

NEW YORK STATE APPELLATE DIVISION:
FOURTH JUDICIAL DEPARTMENT

-----X
In re Nelson Rodriguez :
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 Petitioner. :
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MOTION FOR RELIEF FROM A
JUDGMENT BASED UPON FRAUD
AND MISREPRESENTATION

Index No. 2012-0358

TO: APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

Upon the Affidavit of Nelson Rodriguez (hereinafter the Petitioner), sworn to on the 13th day of December, 2012, the Petitioner shall move this Honorable Court at a Special Term thereof, on the 24 day of December, 2012, at 9 O'Clock in the forenoon, or as soon thereafter as Petitioner can be heard, with regard to A Motion from Relief from a Judgment Based Upon Fraud and Misrepresentation, said Motion is presented as;

1) An Addendum to the Petitioner's properly and timely submitted Writ of Mandamus, electronically filed on the 24th day of September, 2012, which was an Interlocutory Appeal/motion from the lower Court proceedings, which was an active action upon the day of service, with the Index No. 2012-0358;

2) This Motion Moves to have this Honorable Court Rescind the lower Court's Memorandum/Decision, dated October 30, 2012, as it was an obvious fraudulent attempt to misrepresent the law and facts of the lower Court Proceedings and intentionally drafted to circumvent the meritorious claims in the afore-mentioned Writ of Mandamus;

3) As asserted throughout Petitioner's sworn Affidavit, the

fraud and misrepresentation was committed by the Court in this action, who became an adverse party by proxy and stands in contempt of its' own April 5, 2012, Order to Show Cause; as such, the Petitioner is incapable of Moving the lower Court pursuant to CPLR § 5015(a)(3), in seeking the prayed for relief, a conflict of interest clearly attaching;

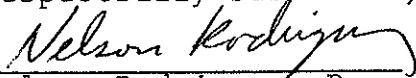
4) The Petitioner further Moves this Honorable Court to lift the Stay of Petitioner's Writ of Mandamus and, prior to reaching the merits of the claims asserted therein, Grant the Injunctive Relief demanded in said Writ of Mandamus, Ordering the Petitioner's Release Forthwith in the interim, nunc pro tunc; and that the Appellate Court Clerk's Office refund the \$315.00 filing fee, as it is clear that Petitioner's Writ of Mandamus was an interlocutory motion and not in need of a RJI #, as erroneously asserted by the Appellate Court Clerk, LXD.

5) Petitioner further Moves this Honorable Court to exercise its' inherent authority in the Interest of Justice and Enter a Judgment consistent with the lower Court's undischarged and uncontroverted April 5, 2012, Order to Show Cause, as this Court has the authority to grant such final judgment as it feels trial court, upon the evidence, should have granted (See, Hacker v. City of New York, 26 AD2d 400, 275 NYS2d 146 (1966), affirmed 20 NY2d 722, 283 NYS2d 46, 229 NE2d 613, certiorari denied 88 Sct 1436, 390 US 1036, 20 LEd2d 296; See also, McCarthy v. Port of New York Authority, 30 Ad2d 111, 290 NYS2d 255 (1968)). Or in the

alternative, appoint a Justice of competent jurisdiction to perform the ministerial function, as that is all that remains to perform;

And for such other and further relief that this Honorable Court may deem equitable, just and proper.

Dated: December 13, 2012
Auburn, New York

Respectfully Submitted,

Nelson Rodriguez, Pro se

STATE OF NEW YORK SUPREME COURT
SPECIAL TERM: COUNTY OF CAYUGA

-----X
In re Nelson Rodriguez, :

Petitioner. :

NOTICE OF PRECAUTIONARY/
PROTECTIVE APPEAL

Index No. 2012-0358

-----X
TO: JUSTICE, THOMAS G. LEONE

C A V E A T

PLEASE TAKE NOTICE, that the caption being In re Nelson Rodriguez, is appropriate due to the fact that it is evidentially undisputed that the Respondents failed to appear and/or file any papers in opposition by Court's final deadline of July 12, 2012, as mandated upon an issuance of an Order to Show Cause pursuant to CPLR § 7006(a);

PLEASE TAKE FURTHER NOTICE, that the Petitioner-appellant by making this Notice of Precautionary/Protective Appeal, does so under extreme duress and in no way takes any Notice of Entry, NOR by this act does he perform Notice of Entry;

PLEASE TAKE FURTHER NOTICE, Petitioner-appellant did receive an electronic printout of the Cayuga County Supreme Court, by members of the New Beginning Innocence Project, which indicates that the action regarding the above-referenced matter had been "Pre-Dismissed" on October 30, 2012. It can be alleged it appears that the Petitioner was advised by the Cayuga County Clerk's Office and the Cayuga County Supreme Court, by communications/documents that did not have the proper certification, advising Petitioner of his appellate rights, as there is no indication as to date of Entry on said document. (See highlighted area on attached document absent the date of claimed sham Memorandum/Decision being rendered).

Dated: December 3, 2012
Auburn, New York

Respectfully Submitted,


Nelson Rodriguez, Pro se

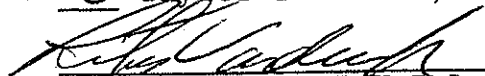
To:

Thomas G. Leone, Justice
Cayuga County Supreme Court
154 Genesee Street
Auburn, New York 13021

Susan M. Dwyer, County Clerk
Cayuga County Office Building
160 Genesee Street
Auburn, New York 13021-3424

Signed to before me this

3 day of December, 2012


NOTARY PUBLIC

Lebertus Vanderwerff
Notary Public, State of New York
Appt. in Cayuga Co. No. 01VA618383
My Commission expires 03/31/16

WebCivil Supreme - Case Detail

Court: **Cayuga Civil Supreme**
Index Number: **000358/2012**
Upstate Index Number: **2012-0358**
Case Name: **RODRIGUEZ vs. GRAHAM**
Case Type: **Other**
Track: **Standard**
RJI Filed: **04/03/2012**
Upstate RJI Number:
Date NOI Due:
NOI Filed:
Disposition Date: **10/30/2012**
Calendar Number:
Jury Status: **Unknown**
Justice Name: **HON THOMAS G. LEONE**

Attorney/Firm For Plaintiff:

AUBURN CORRECTIONAL FACILITY Attorney Type: **Attorney Of Record** Atty. Status: **Active**
AUBURN NY 13021

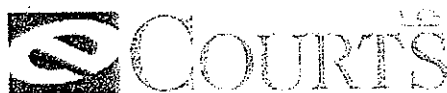
Attorney/Firm For Defendant:

ATTORNEY GENERALS OFFICE Attorney Type: **Attorney Of Record** Atty. Status: **Active**
615 ERIE BLVD WEST SUITE 102
SYRACUSE , NY 13204
315-448-4800

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WebCivil Supreme - Appearance Detail

Court: **Cayuga Civil Supreme**
 Index Number: **000358/2012**
 Case Name: **RODRIGUEZ vs. GRAHAM**
 Case Type: **Other**
 Track: **Standard**

Appearance Information:

Appearance Date	Time	On Up	Appearance Outcome	Judge / Part	Comments	Priority Sec
10/30/2012		Disposed	Pre-Dismissed	HON THOMAS G. LEONE LEONE (Court Activity)		

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WebCivil Supreme - Case Search Results

WebCivil Supreme - Case Search Results

3 Case(s) Match Your Search. **Page 1 of 1 pages**

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Please scroll down to see more cases.

	County	Index Number	Case Status	Plaintiff	Plaintiff Firm	Defendant	Defendant Firm	Appearance Date	Justice
1	Cayuga	1700037/2012	Disposed	RODRIGUEZ		RODRIGUEZ		06/04/2012	HON THOMAS G. LEONE
2	Cayuga	000358/2012	Disposed	RODRIGUEZ	AUBURN CORRECTIONAL FACILITY	GRAHAM	ATTORNEY GENERALS OFFICE	10/30/2012	HON THOMAS G. LEONE
3	Cayuga	000610/2012	Active	RODRIGUEZ		RODRIGUEZ			HON THOMAS G. LEONE

[\[New Search\]](#) [\[Edit Search\]](#)

Memorandum/Decision. This submission is an effort to protect the Petitioner from any default or other penalty from failing to act.

Inassuch, it is under this extreme urgency that the Petitioner here seeks to lay out before this Honorable Court, the events and circumstances that led up to Petitioner's Writ of Mandamus, which Petitioner had moved the Appellate Division: Fourth Judicial Department, to Stay until these matters are resolved in the lower Court. As it will be obvious once the facts of the record are revealed, establishing that the lower Court's sham Memorandum/Decision, dated October 30, 2012, was merely a desperate attempt to relieve Justice, Thomas G. Leone, of the necessity of submitting a sworn affidavit in response to an Order to Show Cause, as to why the lower Court has failed to Enter a Final Judgment consistent with its' own Order to Show Cause, dated April 5, 2012, as the respondent in this action failed to appear/respond as the record clearly supports.

Petitioner further asserts that the Caption being In re Nelson Rodriguez, is appropriate due to the fact that it is evidentially undisputed that the respondents failed to appear and/or file any papers in opposition to Petitioner's Writ of Habeas Corpus as required upon the issuance of a Writ/Order to Show Cause, pursuant to CPLR § 7006(a), invalidating the Caption and Notice of Appearance of parties alleged on the face of the sham Memorandum/Decision, dated October 30, 2012.

Petitioner is incapable of seeking relief pursuant to CPLR § 5015(a)(3); as it is the Court itself, which has acted like an adverse party by proxy, who has committed ethical, civil & criminal violations, both State and Federal, in denying Petitioner's due process rights, which are exhaustively detailed below.

Petitioner comes now before this Appellate Court by way of this sworn affidavit, detailing the facts as asserted below, supported by irrefutable documentary and recorded evidence in both the lower Court and in the Cayuga County Clerk's Office, supporting Petitioner's Motion to have the lower Court's sham Memorandum/Decision, dated October 30, 2012, rescinded and the relief requested in Petitioner's proper and timely filed Writ of Mandamus adjudicated, which preceded the fraudulent, misrepresentation, both material and intentional, of the lower Court's October 30, 2012, sham Memorandum/Decision.

FACTS

1) This action commenced as the members and it's president of A New Beginning Innocence Project, a non-for profit corporation duly registered with the State of New York and the Attorney General's Office, on behalf of the Petitioner, did cause to be filed with the Supreme Court of New York, County of Cayuga:

Special Term, located at: 154 Genesee Street, Auburn, New York 13021, a petition for a Writ of Habeas Corpus, pursuant to the Civil Practice Law & Rules (CPLR) § 7002 and, is certified to be on file with Susan M. Dwyer, Cayuga County Clerk, Cayuga County Office Building, 160 Genesee Street, Auburn, New York 13021-3424, on April 3, 2012.

2) The Court upon consideration and its' close examination of the documentary evidence attached in support of Petitioner's Writ of Habeas Corpus, did Enter an Order to Show Cause, dated April 5, 2012, directing Respondent's to Show Cause "...why an Order should not be entered herein releasing the petitioner, from respondent's custody at AUBURN CORRECTIONAL FACILITY, and why the petitioner, should not have such other and further relief as the court may deem just, proper and equitable. Oral argument shall not be required on the return date of this proceeding. Sufficient cause appearing therefore, let Service of a copy of this petition, supporting affidavit and all papers upon which it is based, on the Attorney General, Syracuse, New York 13024, be deemed good and sufficient service."

3) Thereafter, after the Respondents were properly served, Petitioner, in letters to the Court dated May 17, 2012; June 13, 2012; and June 16, 2012, made several timely objections regarding Respondent's failure to make timely requests for extensions, in

violation of CPLR § 2214(b), and in their failure to identify the specific documents they claimed to have been requesting from the New York State Department of Corrections and Community Supervision (DOCCS), to justify the requested extensions; the Court granted them absent any just cause, the final one being granted six (6) days beyond the Court's final deadline, all this without a hearing to determine the propriety of the Attorney General's requests. The Court also failed to acknowledge and conduct a hearing on the Petitioner's claim of a conflict of interest attaching to the Attorney General's Office representing the Respondent in this action, as their Office was supposed to be investigating the very same serious issues that were material to the Petitioner's Writ of Habeas Corpus as well as other more serious claims involving crimes and improprieties of various governmental agencies and personnel involved with the wrongful conviction and illegal detention/incarceration of the Petitioner in this case. Yet, the Court not only failed to conduct a hearing on these proper and timely objections, the Court never even acknowledged them.

4) Upon the Court's final extension deadline of July 12, 2012, Respondent who failed to appear in this action, by filings or in person, at the Courthouse of the Supreme Court of New York, Cayuga County: Special Term, 154 Genesee Street, Auburn, New York 13021, while representatives for the Petitioner were present at

the afore-mentioned Courthouse, at approximately 9:00 in the forenoon, in which later on same date, they visited the Petitioner at: AUBURN CORRECTIONAL FACILITY, and informed him that upon arriving at the Courthouse to appear before the Court's scheduled deadline proceeding, they were informed by the Court's Clerks, that the Justice was in chambers but would not see anyone, that a hearing will be held on said date upon Petitioner's moving papers, as there was no submissions from the "Respondent", in receipt by the Court, and that no more extensions will be granted that, a "decision," would be and/or entered shortly.

5) Herein, Petitioner having been made aware of the afore-mentioned facts by his representatives (who later provided the Petitioner with sworn affidavits, attesting under oath to said facts) on or about July 23, 2012, did move the Court by way of certified return receipt mail/notice (# 7009 3410 0000 4918 3812) ex parte, for a Summary Judgment, by way of Default.

6) Inassuch, as Petitioner having received absolutely no acknowledgment from the Court regarding the status of his ex parte motion, on or about August 28, 2012, he did cause to be filed again, by way of certified return receipt mail/notice (# 7011 1570 0001 1146 2700), with same Court, a Proposed Judgment Discharging a Person Detained, pursuant to CPLR §§ 7010; 2220(a) & (b); 3212(a) & (b); 3215(a) & (b); 411; 5011; and 5016(a) &

(c), and with the County Clerk's Office, also by way of certified return receipt mail/notice (# 7011 1570 0001 1146 2670), and provided a copy of same as required by statute, as courtesy to the defaulting party(ies), with an affidavit of service. Thereby satisfying any and all mandates upon the sole party of an action in attempting to secure the relief sought and duly owed the Petitioner in this action.

7) In the instant case, the record made before the lower Court and in the Cayuga County Clerk's Office, does support Petitioner's assertions as set forth in his appropriately filed Writ of Mandamus, which was initially filed with this Appellate Court through the Cayuga County Clerk's Office by way of electronic filing services, on September 24, 2012, but forced to re-submit and/or file on October 18, 2012, which irrefutably establishes that the Petitioner is entitled to his relief as set forth in his Habeas Corpus petition and the Court's Order to Show Cause dated April 5, 2012, establishing that the Petitioner is the sole party in this action, and was within his right to move the lower Court by way of Ex parte Summary Judgment for Default Motion, and thereafter by way of the Proposed Judgment Motion, Discharging a Person Detained, compelling the lower Court to act under the obligation of performing its' ministerial duty to Enter a Judgment in favor of the Petitioner as mandated and consistent with the afore-mentioned Order to Show Cause in this case Entered April 5, 2012, so that the Petitioner could perform the final

process in securing his relief and serve Notice of Entry and enforcement of Judgment to obtain his due right to liberty.

8) Furthermore, the record made establishes that the Court violated each and every one of Petitioner's timely objections properly made throughout the proceedings regarding respondent's failure to make timely extensions requests, produce documentary evidence and; dispute Petitioner's claim of conflict of interest that the Attorney General's Office is allowed to represent them in this action, violating the Statutory duty and/or obligation that the Court is under pursuant to CPLR § 2219(a), to address and bring to a close each and every motion the Courts take notice of, within the sixty (60) day statutory mandate, where it is legislated that; "...an order determining any other motion shall be made within sixty days, after the motion is submitted for decision" (emphasis added). A material factor that the Petitioner raised in his timely and appropriately filed ex parte motion, which as a courtesy, Petitioner did provide a copy to the defaulting party(ies), and though it can be construed that a Court doesn't have to take notice of Petitioner's ex parte motion, filed with the Court on or about July 23, 2012, by way of certified return receipt mail/notice (# 7009 3410 0000 4918 3812), yet it is mentioned in said Court's sham Memorandum/Decision, dated October 30, 2012, absolutely establishing that the Court did take cognizance of Petitioner's afore-mentioned properly filed motions, but violated the afore-

mentioned Statutory mandated period of sixty (60) days, which the Court is obligated to address the motions and bring the matters to a close. Herein-again, establishing that the Petitioner is the sole party in this action, as it is evidentially undisputed that the respondent failed to appear/respond and therefore are forever collaterally estopped from opposing any of Petitioner's contentions as set forth in his Writ of Habeas Corpus in this action, as the doctrine of res judicata automatically attaches. In fact, it can be asserted that the Court, based upon it's lack of impartiality throughout the entire proceedings in this case, and when considering all the evidence that the Petitioner has and will further provide this Appellate Court for consideration, it's without any question that the lower Court was judicially estopped from making any "discretionary" ruling contrary to it's Order to Show Cause dated April 5, 2012, absent the submission of any controvertible facts being introduced by way of return, as mandated by CPLR § 7006(a) and the Court's afore-mentioned Order to Show Cause, which to this date remains undischarged. The Court is forever prohibited from making a ruling outside the scope of the irrefutable undischarged April 5, 2012, Order in this action.

9) Inassuch, the Petitioner was within his right to motion the Court by way of Proposed Judgment Discharging a Person Detained, who has irrefutably established the illegality of both, the Court having lack of subject matter jurisdiction to had tried

him and; the sentence imposed thereafter which was never filed and/or recorded with the Court or County Clerk's Office, subjecting the Petitioner to an illegal and wrongful incarceration, making the Court duty bound to act by its' own Order to Show Cause, in this action, filed with the County Clerk's Office on or about April 12, 2012, to enter the Order to Show Cause as a Final Judgment, consistent with the Court's findings as established in said Order to Show Cause. Where the record made before the Court clearly supports the contentions asserted in Petitioner's Writ of Habeas Corpus, which irrefutably entitles Petitioner to be released forthwith.

10) Though the Court's sham Memorandum/Decision also takes notice of Petitioner's afore-mentioned properly filed Proposed Judgment Motion, of which the defaulting party(ies) were also provided with a courtesy copy, the Court, hereto violated the statutory mandate of sixty (60) days, to address and bring to a close a motion submitted for a determination as it did with the afore-mentioned ex parte motion, as mandated pursuant to CPLR § 2219(a), said motions were duly filed with the Court and its' County Clerk's Office. It merits to mention that these motions were never opposed or objected to by the defaulting party(ies), after they were provided a courtesy copy, attaching the doctrine of res judicata, collaterally estopping any future litigation from said defaulting party(ies), with respect to the assertions

and claims as set forth in Petitioner's Writ of Habeas Corpus. Said collateral estoppel also attaches to these proceedings with the Petitioner's Writ of Mandamus, which is why Petitioner has moved this Court ex parte. Inassuch, supporting Petitioner's prima facie case as set forth in his Petition and also, in his Writ of Mandamus presently before this Appellate Court, which ultimately reduces the presiding Justice's role to that of a ministerial function. And if the lower Court is not willing to act under that reduced capacity, it is not beyond the powers of this Court to Enter that Judgment consistent with the lower Court's Order to Show Cause dated April 5, 2012, or appoint a Justice of competent jurisdiction to perform that task.

11) The record clearly establishes, the Petitioner has done everything in his power, as a Pro se litigant, to take every possible step that he legally could to secure the due process right owed him, and to obtain his due entitlement to liberty. However, the above mentioned facts supports Petitioner's contentions as detailed below, that Justice Thomas G. Leone, left his position as an Officer to administer the Law in a Court of Justice, and became an adverse party by proxy, to deny the Petitioner his due process rights owed him throughout the entire proceedings in this action, by acting contrary to the evidence which previously represented sufficient cause to warrant the issuance of said Court's Order to Show Cause dated April 5, 2012.

12) The afore-mentioned Justice Thomas G. Leone, forced Petitioner to seek civil litigation against him by way of a Writ of Mandamus, personally served upon him on or about September 24, 2012, by a member of A New Beginning Innocence Project, Mrs. Sonia Bonilla, who certified said filing by an affidavit of service, which is on file with the Cayuga County Clerk's Office. Therefore, it should be noted that Justice Thomas G. Leone, having been properly served with the afore-mentioned civil litigation, and the respondent collaterally estopped for failing to appear, should automatically prohibit the Court from acting outside the scope of his Order to Show Cause (duly certified to have been filed with the Cayuga County Clerk's Office on or about April 12, 2012, at approximately 2:25PM), and perform his ministerial function that he was reduced to in this action.

13) Inassuch, it doesn't take a paranoid mind, necessarily, to conclude that an individual in a position of authority/power is capable of shielding themselves from civil litigation if they are able to contact political associates who are like-minded, or take certain steps within their sphere of influence to alter the circumstances that may adversely effect them, if such would not necessarily be found out due to a reassuring belief that said individual's associates would not expose the fact that the circumvention of proper procedure is how the judicial system operates. Which leaves this Honorable Appellate Court with the

extremely delicate and crucial position of removing from the public eye the appearance of impropriety from all judicial proceedings, which serves to assure the public of the integrity of the Judicial Branch of government, in administering the law and ensuring that Justice be done. As it is affirmed by every person upon their oath of office, prior to taking their role of Justice.

14) It is absolutely obvious by the record made before the lower Court, that prior to Petitioner being forced to bring civil action against presiding Justice, Thomas G. Leone, said Justice was predisposed in denying the Petitioner his relief sought as set forth in his petition, as initially said Court upon the Petitioner's filing of his moving papers, found sufficient cause appearing in Petitioner's petition, to grant and/or issue an Order to Show Cause as quoted in ¶ 2 infra. It is here, that it's beyond any stretch of the imagination why the afore-mentioned named Justice, having found sufficient cause in Petitioner's moving papers upon its' initial filing to warrant the issuance of an Order to Show Cause upon the Respondent, to then attempt to act contrary to the prima facie case that the Petitioner established, without any filings in opposition from the Respondent. Forcing the Petitioner to bring civil action to compel Justice, Thomas G. Leone, to enter a final Judgment consistent with said Order to Show Cause, April 5, 2012, which it is irrefutably established that he is bound to and in contempt

of, as it is clear that said Justice failed to discharge and/or address it in his sham Memorandum/Decision, dated October 30, 2012. In fact, one can only surmise as to why Justice Leone, immediately after being served with a copy of Petitioner's Writ of Mandamus, became extremely motivated to take every precaution and/or measure available to him to prevent Petitioner from filing his properly brought civil action of a Writ of Mandamus, before the Appellate Division, for adjudication.

15) Inasmuch, as it is undisputed that Thomas G. Leone's background as a corporation counsel included a familiarity with the New York State Corporate Law Statute, which exhaustively covers the mandates on properly and timely filing for various documents necessary for authentication. As a corporate counsel within the City of Auburn, within the County of Cayuga, it can be concluded that Mr. Leone, had a history with the County Clerk's Office and may even have an insiders awareness of the inner-workings of said office, having access to who, what and how these filings are processed. Certainly the evidence suggests that documents bearing the indication of a filing date and time, not registered in that office's records consistent with that date and time, leaves one very suspicious of the propriety of that process. As well as motion papers received by the Cayuga County Clerk's Office by certified return receipt, on a particular date, which would require by statute immediate filing within the Office

upon receipt, doesn't end up "officially" filed until after Justice Thomas G. Leone's sham Memorandum/Decision is "rendered", which was months after receipt of said motion paper. Further suggestive of serious misconduct is the fact that someone can gain access to the Cayuga County Clerk's Office after 2:21PM, on a Friday (November 2, 2012), when most State employees go home early, in order to alter or tamper with public records and file motions and filings en masse, to attempt to cover up the clear and obvious efforts to deny Petitioner's due process rights and legally obtained relief to liberty. It suggests fraud, misrepresentation, and impropriety of the highest level within these governmental agencies.

16) In as much as Petitioner now begins to unravel and/or dismantle the web of intentional misrepresentation and material misrepresentation, along with a line of schemes, detailed below, perpetrated to intentionally deprive the Petitioner of his right to have access to the Courts and from preventing him to timely file his Writ of Mandamus against Justice Thomas G. Leone, in this action, serious improprieties that warrants this Appellate Court to Order and/or conduct a thorough investigation into the official misconduct of the serious mishandling of Petitioner's case, committed by the lower Court, it's County Clerk's Office and by several members of the Bar and/or assigned as Clerks to work this Appellate Court's Clerks Office, supported by the

irrefutable documentary evidence that the Petitioner has provided this Appellate Court and now to his ongoing supporters by way of the web site www.freenelsonrodrigueznow.com, to establish that the only thing worse than intentionally being denied access to the Courts in order to champion your cause, is having won your cause in a Court of law and being denied the relief you have proved you are entitled to. Yet, this is precisely what has happened in Petitioner's case.

17) Inassuch, the record made in the Cayuga County Clerk's Office, irrefutably establishes Petitioner's afore-mentioned assertions as the Petitioner on or about September 24, 2012, did properly serve the afore-mentioned named Justice, by way of personal service, a copy of Petitioner's Writ of Mandamus, containing all relative papers/documents attached thereto, with the exception of affidavits submitted by several members of (N.B.I.P.) Innocence Project, in support of Petitioner's filed Writ of Mandamus, that were mistakenly left out by the server, but shortly thereafter was corrected as said affidavits were served by way of certified return receipt mail, accompanied by an affidavit of service addressed to the Justice chambers and/or Courthouse.

18) Moreover, though the server on the same date she personally served Justice Thomas G. Leone, with a copy of

Petitioner's Writ of Mandamus, through the Cayuga County Clerk's Office, electronically filing service, she did cause to be filed Petitioner's Writ of Mandamus with the Appellate Court Clerk's Office, stamped received on or about September 25, 2012, yet, upon being received, the petition was immediately rejected and returned back to the Petitioner by an unidentified Clerk, only listing themselves by the initials LXD, claiming in their letter dated September 26, 2012, that Petitioner needs to file (1) original with (10) copies and enclose a check for the sum of \$315.00 for filing fee. Contrary to what was told to the server upon the filing of the petition by the Cayuga County Clerk, who processed the electronic filing services of the petition, when the server inquired if there was a filing fee required, as she was prepared to pay the costs of any that was required for said filing. The Clerk informed the server that no filing fee besides the fee for the electronic filing services was required, as the case was still ongoing (active) and the moving papers did display a filing reference docket No. 2012-0358, on the face of the petition.

19) Despite the fact that on or about October 18, 2012, Petitioner re-submitted (1) original along with the (10) copies thereof, with the \$315.00 required filing fee requested, nevertheless, on or about October 25, 2012, Petitioner received a second mailing from the same unidentified Appellate Court Clerk,

returning the \$315.00 institutional check required for the filing of Petitioner's moving papers, asserting the following: "Enclosed please find the above-referenced check (\$315). the filing fee should be submitted with the notice of petition, petition and 10 copies thereof (see NYCRR 1000.9)."

20) Herein, Petitioner immediately wrote three (3) separate letters, one (1) to the Honorable Chief Clerk of the Appellate Division: Fourth Judicial Department, Frances E. Cafarell, informing him that the Petitioner was in receipt of a brief note from his Clerk's Office, who only identifies his- or herself by way of initials and not by name as respectfully mandated. Briefly informing that the Clerk had erroneously "overlooked" the fact that the Petitioner did properly file one (1) original and ten (10) copies with the Honorable Nancy E. Smith (a Justice assigned to have jurisdiction to preside over the matter/action presented) and that enclosed he had also addressed a letter to the Honorable Justice, informing her that upon receipt of his petition and ten (10) copies thereof an institutional check for the sum of \$315.00 will be forwarded to the Clerk's Office to cover the filing fee of this ongoing action. Providing said Clerk with copies of inmate disbursement form 2706, and of the certified mail return receipt to both the Court and the Clerk's Office, in support of his assertions as he requested for them to please take notice of his petition and of the ten (10) copies thereof, properly filed with the afore-mentioned named Justice's

Office, be held and/or recorded as filed and to be calendared with the afore-mentioned Court to be heard, as Petitioner at first opportunity will re-submit the \$315.00 required fee for the appropriate filing of his petition on date it was noted received.

21) Petitioner then wrote two separate letters to the aforementioned Justice, dated November 2, 2012, one accompanying the enclosed, re-submitted institutional check (\$315), briefly asserting that this was the second making of the (\$315) filing fee, for the purpose of processing his petition of a Writ of Mandamus, which was mailed to her Office with (10) copies thereof, by way of certified return mail receipt, verified to have been received by her Office on or about October 24, 2012, and erroneously returned by a Clerk bearing the initials LXD, due to their assumption that the Petitioner failed to send a petition and ten (10) copies along with the requested filing fee. The second letter, though it reiterates having to re-submit the requested filing fee (\$315) due to Clerk's error and hopes that the delay will not further prejudice Petitioner any more than he has already been made to endure by the lower Court in seeking adjudication of Court's issued Order to Show Cause dated April 5, 2012, which warrants final judgment entered granting Petitioner's immediate release forthwith, the most significant issue pointed out to said Justice, that she has the jurisdiction and Statutory authority to "overlook" the Court Clerk's erroneous returning of the statutorily required filing fee, as the Petitioner was led to

believe by the unidentified Clerk, which has delayed the process in this action. Where the Petitioner is being made to purchase another index number to have his Writ of Mandamus adjudicated, which would then translate to having paid twice for the adjudication of the lower Court's Order (factor that was made clear to the personal server at the time she paid for the electronic filing of the petition on behalf of the Petitioner at the Cayuga County Clerk's Office, when she asked if there was a filing fee for the filing of the petition and was told by the processing Clerk that no filing fee was necessary and/or required, as the moving papers had an index number and it was still an ongoing special proceeding (active). That the only fee necessary was for the electronic processing of the petition/papers (words to that effect)). For which the Petitioner has already paid the sum of \$210.00 filing fee upon the initial filing of his Writ of Habeas Corpus and the Court's Order to Show Cause issued on April 5, 2012, accompanied by an index number (2012-0358), in which the Petitioner has prevailed.

22) Finally, requesting that because of the Court Clerk's error the return date of November 5, 2012, that he had submitted an Order to Show Cause with the return date blank, for the Court's convenience, to be filed nunc pro tunc, with the petition filed and affidavit in support of the Order to Show Cause, imploring said Justice to consider all that the Petitioner has

suffered and will continue to suffer should the Honorable Justice fail to bring this matter to a close.

23) Nevertheless, it wasn't until Petitioner was in receipt of the following documents: 1) letter dated September 26, 2012, by unidentified Clerk (LXD); 2) letter dated October 25, 2012, by unidentified Clerk (LXD); 3) letter dated November 2, 2012, by Principal Appellate Court Attorney, Ivan E. Lee; 4) sham Memorandum/Decision alleged to have been filed on November 2, 2012, at approximately 11:35AM; 5) Appellate rights advise from the Cayuga County Supreme Court dated November 2, 2012; 6) Cayuga County Clerk's Search Results Report Printout of Office's records/files dated November 2, 2012 and November 6, 2012; and 7) Cayuga County Clerk's letter dated November 2, 2012, accompanying the Cayuga County Search Results Report Printout previously mentioned. Clearly establishing that all the documents named as recorded and/or filed under the hand written line of a County Clerk's note, as "new as of November 2, 2012," were filed after the recorded date of September 24, 2012, affidavit of Proof of Service that supports that Justice Thomas G. Leone, was personally served with a copy of Petitioner's Writ of Mandamus in this action. All entered and/or processed on the 2nd day of November, 2012, supporting Petitioner's ongoing suspicion that his timely and appropriately filed Writ of Mandamus was intentionally being denied and/or prevented from being filed/heard at the Appellate Court level- was confirmed. Most

significant, what further confirmed Petitioner's afore-mentioned suspicions was when he received a third mailing from the afore-mentioned unidentified Appellate Court Clerk, dated November 13, 2012, asserting the following: "This office is in receipt of the filing fee for the above-referenced matter. In as much as the Order to Show Cause also submitted has not been signed. The matter cannot be processed for filing until such time as you submit a proper notice of petition and (10) copies thereof." This assertion is in total contradiction with the afore-mentioned letter received from an Ivan E. Lee, Principal Appellate Court Attorney, dated November 2, 2012, who asserts the following: "Your application for an order to show cause was presented to the Honorable Stephen K. Lindley, and his Honor declined to sign the order to show cause." Irrefutably establishing that a concerted effort to intentionally deny and/or prevent the Petitioner from filing his Writ of Mandamus against Thomas G. Leone, has been perpetrated by members of Cayuga County Clerk's Office and members of the Appellate Division: Fourth Judicial Department, Clerk's Office, including members of the Bar. Herein giving the Petitioner the entitlement to label the details asserted below; "the November 2, 2012, Conspiracy."

NOVEMBER 2, 2012, CONSPIRACY

a) TAKE for instance first mailing to Petitioner by the unidentified Appellate Court Clerk, dated September 26, 2012, immediately after the appropriate electronic filing of Petitioner's Writ of Mandamus brought to this Appellate Court compelling Justice, Thomas G. Leone, to perform his ministerial duty as the record made before him mandates. Where said unidentified Clerk returns Petitioner's petition under the pretense that it can not be accepted for filing, asserting, "that to commence a CPLR Article 78 proceeding in the Appellate Division, absent of a notice of petition and petition, 10 copies thereof and of the filing fee of \$315.00, as required (see NYCRR 1000.9)." Would not be accepted. We now know that said assertion made in writing, by the unidentified Court Clerk upon receipt of Petitioner's petition was an intentional misrepresentation, due to the fact that Petitioner's petition/moving papers is an interlocutory motion, which needed no filing fee as required in commencing an Article 78 proceeding, in other words, absent of a final judgment. Moreover, nor did the Petitioner need to file a notice of motion with his papers, as an Order to Show Cause to compel an act in accordance to a duty, is a sufficient alternative to a notice of petition, supported by the Cayuga County Clerk's assertions during the processing of Petitioner's Writ of Mandamus (Cf. ¶¶ 18 & 21, infra). As of September 24, 2012, that Petitioner's petition having had an index No. and

still an active case, no filing fee was necessary and/or required.

b) TAKE SECOND mailing to Petitioner by same unidentified Appellate Court Clerk, dated October 25, 2012, immediately after Petitioner proceeded with the intentional afore-mentioned false instructions. Petitioner's filed institutional check for the sum of (\$315) as requested, was immediately returned under the pretense that said filing fee should be submitted with notice of petition, petition and 10 copies thereof, a factor that although at the time Petitioner had his suspicions, he still brought the matter up to the chief Clerk of the Appellate Division: Fourth Judicial Department, Frances E. Cafarell, and Justice Nancy E. Smith, having jurisdiction to preside over Petitioner's matter, as a mistake erroneously "overlooked." Providing them with irrefutable documentary evidence that proved, the filing fee requested of (\$315) and the (1) original and (10) copies thereof, were certified to have been received by the Appellate Court on or about October 24, 2012. Absolutely dismissing the allegations and/or pretense used in second mailing by the unidentified Court Clerk, in dismissing and/or returning Petitioner's filing fee (\$315) requested. In as such, giving further support to Petitioner's suspicions that this was all a collaborated effort to deprive Petitioner of his due process right to have access to the Courts and be heard on his properly and timely filed Writ of Mandamus.

c) TAKE THIRD mailing to Petitioner by Ivan E. Lee, Principal Appellate Court Attorney, dated November 2, 2012. This letter immediately upon reading, totally dismisses the afore-mentioned unidentified Appellate Court Clerk's assertions made to the Petitioner in letters dated September 26, 2012, and October 25, 2012, further confirming Petitioner's above mentioned suspicion. In fact, when considering the assertions made in those letters, it would be totally impossible for Justice Stephen K. Lindley, to have had Petitioner's application of his Order to Show Cause before him, never mind making a determination to had declined to sign Petitioner's Order, when according to the unidentified Appellate Court Clerk's reason(s) for requesting the (\$315) filing fee from the Petitioner in the first place, was due to the fact that Petitioner would need to purchase an additional RJI index number, to have his petition properly filed/recorded and calendared to be heard before an Appellate Court. This factor, coupled with the fact that the (1) original and (10) copies thereof (mailed certified return receipt # [7011 1570 0001 1146 2601], to the Honorable Justice Nancy E. Smith, who has the jurisdiction/authority to preside over this matter, has up to this date, refused to intervene and/or take action to investigate the matter), has not been located, dismisses the third mailing in its entirety. Nevertheless, one of several irrefutable factors that stand out in this third mailing, is the date the letter appears to be drafted, November 2, 2012, as Petitioner's re-submitted filing fee of (\$315) had not yet been received by the

Appellate Court Clerk's Office. Making it impossible to have had Petitioner's petition filed and/or before the Appellate Court, as asserted in the third mailing. Not to mention that the aforementioned date of November 2, 2012, becomes the most significant part of the letter, because it is on that date that we can link the named and unnamed parties that are involved in conspiring to intentionally avoid, at all costs, Petitioner's merits as set forth in his Writ of Mandamus brought against Justice Thomas G. Leone, from being heard and for the Petitioner to obtain his entitled relief in this action.

d) It merits to mention, that while Petitioner was experiencing the afore-mentioned improprieties, he did in fact bring them to the attention of the afore-mentioned Justice, Nancy E. Smith, in letters dated October 18, 2012 and October 30, 2012 and in two separate letters dated November 2, 2012, urging said Justice to intervene and/or exercise her authority over the unwarranted improprieties, so that the Petitioner will not be made to endure anymore then he has already been made to endure by the lower Court throughout the entire process and/or proceedings, as the record before the lower Court has irrefutably established that he has prevailed and only seeks adjudication of lower Court's Order, dated April 5, 2012, by way of entering a final judgment in this action. That while he fears and/or suspects if she fails to act or make such intervention, he will continue to suffer and be prejudiced. (See, Canon 3. [22 NYCRR § 100.3] (D)(1)).

e) TAKE FOURTH mailing to Petitioner by Kelly J. Wejko, Chief Clerk of the Supreme and County Courts of the County of Cayuga, dated November 2, 2012, asserting: "Enclosed is a Certified copy of the Memorandum Decision and Judgment rendered by Hon. THOMAS G. LEONE, on and a notice of your rights on Appeal. All original papers have been filed with the Cayuga County Clerk." Herein, upon receipt of the documents Petitioner immediately took notice of the date on cover letter, the appeal rights letter and the alleged filing of the Memorandum Decision with the Cayuga County Clerk's Office, all taking place on November 2, 2012!?! Confirming Petitioner's afore-mentioned fears and ongoing suspicion, conveyed and/or brought under urgency to the attention of the afore-mentioned Justice, Nancy E. Smith. Petitioner immediately knew that the documents received were fraudulent, and carefully drafted for the sole purpose of assuring that the meritorious assertions made in Petitioner's Writ of Mandamus, supported by the record, will never receive a day in Court, in their desperate attempt to shield Justice Thomas G. Leone, from civil and criminal liability, when he is compelled to respond/answer by way of sworn affidavit, as demanded by the Rules of Civil Practice when making a return to an Order to Show Cause, as would be issued by this Honorable Appellate Court in accordance with the afore-mentioned Writ of Mandamus. Petitioner, upon a close purview of the afore-mentioned documents, beginning with the Chief Clerk's cover letter and notice of right to appeal, absent of any proper certification, immediately took

cognizance of several improprieties within said documents, specifically the intentional misrepresentation regarding the caption reference of the case. Being that In re Nelson Rodriguez # 2012-0358, is the appropriate caption and not 'INDEX 2012-0358 petition, Rodriguez v. Graham, as indicated in documents received, due to the fact that it is evidentially undisputed by the record made before the lower Court recorded/filed with the Cayuga County Clerk's Office, that Respondent failed to appear and/or file any papers in opposition by Court's scheduled final deadline of July 12, 2012, as mandated upon an issuance of an Order to Show Cause, pursuant to CPLR § 7006(a), and not by way of petition pursuant to CPLR § 7008, as indicated in the aforementioned documents received in an attempt to undermine this Appellate Court's integrity, which explains why cover letter and notice of right to appeal, are absent the date claimed the Memorandum/Decision was rendered. Moreover, the fact that the Petitioner was provided with the afore-mentioned notice of right to appeal that, within itself, is an out right intentional material misrepresentation of the facts in this case, as there is absolutely no reason that a prevailing party in an action would need to appeal. Further supporting Petitioner's afore-mentioned assertions that the documents are fraudulent.

Petitioner now being forced to review what he knows to be a fraudulent document, a sham judgment having absolutely no legal standing in law and nonbinding upon Petitioner's prevailing

action, nor can it prohibit his appropriately filed Writ of Mandamus from being heard at this Appellate Court level; hereby taking cognizance of the face of sham Memorandum/Decision document (alleged to have been filed at the Cayuga County Clerk's Office on November 2, 2012, at 11:35AM), represents an intentional material misrepresentation of the facts recorded before the lower Court and filed with the Cayuga County Clerk's Office in this action, where the following irrefutable facts supports Petitioner's contentions, disputing the improprieties on the face of the Memorandum/Decision document:

1) Respondent never appeared and/or filed a response in this action;

2) The action is ex parte, which disputes the caption;

3) The document is absent of naming the Court Room Part it alleges the action was heard and;

4) The time and date it bares on the face of the document claiming to have been recorded and on file with the Cayuga County Clerk's Office is absent on the other three (3) pages which is mandated by statute/law to be recorded.

In fact, a purview of the entire afore-mentioned sham Memorandum/Decision makes it clear that it intentionally misconstrues the facts established in Petitioner's prima facie case, as it purposely evades Court's April 5, 2012, Order to Show Cause, an Order that the Court fails to mention due to the fact

that it has never been controverted by virtue of a return. Petitioner does need to emphasize that the Court in its' sham memorandum/decision purposely misleads the reader when it claims on page 2, second ¶, at bottom that, "even if a return is not filed on a petition for a writ of habeas corpus, a petitioner is not entitled to immediate release." Then later further asserting, "The Court may still reach the merits of the petition even in the absence of a return." It's misleading in two instances, for one, the cases relied upon are factually and procedurally distinguishable from the instant case, as the Court's cited cases deal with petitions absent an Order to Show Cause, where the Court in the instant case upon Petitioner's initial filing of his Writ of Habeas Corpus, found merit and sufficient cause to have granted/issued an Order to Show Cause. Establishing that the Court's silence regarding its' own Order to Show Cause, dated April 5, 2012, is evidence of Court's fraudulent intent to obstruct justice and deny the Petitioner his relief.

In as such, this is also why Court's remaining silent with regard to granting Respondent three (3) extensions in this action, and intentionally misrepresenting the facts when Court claims in sham memorandum/decision that "petitioner alleges that respondent failed to timely file his verified answer and return," when in fact no where in Petitioner's moving papers does he allege that respondent failed to timely file this verified "answer and return," Petitioner has always asserted that the

respondent in failing to respond to his writ of habeas corpus in its entirety, rendered the matter ex parte and in failing to respond it establishes the prima facie case as established by Court's own Order to Show Cause, which again, under CPLR § 7006(a), mandates it be controverted by "making a return," said return is described by CPLR § 7008(a) & (b), and the Court's use of this section of the statute to mischaracterize Petitioner's ex parte motion, is done to mislead the reader and misrepresent the facts. Besides, the mere fact that the Court takes notice of Petitioner's ex parte and Proposed Judgment motions, makes it clear that these motions were properly before the Court, yet the Court failed to abide by the CPLR in addressing and bringing these matters to a close within the statutory sixty (60) day time-frame (see CPLR § 2219(a)).

Though Petitioner's Writ of Mandamus properly filed with this Appellate Court, supports his contention that he is not under any legal obligation to submit a response to "sham Memorandum/Decision" and can choose to totally ignore and/or refuse to entertain the fraudulent document in its' entirety, however, due to the fact that Petitioner, moving by way of this sworn affidavit in support of his motion to Vacate Court's Memorandum/Decision, Based Upon Fraud and Misrepresentation, respectfully likes to point out to this Appellate Court, that even the argument being used to support sham Memorandum/Decision