioner received ineffective assistance of trial counsel in that (1) counsel failed to present an alibi defense, (2) counsel deprived Petitioner of his right to testify in his own defense; (3) counsel failed to obtain records of DNA evidence and failure to conduct independent testing; and (4) failure to present evidence that would establish a mistaken identity defense.

77. The 440 motion is currently pending as of this filing.

The Petition for a Writ of Error Coram Nobis to the Appellate Division, Second Department

78. While the aforementioned 440 motion was pending in the Nassau County Court, on or about November 5, 2013 Petitioner filed a petition for a writ of error coram nobis in the Appellate Division, Second Department, alleging that he received ineffective assistance of appellate counsel. Specifically, the petition alleged that appellate counsel was ineffective for (1) failing to raise a suppression issue on direct appeal concerning the legality of incriminating statements made to law enforcement; and (2) failing to raise a legal error committed by the trial court when it denied severance of the charges contained in Indictment # 436N/08, and consolidated the several indictments filed against Petitioner.

79. The petition is currently pending in the Second Department.[4]

STANDARD OF REVIEW

80. To prevail under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner seeking federal review of his or his conviction must demonstrate that the state court's adjudication of his or his federal constitutional claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established Supreme Court precedent, or resulted in a decision that was based on an unreasonable factual determination in light of the evidence presented in state court. See 28 U.S.C. § 2254(d)(1), (2); Williams v. Taylor, 529 U.S. 362, 375-76 (2000).

81. Under 28 U.S.C. § 2254(d)(1), a federal court must set aside a state court conviction where the petitioner shows that the state court's adjudication of the merits of his claim "resulted

[4] Under New York law, no appeal lies to the New York Court of Appeals from an order of the Appellate Division denying an application for a petition for a writ of error coram nobis See People v. Marsicoveteri, 79 N.Y.2d 913 (1992).

in a decision that ... involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States."

82. The "contrary to" clause of section 2254(d)(1) is violated if the state court reaches a result opposite to the one reached by the Supreme Court on the same question of law or arrives at a result opposite to the one reached by the Supreme Court on a "materially indistinguishable" set of facts. Williams v. Taylor, 529 U.S. 362, 405-06, (2000). An "unreasonable application" of Supreme Court law occurs if the state court identifies the correct rule of law but applies that principle to the facts of the petitioner's case in an unreasonable way. Id at 413.

83. The question is whether the state court's application of clearly established federal law is objectively unreasonable where objectively unreasonable means "some increment of incorrectness beyond error." Earley v. Murray, 451 F.3d 71, 74 (2d. Cir. 2006). While some increment beyond ordinary error is required to warrant habeas relief "the increment need not be great." Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000).

GROUNDS OF UNCONSTITUTIONALITY OF PETITIONER'S CONVICTION AND SENTENCE

POINT I - THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO ADVISE HIM OF THE NATURE AND EXISTENCE OF HIS CONSTITUTIONAL RIGHT TO TESTIFY ON HIS OWN BEHALF, AND FAILURE TO CALL EXCULPATORY AND ALIBI WITNESSES WHO WERE WILILNG AND ABLE TO TESTIFY

A. Failure to Allow Petitioner to Testify on His Own Behalf

84. The United States Constitution protects a criminal defendant's fundamental right to testify in his own defense at his trial. United States Constitution, Fifth Amendment, Sixth

Amendment. Rock v. Arkansas, 483 U.S. 44 (1987), Faretta v. California, 422 U.S. 806 (1975). "The decision whether a defendant should testify at trial is for the defendant to make," and "that trial counsel's duty of effective assistance includes the responsibility to advise the defendant concerning the exercise of this constitutional right". Brown v. Artuz, 124 F.3d 73, 74 (2d Cir. 1997). A criminal defense lawyers has an "obligation to inform their clients of th[is] right and to ensure that clients understand that the ultimate decision belongs to them, not counsel." Chang v. United States, 250 F.3d 79, 83 (2d Cir. 2001).

85. Here, the record establishes that Petitioner was denied his right to testify by his own attorney. Petitioner fully intended to testify in his own defense and assert his innocence of the charges against him. That much is evident by trial counsel's opposition to the District Attorney's consolidation motion, in which he averred that Petitioner fully intended to testify on his own behalf. Given the fact that the trial court had actual notice that Petitioner wanted to testify in his own defense by virtue of the written motions on the consolidation issue, caution dictated that the trial court at least make an inquiry, as is customary.

86. However, Petitioner was blocked from exercising that fundamental right by his attorney, who unilaterally decided that Petitioner was not going to testify. Additionally, the record reveals that trial counsel failed to advise Petitioner that he had the absolute right to testify in his own defense, and that the ultimate decision belonged to Petitioner alone.

87. Nor can the Respondent rely upon Petitioner's failure to interject at the time trial counsel rested the defense and denied him the right to testify.[5] The Second Circuit has held that silence is insufficient to establish a waiver of the fundamental right to testify, as "[a] defendant

[5] Petitioner had no prior criminal background or experience with the criminal justice system that would subject him to experience in trials, sentencing, or knowledge of what Constitutional rights a prisoner and Petitioner enjoys.

who is ignorant of the right to testify has no reason to seek to interrupt the proceedings to assert that right, and we see no reason to impose what would in effect be a penalty on such a defendant." Chang v. United States, 250 F.3d 79, 83-84 (2d Cir. 2001).

88. Because Petitioner was denied his right to testify in his own defense, this Court must grant the instant petition and order Petitioner's release.

B. Failure to Investigate, Prepare an Alibi Defense, and To Call Alibi And Exculpatory Witnesses Who Were Ready, Willing, and Able To Testify

89. The Sixth Amendment guarantees every criminal defendant the right to offer the testimony of witnesses, to compel their attendance if necessary, and to present a defense. United States Constitution, Sixth Amendment. The right to "put before a jury evidence that might influence the determination of guilt" is a fundamental element of due process of law. Taylor v. Illinois, 484 U.S. 400,408 (1988); Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987); Washington v. Texas, 388 U.S. 14, 19 (1967).

90. The United States Supreme Court recognized that "[a] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence." In re Oliver, 333 U.S. 257, 273 (1948). The fundamental right of a defendant to be heard, to have "his day in court," is worth little if the defendant has no meaningful ability to call witnesses to testify on his behalf. As the Supreme Court has emphasized time and again:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.… This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). The Court has explained, "[t]he right of an accused in a criminal trial to due process is, in essence," "the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). Thus, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Crane v. Kentucky, 476 U.S. 683, 690 (1986).

91. The effective assistance of counsel requires that trial counsel conduct a reasonable investigation into the facts of the case. See Gersten v. Senkowski, 426 F.3d 588 (2d Cir. 2005) (holding that trial counsel's failure to consult with medical experts to prepare for cross-examination of prosecution witnesses or call experts as defense witnesses constituted ineffective assistance requiring habeas relief); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (holding "the defendant's right to representation does entitle him to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial"); Scott v. Wainwright, 698 F.2d 427, 429–30 (11th Cir.1983) (defense counsel's failure to familiarize himself with the facts and relevant law made him so ineffective that the petitioner's guilty plea was involuntarily entered); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel); Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982) (where counsel is so ill prepared that he fails to understand his client's factual claims or

the legal significance of those claims, counsel fails to provide service within the expected range of competency); Nealy v. Cabana, 764 F.2d 1173, 1178-79 (5th Cir. 1985) (counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case, interview potential witnesses, and to make an independent investigation of the facts and circumstances of the case).

92. In Pavel v. Hollins, 261 F.3d 210 (2001), the Second Circuit reviewed conviction where the petitioner was found guilty of various sex offenses involving his children where the allegations arose in conjunction with a marital dispute. In reversing the District Court's denial of a habeas relief, the Second Circuit held that trial counsel provided Constitutionally-deficient performance for several reasons, all related to his failure to properly investigate the case and prepare a defense. First, he failed to prepare and present a defense based upon his belief that the trial judge would dismiss the case at the conclusion of the prosecution's case, which was inexcusable. Second, trial counsel failure to call two fact witnesses, given his flawed belief that the case would be dismissed, was not based upon strategic considerations, but was the result of a legally-flawed strategy. Finally, his decision not to call a medical expert to contradict the physical evidence presented by the prosecution was likewise not based upon any legitimate strategic consideration. Additionally, the Second Circuit held that trial counsel's failure to consult with a medical expert to examine the prosecution's evidence constituted deficient performance requiring habeas relief. The Second Circuit further held that "an attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it." 261 F.3d at 220.

93. Here, trial counsel likewise failed in several key respects. First, trial counsel failed to present alibi witnesses that were ready, willing and able to testify that Petitioner was at some other place at the time of the crimes committed against one of the complaining witnesses. Wanda Walters and Sheron Allen were known by trial counsel to be potential alibi witnesses almost one year before the trial commenced. Trial counsel failed to interview these crucial alibi witnesses, develop their testimony, develop leads to other corroborate evidence, and failed to present a defense that the Petitioner was elsewhere at the time he was alleged to have committed one of a series of brutally violent crimes against the victims. A reasonably prudent attorney would have contacted these alibi witnesses, and ensured their presence at trial in order to establish an alibi defense, thus undermining the state's entire case.

94. Raising an alibi defense would not have been an academic exercise. The identity of the person (or persons) who perpetrated these crimes was the crux of the case. The reliability of the identifications by the victims was a determinative factor. At the very least, it would have provided a complete defense against several charges for which Petitioner was convicted and sentenced to consecutive prison terms, reducing his aggregate sentence. However, the likely effect would have been to call into serious doubt not only the evidence that Petitioner committed a crime on November 28, 2005, but the reliability of all identifications of the Petitioner as to all charges contained in the Indictment, and the reliability of the prosecution's case as a whole, achieving a "domino effect."

95. "Ineffectiveness is generally clear in the context of a complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts in which such a decision can be made."

United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989). It is clear that trial counsel had already made the decision, before the start of the trial, before speaking with Wanda Walters or Sheron Allen, not to bother investigating them or calling them as witnesses. Similarly, trial counsel did nothing to develop and corroborate the Petitioner's alibi by checking sales records in the flower shop or the bakery; or checking with the employees who were working on the date in question; contacting other witnesses at the Petitioner's ex-wife's school to verify his presence there on November 28, 2005; or to find any other evidence to support the alibi. Trial counsel simply did nothing.

96. Here, "counsel's behavior was not colorably based on tactical considerations but merely upon a lack of diligence." United States v. Gray, 878 F.2d 702, 712 (3d Cir. 1989). In this case, as in Lloyd v. Whitley, counsel "did not choose, strategically or otherwise, to pursue one line of defense over another. Instead, [he] simply abdicated his responsibility to advocate his client's cause." 977 F.2d 149, 159 (5th Cir. 1992).

97. The identity of the person who perpetrated these crimes was the crux of the case. Trial counsel was aware of the importance of presenting alibi witnesses. Even at the Petitioner's insistence, counsel refused to call his wife and paramour to the witness stand, even though both were ready, willing, and able to testify to his whereabouts on the day Delsy Sanchez was attacked.

98. The omission to speak with Wanda Walters and Sheron Allen, investigate them as exculpatory witnesses, and make an informed decision about whether to call them to the witness stand was fatal. With no alibi to refute the prosecution's theory that Petitioner was the perpetrator of the November 28, 2005 crimes, the jury found Petitioner guilty of those crimes.

At the end of the prosecution's case the court denied the motion for a trial order of dismissal, basing its decision on the lack of testimony from an exculpatory witness that Petitioner had an alibi on November 28, 2005.

99. Wanda Walters and Sheron Allen could have and should have been called to testify, as eyewitnesses who would have provided Petitioner with an alibi, and corroborated Petitioner's theory of misidentification. Had trial counsel spoken with Wanda Walters and Sheron Allen, he could have made an informed decision as to whether to call them to the stand. Had trial counsel at least spoken with the witnesses, evidence consistent with the defense theory could have and should have been presented to the jury. Wanda Walters and Sheron Allen's testimony would have resulted in complete exoneration for Petitioner. Without at least speaking with the witnesses, trial counsel was unable to make an informed decision as to whether to call them to the stand, or to testify, or to present a different defense.

100. Nor was this simply a calculated risk that did not bear fruit. It was completely foreseeable that by not calling Wanda Walters and Sheron Allen as alibi witnesses, such damage would occur, had they been properly interviewed about the whereabouts of the Petitioner before trial. There was simply no strategic or tactical reason not to call these witnesses to the stand to affirm Petitioner's misidentification case.

101. There was additional evidence that could have and should have been presented that the witness' identification of Petitioner was mistaken, independently of the alibi. Specifically, one witness gave police a description of her assailant as wearing a uniform consistent with that of a New York City Correction Officer – except for one, significant detail. The witness described

the pants the assailant was wearing as military-style cargo pants. This description was given shortly after the alleged attack in 2005.

102. However, NYC DOC did not permit its officers to wear military-style cargo pants until 2006, a fact that was made known to trial counsel prior to the commencement of trial several years later. Unfortunately, trial counsel failed to present this evidence that would have called into doubt the identification of Petitioner as the assailant. This evidence would have corroborated and complemented the alibi defense.

103. The cumulative total of these failures was that independent, exculpatory evidence that was readily available was not presented in Petitioner's defense. The direct result of this was the guilty verdict. Had counsel properly investigated the case, presented a cogent defense, and allowed Petitioner to testify in his own defense the result would have been different.

104. Based upon the reasons stated above, the failures of trial counsel rendered his assistance ineffective, and Petitioner is entitled to habeas relief as a consequence.

C. Conclusion

105. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) Strickland further explained:

> The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's

> function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

106. Strickland cautions courts to refrain from second-guessing counsel's strategic decisions from the superior vantage point of hindsight. Id. at 689. "Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690-691.

107. At the same time, "virtually unchallengeable" does not mean wholly unchallengeable. Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001); see also Phoenix v. Matesanz, 233 F.3d 77, 82 (1st Cir. 2000).

108. Here, the prejudice to Petitioner is clear: his former attorney gutted his defense by failing to call alibi witnesses, failing to present evidence that would have supported a mistaken identity defense, and most importantly, unilaterally decided to rest the defense case without permitting Petitioner to take the stand and testify in his own defense, much less giving him the appropriate legal advice and option of whether to testify. These cumulative errors rendered his assistance deficient, requiring habeas relief.

POINT II – PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ARGUE THAT THE TRIAL COURT IMPROPERLY CONSOLIDATE THE INDICTMENTS, DEPRIVING PETITIONER OF DUE PROCESS, AND FAILED TO ARGUE ON APPEAL THAT PETITIONER'S MOTION TO SUPPRESS STATEMENTS WAS ERRONEOUSLY DENIED

109. In her brief filed with this Court, appellate counsel argued that the evidence adduced at trial was legally insufficient to support the Petitioner's conviction or, in the alternative, the verdict was against the weight of evidence. In addition, she asserted that the Petitioner was denied effective assistance of counsel, and that the sentencing judge's imposition of a sentence of two hundred and three years denied Petitioner his right to due process of law. While those claims were not legally frivolous, they posed little chance of securing a reversal of the Petitioner's conviction. Indeed, in answering those claims, the District Attorney characterized them as "meritless", a conclusion with which the Appellate Division, Second Department apparently agreed when it affirmed the Petitioner's judgment of conviction. Under the circumstances, it is submitted that appellate counsel's representation of the Petitioner fell short of the constitutional standard of effective assistance of counsel. As a consequences, this Court should grant the instant petition.

110. The right of an accused to effective assistance of counsel on appeal under the United States Constitutions has long been recognized. Anders v. California, 386 U.S. 738 (1967), Evitts v. Lucey, 469 U.S. 387 (1985). As is the case with claims of ineffective assistance of trial counsel, the performance of appellate counsel is evaluated under the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Thus, it must be determined whether (1)

counsel's performance was deficient in that it was objectively unreasonable under professional standards prevailing at the time in question, and (2) whether it is likely that counsel's deficient performance prejudiced the defendant. Jones v. Barnes, 463 U.S. 745 (1983).

111. The United States Supreme Court has held that for a defendant to demonstrate that appellate counsel's failure to raise a claim constitutes deficient performance, he must do more than show that counsel omitted a non-frivolous argument since counsel does not have a duty to advance every conceivable argument that can be made. Jones v. Barnes, 463 U.S. at 754. However, ineffective assistance may be established where it is shown that appellate counsel omitted a significant and obvious issue, while pursuing issues that were clearly and significantly weaker. Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994); Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1991).

A. Failure to Raise Suppression as a Claim on Direct Appeal

112. Petitioner's appellate counsel failed to appeal the denial of Petitioner's motion to suppress statements he made to law enforcement; instead she focused on other issues that were clearly weaker. This failure rendered her assistance Constitutionally-deficient for several reasons.

113. The Court of Appeals for the Fifth Circuit has held that a defendant's incriminating statement is "powerful evidence of guilt, the admission or exclusion of which would be highly likely to affect the outcome of the trial." United States v. Avants, 278 F.3d 510, 522 (5th Cir. 2002). Stated bluntly, a defendant's incriminating statement is "probably the most probative and damaging evidence" against him. Pyles v. Johnson, 136 F.3d 986, 996 (5th Cir.1998).

114. Here, Petitioner made several statements to law enforcement after his arrest that the prosecution viewed as incriminating. Petitioner moved to suppress the statements, and an evidentiary hearing was held, after which the trial court denied suppression.

115. The evidence adduced at the pre-trial suppression hearing in the trial established that after he was arrested, Petitioner told the arresting officer that he was "into Spanish chicks" when confronted with a piece of paper with a name and a telephone number was found on his person. This statement, given without being first administered Miranda warnings, was introduced against Petitioner at trial, and was used by the District Attorney to successfully argue that Petitioner targeted Spanish-speaking victims to the jury, resulting in Petitioner's conviction.

116. The evidence at the suppression hearing also established that Detective Sheila Wimberly arrived at the Hempstead Police Department at around 7:45 am on the day of Petitioner's arrest, September 9, 2007. She was briefed by the desk officer about the facts of the case. She then met with the arresting officers who provided more detail of the Petitioner's arrest, including that the Petitioner had stated that he is a diabetic. In response, Detective Wimberly requested that the Petitioner be examined by an ambulance medical technician, who cleared him for arrest processing. Furthermore, upon the advice of the ambulance medical technician, Detective Wimberly also gave Petitioner juice and cookies. In addition, stating that it was a "courtesy" to a fellow law enforcement officer – as Petitioner was a New York City Correction officer – the detective transferred Petitioner to a private arrest room, in which she took his pedigree information. Over approximately the next hour, she continuously checked in on the Petitioner multiple times to inquire about his health, asking him "are you okay, how you doing[?]". It was during these periods of inquiry that Petitioner made incriminating statements

to Detective Wimberly. The detective would write down everything she remembered the Petitioner saying each time she left the room. She transcribed those statements into a two page document which she had Petitioner read. She then asked him to sign it but he refused to do so and instead requested a lawyer. At this point Detective Wimberly read Petitioner his Miranda warnings and she recorded no further statements from him.

117. Though Petitioner refused to sign the statement and requested a lawyer, and although there were no Miranda warnings given, the trial court denied suppression.

118. It is clear that the Petitioner perceived this environment to be interrogatory. Detective Wimberly testified to as much on direct:

> Q. When you say he would speak with you, would you initiate conversation or would he initiate conversation?
> A. He would initiate conversations.
> Q. And before he initiated conversations, did you ask him any questions?
> A. No.
> Q. Approximately how many times do you think this happened?
> A. Several times. Several times I was in and out of the private room that we had put him in, checking in on him, seeing if he was okay. I would come in, in and out talking with other officers. I was in and out of the room that he was being held in several times.
> Q. And what is it that he would talk to you about?
> A. The incident.
> Q. Can you tell us why it is that you thought he was talking to you?
> A. I got a feeling that he just wanted to relate to me what happened and that was just my feeling, that he just wanted to let me know what happened.

Even this statement belies the detective's assertion that she did not ask any questions that precipitated the Petitioner's responses. The reality is that the detective induced the Petitioner into believing that they were in a back and forth discussion, eliciting statements from him about the case. The detective did not just stare silently at the Petitioner each time she walked into his room, although even silent acquiescence to his on-going statements might be too much. Instead,

over and over again, she went into his room and said to the Petitioner – an individual that already knew he was being treated with "courtesy" as a fellow law enforcement officer by having been moved to a private room and continually checked on – "are you okay, how you doing[?]" The result of the Petitioner opening up to her at that point was inevitable.

119. On cross examination, Detective Wimberly testified "In between the time that the defendant was in the arrest room cuffed to the bench, I was in and out of that room on a continuous basis and every time I would go in that room he would make these oral statements. And upon leaving that room, I would jot down those statements." Also, "When I would go into the room he would say to me, 'Detective, can I talk to you? Let me just tell you what happened.' And I would listen." One cannot accept the detective's assertions on face value that she was merely inquiring about Petitioner's health over and over again, given the affect it had of getting the Petitioner to offer incriminating statements. Based on her testimony at the hearing, it could be held that Detective Wimberly's motivation was to evoke an incriminating response. She testified that she thought the Petitioner was speaking to her to tell his side of the story and that she did not stop him from doing so; in fact, she kept coming back for more. Therefore, her true intentions are clear. Moreover, after the Petitioner was removed from the private room in which he had been held as a "courtesy" to him as a fellow member of law enforcement, the detective vouchered for DNA analysis the juice box from which he had been drinking. Her testimony was that she had provided him with the juice and cookies at the behest of the ambulance medical technician, and because "she was not knowledgeable about diabetics," but clearly her ulterior motive was to surreptitiously gather the Petitioner's genetic material. Keeping him in a room by himself had the duel benefit of insuring that no other prisoners would come in contact with the

juice box and that the detective would be the only person with whom Petitioner had contact during this period. The same ulterior motive of evidence-gathering by inducing him to talk could be said of her reasons for continuously returning to the room where he was being held to ask him "are you okay, how you doing[?]." Her true motive was clear and inescapable from her own testimony. She intended to evoke incriminating responses from the Petitioner over and over again, and did so. This was the functional equivalent of interrogation prior to any Miranda warnings being administered. Brewer v. Williams, 430 U.S. 387 (1977); Rhode Island v. Innis, 446 U.S. 291 (1980).

120. Further, while the statements made by Petitioner to Detective Wimberly were not introduced against him at trial, the trial court's denial of suppression still negatively impacted Petitioner. By refusing to grant suppression, the trial court subjected Petitioner to possible cross-examination with illegally-obtained statements made to Detective Wimberly, tainting the trial. See Harrison v. United States, 392 U.S. 219 (1979).

121. Because the trial court erroneously denied suppression of the statements, which were used against Petitioner in one fashion or another, the failure of his appellate counsel to raise this point on appeal deprived him of effective assistance of appellate counsel. As a result, this Court should grant the instant petition.

B. Failure to Raise Substantive Joinder Issue on Appeal

122. On direct appeal, appellate counsel did not raise prejudicial joinder as a substantive point. She inexplicably chose instead to argue that trial counsel was ineffective for failing to vigorously challenge consolidation of the indictments and joinder of the various counts. This was not only misguided, but prejudicial as it deprived Petitioner of meaningful appellate review

of a substantial issue of law. Because appellate counsel omitted a significant and obvious issue and pursued an issue that was clearly and significantly weaker, habeas relief is warranted.

123. In United States v. Lotsch, 102 F.2d 35 (2d Cir. 1939), the Honorable Learned Hand opined:

> There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition.

Id. at 36.

124. As a result, even if distinct offenses are properly joined, a court must exercise sound discretion in granting severance of charges where a defendant is substantially prejudiced by joinder. United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980). The Second Circuit has recognized that "juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one." Id.

125. The Supreme Court has instructed that "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." Schaffer v. United States, 362 U.S. 511, 516 (1960). The Supreme Court has held that such prejudice exists when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or

prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 506 U.S. 534, 539 (1993).

126. Here, consolidation of the indictments and the multiple charges against Petitioner violated his fundamental right to a fair trial. The sheer weight of the multitude of the charges greatly prejudiced Petitioner, and prevented the jury from making a reliable judgment about guilt or innocence. The prosecution used this to its advantage to argue at trial that Petitioner targeted Hispanic women in Hempstead, Long Island, and that the jury could not ignore the amount of evidence by virtue of the number of victims and number of instances.

127. Trial counsel objected to the consolidation of the indictments, and raised various arguments in written submissions to the trial court. Thus, the record is clear that he vigorously opposed consolidation by raising a host of factual and legal arguments, and was in no way Constitutionally-deficient on this particular point, as was asserted by appellate counsel.

128. The issue being properly preserved, it was ripe to appeal and would have likely resulted in a reversal. However, because appellate counsel failed to present the substantive consolidation/joinder issue, the Appellate Division never considered it. Instead, the issue was decided as follows:

> The defendant's contention that he was deprived of the effective assistance of counsel by virtue of his attorney's failure to assert certain arguments in challenging the People's motion to consolidate the indictments is without merit. The evidence established that the defendant's counsel provided meaningful representation in opposing the motion.

People v. Walters, 90 A.D.3d 958, 934 N.Y.S.2d 7202 (2d Dept. 2011).

129. This failure on the part of appellate counsel likewise deprived Petitioner of the effective assistance of counsel. As a result, this Court should grant the instant petition.

POINT III - PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE HIGHLY PREJUDICIAL AND UNFOUNDED ALLEGATION THAT HE "TARGETED HISPANIC WOMEN" WAS USED A BASIS TO ESTABLISH CRIMINAL PROPENSITY

130. The Supreme Court has mandated that state courts, in conducting criminal trials, must proceed consistently with "that fundamental fairness" which is "essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941); see also Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment").

131. A number of Supreme Court holdings pre-dating the Appellate Division's decision herein have embodied this bedrock principle of law in the context of Due Process challenges to the improper admission of trial evidence. To illustrate, in Lisenba, supra where the Court concluded that the admission of the evidence at issue did not deprive the Petitioner of federal due process, the Court explicitly stated that "[t]he aim of the requirement of due process is ... to prevent fundamental unfairness in the use of evidence whether true or false..." Id. at 236. Years later, in Spencer v. Texas, 385 U.S. 554 (1967), where the Court again rejected a federal due process challenge to the admission of trial evidence, the Court nonetheless reaffirmed that "[c]ases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." Id. at 563–64.

132. Again, in Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court held that the cumulative effect of evidentiary trial errors given the facts and circumstances of a

particular case may deprive a criminal defendant of the fundamental right to a fair trial. From this, in Dowling v. United States, 493 U.S. 342, (1990), the Court articulated the following standard: [W]hether the introduction of [a] type of evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice'" Id. at 352. (internal citations omitted); see also Estelle, supra at 75 citing Lisenba, supra at 228 (holding that "the introduction of the challenged evidence ... [did not] 'so infuse[ ] the trial with unfairness as to deny due process of law[,]' " where the federal challenge was whether the admission of particular trial evidence deprived the petitioner of federal due process).

133. Where a prosecutor introduces evidence of uncharged crimes or bad acts against a defendant to demonstrate his criminal propensity, traditional notions of Due Process and fundamental fairness are violated. United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992), see also Dudley v. Duckworth, 854 F.2d 967 (7th Cir. 1988). Admission of uncharged crimes or bad acts evidence is still subject to a determination by the trial court that the prejudice in admitting the evidence does not outweigh probative value. United States v. Zackson, 12 F.3d 1178 (2d Cir. 1999). This rule of exclusion rests upon sound policy considerations as it is neither unreasonable nor contrary to experience for a juror to believe that a person who has engaged in criminal behavior in the past may well have done so again. It is designed to prevent conviction on evidence of a defendant's criminal history and unsavory character rather than his actual commission of the crime charged. "It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much." (1A Wigmore, EVIDENCE § 58.2, p. 1212 [Tillers rev.1983]).

134. "One may not be convicted of one crime on proof that he probably is guilty because he committed another crime." People v. Goldstein, 295 N.Y. 61, 64 (1946). "If a …propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away. Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one (Wigmore, Evidence, vol. 1, §§ 55, 192). In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar." People v. Zackowitz, 254 N.Y. 192, 197 (1930). It is the same theoretical underpinning that prohibits multiple punishments for the same offense, as embodied in the Double Jeopardy clause of the Fifth Amendment.

135. Here, the prosecutor sought to consolidate the indictments against Petitioner based upon a theory that he targeted Hispanic women in his crimes, and therefore, employed a similar modus operandi by robbing them prior to sexually assaulting them. The prosecution further argued that because all of the alleged incidents took place within the Village of Hempstead, the descriptions given by each of the victims loosely resembled the Petitioner (black male, between 5'9 and 6'0, stocky build), this was further evidence of identification and modus operandi. The trial court granted the prosecution's motion, and denied Petitioner's cross-motion for severance on that basis.

136. However, in this case, there was no proof that Petitioner "targeted Hispanic women." There was no proof linking the women's race or culture as being the reason for their attacks. There was insufficient proof that demonstrated that Petitioner was the man who committed these acts against them. In fact, Dottin is an African American female, who could not

even identify the man who attacked her at the lineup. Isla Morales remained irresolute and admitted she could not figure out who it was even after making her selection. Sanchez, whose initial description of her attacker did not include height, weight, age, facial hair or hairstyle, made her selection of Petitioner at the lineup based on a dubious recollection of sad eyes and a round face. During the crimes against the women, the perpetrator wore different clothing, carried a different gun, some victims were sexually battered while others were only robbed, the perpetrator in some instances talked to the victims while others he did not, the women were in different age groups, some incidents occurred in public, and others were in secluded locations. The prosecution combined these attacks by grouping the women into a category based on race, and essentially attempted to lead the jury to believe Petitioner had a propensity to commit these acts against Hispanic females.

137. This principle of law has been codified in Rule 403 of the Federal Rules of Evidence, which requires a court to exclude evidence if its probative value is substantially outweighed by a danger such as unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence, causes confusion for the jury, or misleading. Id. Whether an issue remains sufficiently in dispute for similar acts evidence to be material and, hence, admissible, unless prejudicial effect of evidence substantially outweighs its probative value, depends not on the form of words used by counsel but on the consequences that the trial court may properly attach to those words. Fed. R. Evid. 403; Fed. R. Evid. 404(b); United States v. Figueroa, 618 F.2d 9345 (2d Cir. 1980). Evidence is prejudicial when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission in evidence. Fed. R. Evid. 403.

138. State appellate courts conducting harmlessness review of trial court errors are required to find constitutional errors "harmless beyond a reasonable doubt" before affirming a conviction. Chapman v. California, 386 U.S. 18, 24 (1967). Federal courts conducting habeas review of state court convictions "apply a less stringent standard." Wood v. Ercole, 644 F.3d 83, 94 (2d Cir. 2011)

139. Accordingly, federal courts may vacate a state conviction when the constitutional violation 'had substantial and injurious effect or influence in determining the jury's verdict.'" Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). "In assessing whether the erroneous admission of evidence had a substantial and injurious effect on the jury's decision, we consider the importance of the ... wrongly admitted evidence, and the overall strength of the prosecution's case. The importance of wrongly admitted evidence is determined by the prosecutor's conduct with respect to the ... evidence, whether the evidence bore on an issue plainly critical to the jury's decision, and whether it was material to the establishment of the critical fact, or whether it was instead corroborated and cumulative[.]" Wood, 644 F.3d at 94 (internal citations, brackets, and quotation marks omitted).

140. In this case, combining the different attacks on these women and allowing the prosecution to assert that the Petitioner was the perpetrator who targeted these women on the basis of race/national origin with no basis was so prejudicial so as to deny Petitioner Due Process. There were five victims, each attack was substantially different from each other. By consolidating the indictments, the jury was misled into believing that if they found Petitioner guilty of one attack, he must be guilty of the other attacks. The consolidation of cases also caused confusion of the facts of the case, as each incident differed from the others. The evidence

that the women were Hispanic is not highly probative of whether race was the motivating factor for the crimes committed considering the crimes varied over a span of years with distinguishing facts not evidenced by a knowledge or desire to target Hispanic women.

141. Thus, including the unfounded allegations that Petitioner targeted Hispanic women misled and confused the jury, and created the idea that Petitioner did indeed commit each and every act, and that he had a propensity to commit such crimes. Since Petitioner was never charged or convicted of hate crimes, these allegations should have been excluded. The prejudicial effect of this evidence substantially outweighed any probative value.

142. Because Petitioner was denied Due Process by the introduction of this evidence and the consolidation of the indictments, this Court should grant the instant petition.

POINT IV - PETITIONER WAS DENIED DUE PROCESS WHERE THE TRIAL COURT IMPOSED AN AGGREGATE SENTENCE IN EXCESS OF TWO HUNDRED YEARS BASED ON THE UNPROVEN ALLEGATION THAT PETITIONER "PREYED" ON "IMMIGRANT AND NON-ENGLISH SPEAKING WOMEN" AND ACTED WITH DEPRAVITY AND BARBARITY WHEN DOING SO

143. The Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed, and a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or

(2) is grossly out of proportion to the severity of the crime. Coker v. Georgia, 433 U.S. 584 (1977); Solem v. Helm, 463 US. 277 (1983).

144. On an Eighth Amendment challenge to the length of a term-of-years sentence, the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. To determine whether a punishment is cruel and unusual, in violation of the Eighth Amendment, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. Graham v. Florida, 560 U.S. 48 (2010).

145. Public perceptions of standards of decency with respect to criminal sanctions are not conclusive of whether a particular sanction violates the Eighth Amendment. The penalty must accord with the dignity of man which is a basic concept underlying the Eighth Amendment. The punishment must not be excessive; when a form of punishment in the abstract is under consideration, inquiry into excessiveness must consider whether the punishment involves an unnecessary and wanton infliction of pain and whether the punishment is grossly out of proportion to the severity of the crime. Gregg v. Georgia, 428 U.S. 153 (1976).

146. The Court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. Solem v. Helm, 463 U.S. 277 (1983).

147. Petitioner stands convicted of crimes that are classified as Class B Violent Felony Offenses under New York law, which carry a minimum term of imprisonment of 5 years, and a

maximum term of imprisonment of 25 years. A Class B Violent Felony does not carry with it a statutorily-authorized sentence of life imprisonment.

148. It is fundamental that "the sentencing process, as well as the trial itself, must satisfy the rigors of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358 (1977). The United States Supreme Court in Mempa v. Rhay, 389 U.S. 128, 133 (1967) and Townsend v. Burke, 334 U.S. 736, 741 (1948) leave to the view that:

> As a matter of due process an offender may not be sentenced on the basis of materially untrue assumptions or misinformation. Rather, to comply with due process the sentencing court must assure itself that the information upon which it bases the sentence is reliable and accurate.

(Cite). Due process requires that convicted person not be sentenced on materially untrue assumptions or misinformation. United States Constitution, Fifth Amendment, Fourteenth Amendment; United States v. Pugliese, 805 F.2d 1117 (2d Cir.1986); United States. v. Romano, 825 F.2d 725 (2d Cir. 1987).

149. Misinformation or misunderstanding that is materially untrue regarding prior criminal record or material false assumptions as to any facts relevant to sentencing renders the entire sentencing procedure invalid as a violation of Due Process. The court has an obligation to assure itself that information upon which it relies in sentencing defendants is both reliable and accurate. United States v. Pugliese, 805 F.2d 1117, 1123-24 (2d Cir. 1986).

150. Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding. United States. v. Malcolm, 432 F.2d 809 (2d Cir. 1970).

151. Petitioner submits the trial court committed constitutional error by relying on uncharged, unproven and unreliable evidence to arrive at a decision to impose the maximum sentence on each and every convicted count. There was simply no proof the perpetrator intentionally selected his victims based on their national origin or ancestry. Equally lacking was proof that he inquired into or was otherwise aware of their immigration status or non-English-speaking capacity. Compounding the court's disregard for the lack of evidence, these unsupported findings, as well as those related to the supposedly depraved and barbaric characteristics of the crimes, were entirely unilateral on the part of the court.

152. The prosecution did not allege, argue or prove beyond a reasonable doubt depravity or barbarity in the commission of the crimes. Nor did the prosecution allege, argue or prove beyond a reasonable doubt the intentional selection of immigrant or non-English speaking women. Rather, the prosecution made a distinct, if equally spurious, argument: the attacker targeted "Hispanic" women. Neither the prosecution's unsupported claim nor the court's unilateral one was based on the slightest proof. The trial court's self-directed, speculative findings of fact wrongly informed the decision to sentence Petitioner to the maximum term of imprisonment on each count, mandating a new trial where uncharged and unproven hate crime allegations will have no bearing on the proper exercise of judicial decision-making.

153. As a consequence of the foregoing, Petitioner has been deprived of his fundamental Due Process rights, requiring this Court to grant him habeas relief.

CONCLUSION AND RELIEF REQUESTED

154. A state court decision is "contrary to" clearly established federal law where the state court arrives at a conclusion opposite to the Supreme Court on a question of law. Williams v.

Taylor, 529 U.S. 362, 405 (2000). The New York state court decisions concerning Petitioner's direct appeal were contrary to this clearly established Federal Constitutional law.

155. As stated above, established Supreme Court precedent is clear: Due Process requires a defendant the right to testify on his own behalf, prohibits irrelevant and substantially prejudicial evidence from being considered at trial, prohibits a defendant from receiving a cruel and unusual sentence in light of unfounded allegations which were contemplated during this stage, and the right to offer testimony of witnesses and to present a defense.

156. In so ignoring these binding decisions, the Appellate Division and the New York Supreme Court, Appellate Division, Second Department unreasonably applied established Supreme Court precedent.

157. For the reasons set forth above, this Court should grant the petition herein in its entirety.

WHEREFORE, Petitioner prays that this Court:

(A) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement upon a personal recognizance bond; or in the alternative,

(B) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement unless the judgment of conviction and sentence are vacated and he be restored to pre-trial status if he is not retried within sixty days; or in the alternative,

(C) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement unless his sentence is vacated and modified to excise the indeterminate maximum term of life imprisonment and relieving him of any subsequent penalty or other consequence of its imposition, or in the alternative

(D) Order that the determination of this Petition be held in abeyance pending final resolution of any state court pending matters concerning the judgment of conviction attacked in this petition; and

(E) Grant such other and further relief as this Court may deem just, proper and equitable.

Dated: Winter Park, Florida
March 18, 2014

Respectfully Submitted,

_____

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