

Nelson Rodriguez
Auburn Correctional Facility
135 State Street- Box 618
Auburn, New York 13024

Frances E. Cafarell
Chief Clerk
Appellate Division:
Fourth Judicial Department
50 East Avenue, Suite 200
Rochester, New York 14604

January 17, 2013

Re: In re Nelson Rodriguez
Index No. 2012-0358

Dear Ms. Cafarell:

Please be advised that the Petitioner, upon receipt of your letter dated December 26, 2012, and after a phone conversation with Mrs. Perretti, a member/supporter of A New Beginning Innocence Project on January 10, 2013, is aware of your position regarding how Petitioner should proceed to seek the relief prayed for in his Writ of Mandamus. The Petitioner is also aware that you have informed the afore-mentioned member/supporter on numerous occasions via phone conversations, that the Petitioner has been misadvised on how to proceed, that the Petitioner is going about it all wrong, that there is a respondent in this matter. And when asked by the afore-mentioned member/supporter, Mrs. Perretti, who are you referring to as being the Respondents in this action your assertion was "well he (Petitioner) certainly didn't put himself in prison on his own (indicating the trial prosecutor) someone put him in there" (words to that effect). In as much as that is an accurate assertion, the truth of the matter is that you being a member of the Bar since 1986, qualifies you to be familiar with the Civil Motion Practice Procedures.

Therefore, based upon the facts as asserted in Petitioner's moving papers, it should be obviously clear that the Petitioner

was within his right to have moved the lower Court by way of Writ of Habeas Corpus, in this action as the irrefutable documentary evidence attached as exhibits in support of Petitioner's aforementioned petition proves that when the Petitioner stood before a Bronx Supreme Court throughout three (3) separate trials proclaiming his innocence in this case, the Court lacked both, subject matter and in persona jurisdiction of the action, as the alleged accusatory instrument used to confer the conviction is certified to have been filed with the Bronx Court and County Clerk's Office on or about January 9, 1990, four years after Petitioner's illegal arrest, multiple defective trials, and two years from the date of his wrongful and illegal conviction, for which irrefutable certified documentary evidence supports Petitioner's other assertion set forth in his petition, that the sentence imposed of 58 1/3 years to Life in open Court was never filed and/or recorded in this case. In as such, it's these aforementioned irrefutable facts that prompted Petitioner to seek his immediate release from an illegal conviction and of his illegal confinement by way of a State Writ of Habeas Corpus, fully described here below for which the respondent, Superintendent Harold H. Graham, having charge of the illegal custody of the Petitioner, failed to appear and/or respond in this action.

However, it is evident that based upon the afore-mentioned assertion made by you (via phone), to the afore-mentioned member/supporter, Mrs. Perretti, and asserting the same to the Petitioner by way of correspondence dated December 17, 2012 and December 26, 2012, coupled with the fact that you and your office has been in possession of Petitioner's Writ of Mandamus since September 24, 2012, along with numerous correspondences with attached documentary evidence as exhibits in support of the afore-mentioned assertions brought before this Appellate Court in this action, makes it that much more impossible for one to believe that your "misadvice" to both the Petitioner and Mrs. Perretti, is due to your misconstruing the facts as set forth in

Petitioner's petition presently before you and your office for which the Petitioner hereby takes the liberty to fully describe here below.

On April 3, 2012, a petition for Habeas Corpus was filed in the Cayuga County Clerk's Office and the required filing fee submitted, causing an Article 70 Special Proceeding to be commenced. The Supreme Court of Cayuga County, Justice Thomas G. Leone, did sign an Order to Show Cause on April 5, 2012, pursuant to Civil Practice Law & Rules (CPLR) § 7003(a), as said Court determined that it was "...clear there is no disputable issue of fact," did "...order the respondent to show cause why the person detained should not be released." Said Order to Show Cause was filed April 12, 2012, in the Cayuga County Clerk's Office and was timely and properly served upon the Respondent, Harold H. Graham, Superintendent of Auburn Correctional Facility, and the respondent's Attorney, Ray A. Kyles, Assistant Attorney General, working under Eric T. Schneidermann, Syracuse Regional Office. As CPLR § 7004(b) clearly mandates; "The Writ shall be directed to, and the respondent shall be, the person having custody of the person detained." This respondent was mandated by CPLR § 7006(a) to make a return to the Order to Show Cause dated April 5, 2012, and filed April 12, 2012, by the May 16, 2012, return date. CPLR § 7008(a) specifies when a return (not if) shall be filed and served; and CPLR § 7008(b) further explicitly describes the content of said return, which it is mandated that the respondent adhere to. And the recent certification made by the Cayuga County Clerk's Office on December 26, 2012, supports Petitioner's assertions that the respondent failed to appear and/or respond in this action.

The Petitioner has provided this Appellate Court with documentary evidence from the Cayuga County Clerk's Office, first non-certified and finally certified on December 26, 2012, which irrefutably establishes that the only filings before the Supreme Court of Cayuga County, under the full caption of, in the Matter

of Rodriguez v. Graham, Index No. 2012-0358, was the Petitioner's filings, irrefutably establishing that once the respondent failed to meet the statutory mandate of going forward with the case He then defaulted by abandoning the action, and the proceedings were from that point on, ex parte, as the doctrine of res judicata forever attaches to this action.

In as such, any so called respondents asserted by you including the trial prosecutor and the Bronx County Clerk's Office, had an opportunity to respond and make affidavits controverting the Petitioner's assertions as set forth in his Article 70 Habeas Corpus petition, pursuant to CPLR § 7008(a) & (b), yet the "respondents" remained silent. In Civil Practice, both statutory and Common Law, which as an attorney and/or a practiced member of the Bar, you are cognizant that failure to refute an allegation is an admission of its' veracity. The respondents had an opportunity to offer certified documentary evidence in contravention to the Petitioner's certified documentary evidence, they failed to do so. The prima facie case established by the Petitioner and the Court's Order to Show Cause dated April 5, 2012, became the law of the case upon the failure of the respondents to appear and/or respond. Clearly establishing that whatever respondent existed prior to May 16, 2012, no longer exists in this action. And assuming arguendo the return date was July 12, 2012, as the Petitioner and his supporters were led to believe, the same assertion still holds true, as the now certified record evidence irrefutably establishes.

Additionally, upon the afore-mentioned asserted facts Petitioner then move the Supreme Court of Cayuga County, Justice Thomas G. Leone, for Summary Judgment, ex parte, by way of Default, on July 23, 2012, (which is evident that the Court took notice of said ex parte Default motion as it's mentioned in

Court's October 30, 2012, sham memorandum/decision, for which the Court had 60 days to bring to a close). Petitioner then on August 28, 2012, motioned the same Court with a Proposed Judgment Discharging a Person Detained, where again the Court took notice of said motion in it's afore-mentioned October 30, 2012 sham memorandum/decision, with an attached copy of Petitioner's ex parte motion for summary judgment by way of default, for which the defaulting party was provided a courtesy copy of same, giving them a 30 day window of opportunity to submit opposing papers, motioning the Court to strike Petitioner's ex parte summary judgment motion by way of default as improper, coupled with the fact that the Court also had an opportunity to strike the ex parte motion upon its initial submission as improper and failed to do so. Especially considering that the record made before this Appellate Court establishes the underhanded tactics of the lower Court throughout these Proceedings, in an attempt to drown the Petitioner in the dark mirky waters of Procedural remoteness, with the design of depriving the Petitioner of his due entitlement to liberty, as clearly displayed throughout the entire proceedings in this action, establishes that if said Court had the opportunity to dismiss or strike the Petitioner's afore-mentioned timely and properly filed motions on a Procedural defect or error, it is undeniable that the lower Court Justice, Thomas G. Leone, would immediately have done so. Nevertheless, the Cayuga County Clerk's Office is certified to have received same but failed to file it in their records/files. In any event, had there in fact been a response filed by the respondent with the Cayuga County Clerk's Office, it certainly would have been recorded and/or filed with the afore-mentioned County Clerk's Office, that never happened, as the irrefutable certified record evidence undisputably establishes.

Nevertheless, it is the afore-mentioned facts that prompted the Petitioner to move this Appellate Court ex parte for a Writ of Mandamus, to compel the lower Court to perform a ministerial

duty as it is owed the Petitioner from the moment the opposing party defaulted and abandoned the action. Yet, the Supreme Court of Cayuga County, Justice Thomas G. Leone, as up to date has continued to deny the Petitioner due process, revealing the undeniable bias that has motivated the continued violations of Petitioner's Constitutional rights in having this matter reach a conclusion consistent with the facts as they are established on the record, supporting Petitioner's ongoing assertion that the lower Court is in contempt of its own Order to Show Cause dated April 5, 2012, where it clearly found sufficient cause appearing in Petitioner's moving papers, which authorized the Court to execute an Order to Show Cause in this action. And upon submission of Petitioner's ex parte Motion to this Appellate Court, dated September 24, 2012, that Motion was effectively "made" when the ex parte motion papers and proposed order were properly submitted to this Court (See, 2d Rep. Leg. Doc. (1958) No. 13, p. 181). Lastly, once the Writ of Mandamus was made and/or filed with this Appellate Court, it effectuated a stay to the lower Court proceedings until such time as this Appellate Court adjudicated Petitioner's Writ of Mandamus, which to this day has not happened, in violation of the Petitioner's State and Federal Constitutional and Due Process Rights.

Petitioner, upon his completion of this correspondence dated January 16, 2013, received legal correspondence from you and therefore he now seeks to incorporate his response to said legal correspondence, asserting upon a close purview, the following assertions as described here below:

Contrary to your assertions:

- 1) The reason there is no proceeding pending before this Appellate Court is due to the fact that you and your Appellate Court Clerk's Office have been stone-walling the Petitioner and

not allowing the timely and properly submitted Writ of Mandamus to be filed in this action.

2) The reason that the Petitioner's Writ of Mandamus cannot be considered nunc pro tunc, as you assert, is due to the fact that you and your office have not filed it.

3) Your explanation regarding the procedures of special proceedings is not correct in that you have failed to recognize that the Petitioner's habeas corpus proceeding is defined by the CPLR as a "Special Proceeding" and the Writ of Mandamus is a motion to the Appellate Court which sits as a trial judge over a judge-tried case, therefore said Writ of Mandamus was not an attempt to "commence a proceeding" as the action is still ongoing.

4) Your continued assertion of there being a respondent in this action is unsupported by the Certified Cayuga County Clerk's record dated December 26, 2012, and this is an obvious attempt by you to get the Petitioner to invite the defaulting party back in and abandon the clear and undisputed entitlement to liberty as a result of said default, has not gone unnoticed.

5) PLEASE TAKE NOTICE, that the Petitioner has no intention in following your directions regarding the procedural steps to secure his entitled relief. You were placed on notice by Mrs. Perretti, the afore-mentioned member/supporter that the Petitioner will not seek to "commence" an Article 78 Proceeding by submitting 1 original and 10 copies of a petition and notice of petition, as also asserted above, this is an ongoing action. Therefore, if you persist in this intentional denial of access to the court, the only submission you will receive from the Petitioner, is a summons to appear as a defendant, for Obstruction of Justice, concealing a known fraud, willful and

wanton deception, denying access to the courts, conspiring to deprive a person of a constitutional right to liberty, which has clearly been established, as well as other unethical and professional violations of your public office.

PLEASE TAKE FURTHER NOTICE, the Petitioner and his supporters have done everything in their power to bring this matter to a close through this Appellate Court, and have been met with every obstacle imaginable created by you and your Clerk's Office and the Appellate Attorney, Ivan E. Lee, to sidetrack and otherwise derail the Petitioner's meritorious claims as set forth in his appropriately submitted Writ of Mandamus. The Petitioner will no longer seek assistance from this Appellate Division: Fourth Judicial Department, as it is clear that the door to justice has been locked shut to the Petitioner at this juncture.

C A V E A T

Failure to enter this Default Judgment, properly filed on July 23, 2012, supported by documentary evidence, is an obstruction of justice and a deliberate denial of Petitioner's entitled right to liberty, and the liability that automatically attached to the defaulting party will attach as an accomplice liability to any other party who refuse their duty and/or conspire to impede that right.

Dated: January 13, 2013
Auburn, New York

Signed to before me this

12th day of January, 2013



N O T A R Y P U B L I C

Michael A. Holm
Notary Public
01H06241107

Qualified in Cayuga County
My Commission Expires on 5/16/2015

Respectfully Submitted,



Nelson Rodriguez, Pro se

Cc:

Mrs. Barbara Perretti,
Member/Supporter of A
New Beginning Innocence
Project
Chief Judge,
Henry J. Scudder
www.freenelsonrodrigueznow.com