

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

Presiding Justice: Henry J. Scudder
Appellate Division:
Fourth Judicial Department
19 E. Pulteney Sq.
Bath, New York 14810-1575

November 13, 2012

Re: In re Nelson Rodriguez
Return Receipt # 7009 3410 0000 4915 7721

Dear Presiding Justice Scudder:

Please be advised that the Petitioner in the above referenced matter by way of this Notice/Formal Complaint, hereby respectfully brings this Notice/Complaint to your most esteemed Honor's attention in hopes that your Honor will conduct a thorough investigation into the serious mishandling and irrefutable official misconduct committed by the lower Court, it's County Clerk's Office and several members of the Bar assigned to your Fourth Department Appellate Division: Court in the above referenced matter.

Inassuch, Petitioner, upon receiving the fraudulent Judgment from Justice, Thomas G. Leone, dated October 30, 2012, is being forced to file a Notice of Appeal in this action under extreme duress, in order to protect any rights that might be jeopardized should Petitioner fail to file said Notice, as the record made below supports Petitioner's assertions that the only matter that should be before this Appellate Court is his timely filed Writ of Mandamus to compel a ministerial mandated duty to be performed by the lower Court Justice in this matter.

In fact, the irrefutable documentary evidence that the Petitioner has provided your Honorable Judgship to review/examine speaks for itself, as it establishes that the lower Court, it's

County Clerk's Office, with the assistance of several members of your Appellate Court, has contrived to alter their official Court and County Clerk's records as well as derail the efforts of the Petitioner in filing his Writ of Mandamus, in their desperate attempt to avoid the merits of Petitioner's Writ of Mandamus, which was properly and timely filed with this Appellate Court. As well as denying Petitioner's right to access to the Courts and his due entitlement of relief.

Herein, Petitioner identifies the following list of documents:

a) Writ of Mandamus (filed Sept. 24, 2012, with the Appellate Division) with postage receipt from County Clerk's Office.

b) Affidavit of Service.

c) Letter dated October 18, 2012, and VERIFICATION, reflecting Petitioner's second attempt to file Writ of Mandamus with revised Affidavit in Support of an Order to Show Cause and Order to Show Cause, with Appellate Division: Fourth Department, addressed to Justice Nancy E. Smith.

d) Letter dated October 27, 2012, to Susan M. Dwyer, County Clerk, requesting a Certified copy of case-file Computer Printout.

e) Letter dated October 30, 2012, to Appellate Clerk's Office in reference to said office returning Petitioner's filing fee for Writ of Mandamus.

f) Letter dated November 2, 2012, to Nancy E. Smith, re-submitting the filing fee for a Writ of Mandamus.

g) Letter dated November 2, 2012, to Nancy E. Smith, Justice of the Fourth Department, seeking the remedy pursuant to CPLR § 2001, for the erroneous returning of the filing fee by the Appellate Court Clerk, and for the new Order to Show Cause and Affidavit in Support of an Order to Show Cause to be filed nunc pro tunc, to the original October 18, 2012, filing.

h) Sham Judgment of Justice Thomas G. Leone, baring the County Clerk's electronic time and date stamp indicating it was filed on

November 2, 2012, at 11:35A, by a B T.

i) Letter from Susan M. Dwyer, County Clerk of Cayuga, dated November 2, 2012, indicating that the requested printout was enclosed, absent the certification as initially requested in letter dated October 27, 2012.

j) The County Clerk's Court Printout indicating two separate run dates, the first on November 2, 2012, revealing all that was on file as of November 2, 2012, run time of 2:21P. Note the Sham Judgment baring the same date and time of 11:35A, is not secure on said printout. The second run date of November 6, 2012, with the run time of 11:26A, contains an interesting pen written note from whom Petitioner suspects to be Susan M. Dwyer, stating that all entries baring the action date of 11/02/2012, were "new as of Nov. 2, 2012", which when compared to the run date of 11/02/2012, shows that these entries must have occurred after 2:21P.

k) Photocopies of Disbursement or Refund Request forms, Contraband Receipt, Certified Mail and Return Receipts, which reflects the timely filing and reception of Petitioner's mailings to the Courts and agencies in question in attempting to secure his right to liberty by gaining access to the Courts. These verifications and receipts prove that the motions and filings were received by the Court and County Clerk's Office of Cayuga County and the Appellate Division, well before they were illegally entered into the County Clerk's Court printout, most of them by months, revealing evidence of Tampering with Official records, which may explain why Susan M. Dwyer, County Clerk, failed to provide a certified copy of the afore-mentioned Court printout as requested.

l) Letter from Ivan E. Lee, Principal Appellate Court Attorney, dated November 2, 2012, informing the Petitioner that his 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. Which confuses the Petitioner as the action had not yet been filed nor received an RJI # and/or absent of the

resubmitted fee required for filing, thereby not properly being before his Honor, Stephen K. Lindley, as the above mentioned facts would have made it impossible to have been calendared before the afore-mentioned Court to be heard.

m) Letter dated November 6, 2012, to Nancy E. Smith, requesting an emergency Stay, pursuant to CPLR § 2201, while the fraudulent and jurisdictionally defective sham judgment be vacated and Petitioner's rights be secured.

n) Letter dated November 7, 2012, to Susan M. Dwyer, County Clerk, placing her on Notice concerning her or her office being a party to fraud by tampering with official records or allowing others to do so.

Which warrants this Court to Order a most exacting investigation into these allegations concerning the conduct of the lower Court, it's County Clerk's Office and several members of this Fourth Department Appellate Division personnel and let the chips fall where they may, further ordering a stay on Petitioner's Writ of Mandamus, until such time as this matter be thoroughly investigated and properly resolved, so that the Writ of Mandamus may then properly be heard nunc pro tunc to it's initial date of filing.

Lastly, the Petitioner also respectfully requests to be provided with copies of all to/froms and correspondance of this Honorable Court's initial Order for said investigation and it's findings pursuant to this Court's Rules and Ethics Committee, in ordering said investigation but not limited to any and all sanctions that may be ordered by this Court to be taken against any of the above-mentioned officials as a result of their official misconduct in this action.

Dated: November 13, 2012

Cc: Governor's Office
Mrs. Sonia Bonilla &
Mrs. Irma Diaz, Members
of a New Beginning Innocence Project

Respectfully Submitted,



Nelson Rodriguez, Pro se

SUPREME COURT, APPELLATE DIVISION:
FOURTH JUDICIAL DEPARTMENT

-----X	APPELLATE DIVISION
STATE OF NEW YORK: EX REL. A NEW	: 4TH DEPARTMENT
BEGINNING INNOCENCE PROJECT	: WRIT OF MANDAMUS EX
"WE THE PEOPLE" ON BEHALF OF	: PARTE PURSUANT TO CPLR
NELSON RODRIGUEZ	: §§ 2213(a); 2217(b);
	: 7801; 7803(1) & 7804
	: :
	: :
Petitioner.	: Index No. 2012-0358
-----X	

TO: APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

Comes now Nelson Rodriguez, by Mr. Carlos Davila, President of A NEW BEGINNING INNOCENCE PROJECT, located 391 E. 149th Street, Bronx, New York 10455, and moves the Court for leave to file the Petition for a Writ of Mandamus;

Petitioner further moves the Court that an Order and Rule be entered and issued, directing the Honorable Thomas G. Leone, Justice Supreme Court of New York, County of Cayuga: Special Term, 154 Genesee Street, Auburn, New York 13021, in his capacity as Supreme Court Justice, of New York, to Show Cause why a Writ of Mandamus should not issue against him in accordance with prayer of said petition, and why your Petitioner should not have such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

I JURISDICTION

This Court has jurisdiction over the present Action pursuant to the Civil Practice Law & Rules (CPLR) §§ 2213(a); 2217(b); 217(1);

506(b)(1); 7801; 7803(1); and 7804, which seeks to compel a body or officer to perform a duty enjoined upon it by law.

II QUESTION PRESENTED

Absent any triable action, the Respondent having failed to go forward with the case, an Order to Show Cause having issued directing said party to show cause why Petitioner should not receive the relief sought in Habeas Corpus Petition; upon what justification does a Court fail to Enter a Judgment granting the relief previously recognized as due the Petitioner in said Court's afore-mentioned Order to Show Cause?

III INTRODUCTION

1) The Petitioner, We the People of the State of New York: ex rel. 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 Nelson Rodriguez, did cause to be filed with the Supreme Court of New York, County of Cayuga: Special Term, 154 Genesee Street, Auburn, New York 13021, a Petition for a Writ of Habeas Corpus, pursuant to the Civil Practice Law & Rules of New York (CPLR) § 7002, attested to by thousands of signatures attached to the Petition, both hard copy and those on electric file by way of the web site www.freenelsonrodrigueznow.com, which represents concerned New York

residents and citizens of the world, foreign and domestic, and Verified by Mr. Carlos M. Davila, President of the afore-mentioned Innocence Project, on the 2nd day of April, 2012, and 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 the 3rd day April, 2012 (See, Exhibit "A").

2) The Court upon consideration of Petitioner's Writ of Habeas Corpus Petition (ibid.), 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 the 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 Order to Show Cause, together with a copy of the petition, supporting affidavit and all papers upon which it is based, on the Attorney General, Syracuse Regional Office, 615 Erie Boulevard West, Suite 102, Syracuse, New York 13024, and on Respondent by regular mail, on or before the 25th day of April, 2012, be deemed good and sufficient service" (See, Exhibit "B").

3) In letters to the Court dated May 17, 2012; June 13, 2012; and June 26, 2012, while petitioner made timely objections regarding Respondent's failure to make timely request for

extensions in violation of CPLR § 2214(b) and, while the Court granted final extension six (6) days beyond Court deadline, where the Petitioner had also alerted the Court that Respondent in their multiple requests for the afore-mentioned extensions had failed to identify the requested documents they claimed to have been requesting from the New York State Department of Corrections and Community Supervision (DOCCS), in order for the Court to properly review the evidence and make a decision in the matter (See, Exhibit "C"). Yet, the Court failed to acknowledge and/or respond to Petitioner's objections.

4) In as much as the Court ignored Petitioner's afore-mentioned objections, the Court also ignored Petitioner's out set objection for the Attorney General's Office to represent the Respondent in this action as Mr. Carlos M. Davila, President of the afore-mentioned A New Beginning Innocence Project, who filed the related Writ on Petitioner's behalf in this action, also on November 15, 2011, filed on behalf of the Petitioner an eighty-one (81) page Complaint with the Attorney General's Office at: 120 Broadway, New York, New York 10271, against the Bronx District Attorney's Office, its trial prosecutor and several other named court personnel, raising the same claims raised before the presiding Court along with additional serious claims that the Attorney General's Office has failed to respond to which can be construed as an ongoing investigation, making a case for conflict of interest. Nevertheless, in the instant case as the Court

continued to disregard Petitioner's ongoing objections regarding Respondent's untimely requests for extensions; their failure to identify the documents claimed to have been requested and; Petitioner's conflict of interest claim, forcing the Petitioner on or about June 17, 2012, to move under the "Freedom of Information Law" pursuant to Public Officer's Law § 84 et seq., to have Assistant Attorney General, Ray A. Kyles, who was assigned to represent the Respondent in this action, turn over and/or provide the presiding Court and Petitioner with any and all correspondence he and his Office claim they have been forwarding to the New York State Department of Corrections and Community Supervision, regarding the unidentified documents requested of that agency and used to obtain the extensions, establishing that the Court not only failed to act impartial, but failed to compel the Respondent to act in accordance with the statutory mandate of the Freedom of Information Law (See, Exhibit "D"). Furthermore, under the Civil Practice Law & Rules (CPLR), governing Special Proceedings, where a Pro se litigant makes a timely motion by way of objection, it can support the Court to act Sua Sponte to enter a default judgment on the disobedient party (Cf. CPLR § 3126(3)).

5) Upon the Court's deadline of July 12, 2012, representatives for the Petitioner appearing at the Courthouse of the Supreme Court of New York, Cayuga County: Special Term, 154 Genesee Street, Auburn, New York 13021, at approximately 9:00 in the forenoon, it being told them by the Court Clerk that the Justice was in chambers

and would not see anyone, that a hearing will be held this day upon the Petitioner's moving papers, no submissions of the Respondent having been received by the Court, that no more extensions will be granted, a decision would be had and/or entered shortly, the aforementioned representatives left the Courthouse and visited Petitioner at Auburn Correctional Facility, 135 State Street- Box 618, Auburn, New York 13024, and informed him of those recent events (See attached affidavits, Exhibit "E").

6) Petitioner, being made aware by his representatives that Respondent defaulted, by failing to respond to Petitioner's Writ of Habeas Corpus, on Court's final deadline of July 12, 2012, Moved the Court, Ex parte, on or about July 13, 2012, (certified return receipt # 7009 3410 0000 4918 3812), for a Summary Judgment, by way of Default (See, Exhibit "F").

7) On August 28, 2012, Petitioner having received no acknowledgment from the Court regarding the status of Petitioner's Ex parte Motion, did cause to be filed, by certified return receipt (# 7011 1570 0001 1146 2700) with the Supreme Court of New York, County of Cayuga: Special Term, 154 Genesee Street, Auburn, New York 13024, a Proposed Judgment Discharging Person Detained pursuant to CPLR §§ 7010; 2220(a) & (b); 3212(a) & (b); 3215(a) & (b); 411; 5011; and 5016(a) & (c), providing Notice of same to all interested parties, with an affidavit of service (See, Exhibit "G"). Thereby satisfying the statutory mandate as the sole party,

to move the Court to enter a judgment, so that Petitioner can serve the Respondent with Notice of Entry, and seek thereafter the enforcement of the Court's judgment, Petitioner's Right to Liberty.

In order to prevail on a mandamus claim the Petitioner must satisfy three essential prerequisites; a) A right to the relief sought; b) A duty on the party to perform; and c) That no adequate remedy like an appeal exists:

I

Based upon Petitioner's uncontested CPLR § 7002, Writ of Habeas Corpus claim, Petitioner has established a clear right to his Liberty.

II

As the triable issue has been removed from the action by virtue of the opposition's failure to move forward with the case; all that remains for the Justice to perform is a non-discretionary, ministerial function of converting the Order to Show Cause into a final Judgment.

III

As an Order to Show Cause is non-final and appealing such would not decide any controversy, when a party fails to meet the

obligatory mandate of responding, which is necessary to controvert the prima facie case, the prevailing party would not seek appellate review of that Order to Show Cause, but entry of Judgment based on that Order. Thereby requiring the extraordinary Writ of Mandamus.

V THE WRIT OF MANDAMUS

1) In the instant case Petitioner seeks to establish that Mandamus is the appropriate remedy. It is well settled that the remedy of Mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion (See, Matter of County of Fulton v. State of New York, 76 NY2d 675, 678, 563 NYS2d 33, 564 NE2d 643; Matter of Mullen v. Axelrod, 74 NY2d 580, 583, 549 NYS2d 953, 549 NE2d 144; Klostermann v. Cuomo, 61 NY2d 525, 539, 475 NYS2d 247, 463 NE2d 588; Matter of Legal Aid Society v. Scheinman, 53 NY2d 12, 16, 439 NYS2d 882, 422 NE2d 542.

2) Herein Petitioner has shown that due to Respondent's failure to go forward with the case (¶'s 5 & 6 Supra), it rendered the assertions as set forth in Petitioner's Writ of Habeas Corpus ipso facto, the law of the case, removing any issue of material fact to be determined. In as such, rendering the matter hereinafter Ex parte, as Respondent removed himself from the action by said default (ibid.). Subsequently, Petitioner was in his right to move

the Court by way of Ex parte motion for a Summary Judgment by way of Default, based upon that theory (ibid.). "A motion for summary judgment may be granted only when there is no doubt as to the absence of any triable issue of material fact (Kolivas v. Kirchoff, 14 AD3d 493, 787 NYS2d 392 [2nd Dept. 2005])...(See also, Andre v. Pomeroy, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853), where it is asserted, "where there is no genuine issue to be resolved at trial, case should be summarily decided, and an unfounded reluctance to employ remedy will only serve to swell trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

A party seeking mandamus must show a "clear legal right" to relief (County of Fulton, Supra, 76 NY2d at 678, 563 NYS2d 33, 564 NE2d 643, citing, Matter of Legal Aid Society v. Scheinmann, Supra), the availability of the remedy depends "not on the [Petitioner's] substantive entitlement to prevail, but on the nature of the duty sought to be commanded- i.e., Mandatory, non-discretionary action" (Matter of Hamptons Hosp. & Med. Ctr v. Moore, 52 NY2d 88, 97, 436 NYS2d 239, 417 NE2d 533). If the right performance is clouded by "reasonable doubt or controversy," the petition should be denied. See e.g. New York Civ. Liberties Union v. State, 4 NY3d 175, 791 NYS2d 507, 824 NE2d 947 (2005); Association of Surrogate and Supreme Court Reporters within the City of New York v. Bartlett, 40 NY2d 571, 574, 388 NYS2d 882, 357 NE2d 353 (1976). Only ministerial acts that involve no exercise of

judgment or discretion are subject to mandamus to compel. (Gimprich V. Board of Education of the City of New York, 306 NY 401, 188 NE2d 578 (1954).

It requires not the least amount of persuasive argument to assert that once a dispute has been decided, whether by adjudication or default, the party(ies) have a right for that judgment to be entered (Cf. Ex parte Newman, 81 U.S. 152, 20 L.Ed 877, 14 Wall. 152)(Cf. also, In re Watts, 130 C.C.A. 520, 214 F. 80). Where Petitioner's Writ of Habeas Corpus petition resulted in an Order to Show Cause (§ 2 Supra), demanding of the Respondent to show cause why the relief sought should not be granted to Petitioner, failure Respondent to respond to said Writ in its entirety, amounts to a concession to all facts asserted therein. Said default can be considered arguendo, a form of stipulation by the silent Respondent, of the veracity of Petitioner's factual and legal claims. If nothing else, it certainly removes from the action any disputable matter, reducing the judges' role to a ministerial function of merely converting the Order to Show Cause into a final judgment. Aside from a party's right to have a matter reach a final judgment, in the instant case there exists a far weightier right to liberty, which depends upon the judge's ministerial act in order for the Petitioner to enjoy (§'s 6 & 7).

What does not appear from these proceedings is a clear rationale of what prevents the Justice, Thomas G. Leone, from

entering a final judgment. As there is nothing to consider or decide in this matter, what remains is a simple duty, which is a "clear legal right" of the sole party to this action, the Petitioner, making any further delay magnify the prejudice Petitioner has suffered as a result of his unjust incarceration and wrongful/illegal conviction.

V JUDGE'S FAILURE TO PRESIDE IMPARTIALLY

In the instant case mandamus is appropriate as the record reveals that not only has the presiding Justice, Thomas G. Leone, ignored and/or refused to acknowledge Petitioner's Ex parte Motion for Summary Judgment and Notice of Proposed Judgment Discharging Person Detained; when it's irrefutable that the Respondent defaulted by failing to respond in this action on Court's deadline. What's most significant is Justice Leone's lack of impartiality throughout the proceedings.

Petitioner's Numerous Objections:

In a letter dated May 17, 2012 (Exhibit "C"), Petitioner made numerous objections for the following reasons: a) for the failure of the Assistant Attorney General, Ray A. Kyles', to identify the documents (in violation of CPLR § 3126(3)) he informed the Court were necessary to contest Petitioner's claims; b) for Assistant Attorney General, Ray A. Kyles', requesting a 29 day extension (to

obtain previous unidentified documents) the day before the deadline (in violation of CPLR § 2214(b)); and c) objecting to the Attorney General's Office representation of the Respondent in this action by placing said Office and the Court on Notice that a conflict of interest exists. As the Attorney General's Office was in possession of a properly filed complaint since November 15, 2011, expressing the same severe issues raised in Petitioner's Writ of Habeas Corpus Petition, among other serious allegations, and not to mention that during a deposition by the Attorney General's Office on or about 2009, Petitioner informed and placed said Attorney General's Office on Notice, that they were concealing the fraud and criminal acts committed by the Bronx District Attorney's Office against the Petitioner in this action (See, 2012 WL 1109318 In re Pellegrini, (NYAD 2 Dep't 2012)). Despite these objections, Court granted the extensions and failed to hold a hearing regarding the issues raised on conflict of interest (Cf. In re Pellegrini, Supra).

In letter dated June 13, 2012, Petitioner renewed previous objections in response to A.A.G., Ray A. Kyles' letter, dated June 12, 2012, which was a second request for an extension, again the day before the deadline of June 13, 2012. Petitioner once again pointed out to the Court that the Respondent has defaulted by failing to identify the documents they're requesting of DOCCS, and by failing to abide by CPLR § 2214(b), which mandates a request

for an extension of time be made at least two days before the Court's deadline (§ 3 Supra).

Petitioner, having taken notice that the Court ignored and/or outright refused to acknowledge his afore-mentioned requests and/or objections, was forced to demand of A.A.G., Ray A. Kyles, by way of F.O.I.L., dated June 17, 2012, to provide the Honorable Court and the Petitioner under the "Freedom of Information Law" pursuant to the New York Public Officer's Law §§ 84 et seq., with any and all correspondences that he and his Office has forwarded to the New York State Department of Corrections and Community Supervision, requesting the unidentified documents they claim they have been requesting from the afore-mentioned Department, to obtain the numerous extensions in this action. In doing so, Petitioner also informed A.A.G., Ray A. Kyles, by providing a recently filed felony complaint with supporting exhibits attached "A" through "Z-10," on file with the Governor's Office in pursuit to have a special prosecutor appointed to prosecute the named officials as charged in said criminal complaint, where the same severe issues raised in Petitioner's present Writ of Habeas Corpus, among other serious allegations, are raised. Petitioner went beyond the scope of these proceedings and provided A.A.G., Kyles, and the presiding Justice, Thomas G. Leone, with copies of incriminating documentary evidence which represented Petitioner's innocence and wrongful/illegal conviction (Cf. ¶'s 3 & 4 Supra).

Petitioner, in his letter dated June 26, 2012, further renewed his previous objections as asserted in letters dated May 17, 2012, and June 13, 2012; including renewing his objections to the fact that the Attorney General's Office has been made aware of the same severe issues raised since November 15, 2011. Also of the fact that the Attorney General's Office should have been precluded from not just responding to Petitioner's Writ, but from representing the Respondent in this matter period. Which the Court continued to overlook. Nevertheless, what's most compelling in this matter is the fact that the Court not only continued to ignore Petitioner's afore-mentioned numerous timely objections during these proceedings, but went so far as to grant Respondent's third last minute request for an extension, six (6) business days beyond the Court's deadline, making Court's Order in violation of its previous May 16, 2012, Order. Which warrants the Court to rule upon Petitioner's timely served Writ of Habeas Corpus, Ordering Petitioner be released forthwith, and any other and further relief that may be just, proper, and equitable (See, Letter to Court dated June 26, 2012, Exhibit "C").

DEFAULT JUDGMENT

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [1986]; Napolitano v. Suffolk County Dept. of

Public Works, 65 AD3d 676, 884 NYS2d 484 [2nd Dept. 2009]). A motion for summary judgment may be granted only when there is no doubt as to the absence of any triable issue of material fact (Kolivas v. Kirchoff, Supra.). In the instant case Petitioner has made three default claims against the Respondent for statutory violations, which the Court never acknowledged. 1) Respondent never identified the documents in question (Exhibit "C"), in violation of CPLR § 3126(3). 2) Respondent continuously made untimely requests for extensions (*ibid.*), in violation of CPLR § 2214(b). and 3) Respondent failed to respond to Petitioner's Writ of Habeas Corpus (Exhibit "F"), in violation of CPLR § 7008(a) & (b). These points of objection and summary judgment motion were timely filed with the Court in this action and deserved an impartial treatment, there is no question as to their prima facie substance, which warranted at least a hearing, yet not even that was provided to Petitioner in Justice Thomas G. Leone's Courtroom.

INJUNCTIVE RELIEF


Petitioner hereby demands by way of injunctive relief, to be reinstated to the status quo of his pre-illegally captive state, where Petitioner enjoyed the civil liberties and Constitutional protections that every other citizen enjoys not duly convicted of a crime. In as such, Petitioner points out to this Honorable Court that Petitioner has established that the Rules and Regulations of

the Department of Corrections and Community Supervision, along with all the attendant restrictions on one's liberty that it entails, is a violation of a free citizen's right to be free from cruel and unusual punishment, to be secure in one's own home, to the free exercise of life, liberty and the pursuit of happiness. Therefore, the DOCCS guidelines and restrictions on the Petitioner is currently and has always been a violation of his civil rights and liberties, which warrants this Court's immediate injunctive relief in removing an American Citizen from the unconscionable conditions that are a day to day reality in a State Maximum Security Prison.

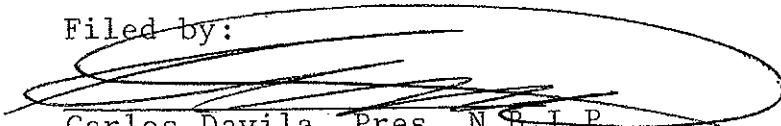
WHEREFORE, it is hereby prayed by Petitioner that this Honorable Court enter an Order demanding of Thomas G. Leone, acting in his capacity as Justice of the Supreme Court of Cayuga County: Special Term, to Show Cause why he should not have this Writ of Mandamus entered against him, compelling him to enter his Order to Show Cause, dated April 5, 2012, as a Final Judgment, and for such other and further relief this Court may deem equitable, just and proper.

Dated: September 17, 2012
Auburn, New York

Respectfully Submitted,


Nelson Rodriguez

Filed by:


Carlos Davila, Pres. N.B.I.P.



Customer Copy
Label 11-B, March 2004

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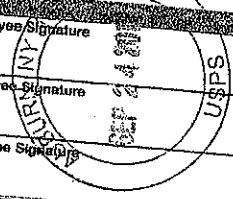
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Date Accepted 9/24/19	Scheduled Date of Delivery Month 9 Day 29	Return Receipt Fee \$
Mo. Day Year 9 24 19	Scheduled Time of Delivery <input type="checkbox"/> Noon <input type="checkbox"/> 3 PM	COD Fee \$
Time Accepted <input type="checkbox"/> AM <input type="checkbox"/> PM	Military <input type="checkbox"/> 2nd Day <input type="checkbox"/> 3rd Day	Insurance Fee \$
Flat Rate <input type="checkbox"/> or Weight lbs. 14.90 ozs.	Int'l Alpha Country Code	Total Postage & Fees \$ 17.40
		Acceptance Emp. Initials SK

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Mo. Day		<input type="checkbox"/> PM	
Delivery Attempt	Time	<input type="checkbox"/> AM	Employee Signature
Mo. Day		<input type="checkbox"/> PM	
Delivery Date	Time	<input type="checkbox"/> AM	Employee Signature
Mo. Day		<input type="checkbox"/> PM	



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Nelson Rodriguez SSA 5477
Auburn Correctional Facility
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Auburn New York 13021

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Supreme Court State of New York
Appellate Division 4th Dept
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FOR INTERNATIONAL DESTINATIONS, WRITE COUNTRY NAME BELOW.

AFFIDAVIT OF SERVICE

Index No 2012-055

RECEIVED

State of New York
County of Cayuga

SEP 25 2012

FILED
CAYUGA COUNTY CLERK
Sep 24, 2012 11:08A
Susan M. Dwyer

The undersigned being duly sworn, deposes and says
Sonia Buella is not a party to the action, is over
(name of person serving papers)

APPELLATE DIVISION
4TH DEPARTMENT

18 years of age and resides at 955 Overgreen Ave
BRONX NY 10473 # 703
(complete address of person serving papers)

That on Sept 24 - 2012, deponent served the within
(date of service)

Writ of Mandamus
(name of document[s] served)

upon Thomas Leone located at
(name of person/corporation served)

154 Genesee Street Auburn
(complete address where other party/corporation served)

(Select method of service)

Personal Service: by delivering a true copy of the aforesaid documents personally;
deponent knew said person/corporation so served to be the person/corporation described.

Service by Mail: by depositing a true copy of the aforesaid documents in a postpaid
properly addressed envelope in a post office or official depository under the exclusive care
and custody of the United States Postal Service.

Sonia Buella
Signature of person serving papers

Sonia Buella
Printed Name

Sworn to before me this 24th

day of September 2012

Brenda K. Tompkins
Notary Public

Brenda K. Tompkins
Notary Public, State of New York
Qualified in Cayuga County, 04T06097393
My Commission Expires 8/18/15

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

Nancy E. Smith, Justice
Appellate Division:
Fourth Judicial Department
50 East Avenue
Rochester, New York 14604

October 18, 2012

Re: In re Nelson Rodriguez

Attention Justice Smith:

Please find enclosed for your review one (1) original and ten (10) copies of a Writ of Mandamus with Order to Show Cause and Affidavit in Support of an Order to Show Cause for a Writ of Mandamus, Ex Parte, with a Request for Judicial Intervention form.

Please be advised that an institutional check will be forwarded to your Clerk's Office for the sum of \$315.00 to cover the filing fee for initiating a civil action in your Court.

Thank you for your attention in this matter, the Petitioner awaits the return of the filed moving papers bearing the RJI # for service of process.

Dated: October 18, 2012
Auburn, New York

Respectfully Submitted,

Nelson Rodriguez, Pro se

V E R I F I C A T I O N

STATE OF NEW YORK)

)ss.:

COUNTY OF CAYUGA)

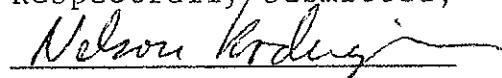
I, Nelson Rodriguez, being duly sworn, deposes and says that he is the Petitioner in the above-entitled proceeding, that the Petitioner has read the foregoing documents and knows the contents thereof, that the same is true to the Petitioner's own knowledge, except as to those matters therein stated upon information and belief, which matters Petitioner believes to be true. The Petitioner having initially attempted to file this Petition on the 25th of September, 2012, did have his moving papers returned with instructions from the Clerk of the Court, Appellate Division: Fourth Department, to send an original with ten (10) copies and enclose \$315.00 filing fee, which the Petitioner now does, including affidavits that were mistakenly left out by the server who served Thomas G. Leone, making the moving papers received by said Justice Leone, a complete packet, with the exception of the Order to Show Cause and the Affidavit in Support of an Order to Show Cause for a Writ of Mandamus Ex Parte, which will be served upon Justice Leone once the Petitioner receives the RJI # from this Court's Clerk's Office.

Sworn to before me this
18th day of October, 2012



NOTARY PUBLIC.

Respectfully Submitted,


Nelson Rodriguez

JEFFREY SCOTT GIRVIN
NOTARY PUBLIC, STATE OF NY
01GI6127101
QUALIFIED IN CAYUGA COUNTY
COMMISSION EXPIRES 5/16/2013

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

Susan M. Dwyer,
Cayuga County Clerk
Cayuga County Office Building
160 Genesee Street- Box 616
Auburn, New York 13021

Re: Case Doc. # Rodriguez v. Graham, Index # 2012-0358

Dear Ms. Dwyer:

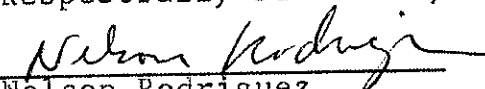
Good Day; the Petitioner in the above referenced matter is respectfully requesting from you and/or your office a Certified copy of the computer printout reflecting the complete filing of all papers/motions made by the named parties in this action, but not limited to Court's ruling during the said proceedings.

Additionally, please inform the Petitioner if there is any additional fee beyond the enclosed five (\$5.00), as the Petitioner is prepared to provide your office with any additional required fee.

As is customary, thanking you and your office for your time and most welcomed consideration in this matter.

Dated: October 27, 2012
Auburn, New York

Respectfully Submitted,


Nelson Rodriguez

Signed to before me this

27 day of October, 2012


J U R A T

Lebertus Vanderwerff
Notary Public, State of New York
Appt. in Cayuga Co. No. 01VA6183853
My Commission expires 03/31/16

D

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

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

October 30, 2012

Re: In re Nelson Rodriguez

Dear Honorable Clerk Cafarell:

Good day! The undersigned is in receipt of a brief note from your Clerk's Office, who identifies his- or herself by way of initials and not by name as respectfully mandated.

Moreover, enclosed attached to note was the return of the undersigned's \$315.00 (institutional check), asserting that the afore-mentioned sum was being returned due to it's not accompanying the notice of petition and petition and ten copies thereof (See NYCRR 1000.9), (point of fact; the petition was attached to an Order to Show Cause, which acts as an adequate substitute for notice of petition, and an Affidavit in Support of an Order to Show Cause). However, what the Clerk "overlooked" is the fact that the undersigned did properly file one (1) original and ten (10) copies with the Honorable Nancy E. Smith, who is assigned to have Jurisdiction to preside over the matter/action presented.

Additionally, the undersigned has also enclosed a copy letter addressed to the afore-mentioned Honorable Justice Nancy E. Smith, informing said Justice that upon receipt of his petition and 10 copies thereof an institutional check for the sum of \$315.00 will

E

be forwarded to the Clerk's Office to cover the filing fee of this action. See also, copy inmates disbursement form 2706, and certified mail return receipt to both the Court and Clerk's Office in support of the undersigned's afore-mentioned assertions.

Lastly, please take notice that the undersigned's petition and 10 copies filed with Justice Nancy E. Smith's Office, be held and/or recorded as filed and calendared with the Court to be heard, as the undersigned at first opportunity will re-submit the \$315.00 required fee for the appropriate filing of his petition on date note received.

Thanking you and your office for your attention and consideration in this matter.

Dated: October 30, 2012
Auburn, New York

Respectfully Submitted,

Cc: Copy

Nelson Rodriguez, Pro se

Nancy E. Smith, Justice
Appellate Division:
Fourth Judicial Department
50 East Avenue
Rochester, New York 14604

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

Nancy E. Smith, Justice
Appellate Division:
Fourth Judicial Department
50 East Avenue
Rochester, New York 14604

November 2, 2012

Re: In re Nelson Rodriguez


Attention Justice Smith:

Please find enclosed for the purpose of processing Petitioner's Writ of Mandamus, which was mailed to your office along with ten (10) copies on October 22, 2012, and was verified to have been received by your office by return receipt, an institutional check for the sum of \$315.00. This represents the second mailing of the filing fee, as the Clerk bearing the initials LXD, erroneously returned the filing fee that was forwarded by certified mail and return receipt, due to said Clerk's assumption that the Petitioner failed to send a Petition and ten (10) copies along with said filing fee.

It is the Petitioner's hope that this delay will not prejudice the processing of this Petition and ultimate adjudication of this most urgent matter. Thank you for your time and consideration, the Petitioner looks forward to the resolution of the lower Court proceedings by your most sagacious intervention.

Dated: November 2, 2012
Auburn, New York

Respectfully Submitted,


Nelson Rodriguez, pro se

Signed to before me this

2 day of November, 2012


NOTARY PUBLIC

Lebertus Vanderwerff
Notary Public, State of New York
Appt. in Cayuga Co. No. 01VA0183853
My Commission expires 03/31/16

F



FRANCES E. CAFARELL
CLERK OF THE COURT

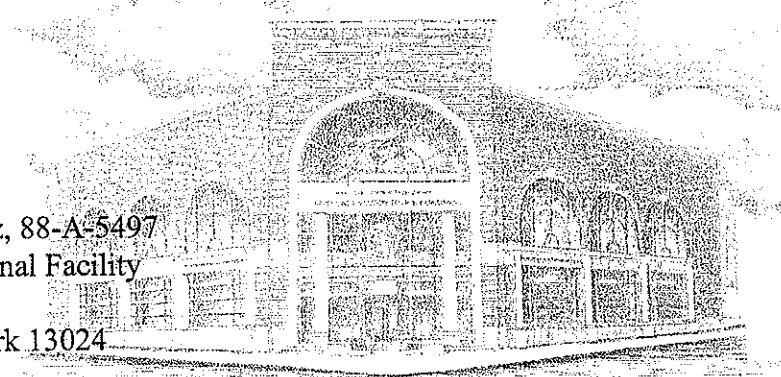
NEW YORK STATE SUPREME COURT
APPELLATE DIVISION, FOURTH DEPARTMENT
M. DOLORES DENMAN COURTHOUSE
50 EAST AVENUE, SUITE 200
ROCHESTER, NEW YORK 14604
(585) 530-3100 Fax (585) 530-3247



ALAN L. ROSS
DEPUTY CLERK OF THE COURT

October 25, 2012

Nelson Rodriguez, 88-A-5497
Auburn Correctional Facility
P.O. Box 618
Auburn, New York 13024



Re: CPLR Article 78 proceeding

Dear Mr. Rodriguez:

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* 22 NYCRR 1000.9).

Very truly yours,

Appellate Division Clerk's Office
LXD/sw

Encl.

F

SUPREME COURT, APPELLATE DIVISION:
FOURTH JUDICIAL DEPARTMENT

-----X
STATE OF NEW YORK: EX REL A NEW :
BEGINNING INNOCENCE PROJECT :
"WE THE PEOPLE" ON BEHALF OF :
NELSON RODRIGUEZ, :
Petitioner. :
: :
: :
: :
-----X

AFFIDAVIT IN SUPPORT OF
AN ORDER TO SHOW CAUSE
FOR A WRIT OF MANDAMUS
EX PARTE PURSUANT TO
CPLR §§ 2213(a); 2217(b);
7801; 7803(1) & 7804.

Index # _____
RJI # _____

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

I, Nelson Rodriguez, deposes and says that:

1) I am the Petitioner in the above entitled action, and make this affidavit in support of an Order to Show Cause for a Writ of Mandamus, Ex parte, pursuant to CPLR §§ 2213(a); 2217(b); 7801; 7803(1) & 7804; and the Rules of the Court for the Appellate Division: Fourth Department §§ 1000.9(a) & (b)(1); and 1000.13(b)(1).

2) As it is generally frowned upon to move ex parte when the adverse party can be prejudiced by moving the Court without notice. Yet, in the instant case no prejudice can be suffered and/or claimed by the Respondent who removes himself from the action by his failure to appear. The Order to Show Cause was entered on the 5th of April, 2012, and the Respondent had been timely served, which acts as an adequate substitute for notice. The relief sought was clearly expressed in said Order to Show Cause, which the Respondent received. The Court extended the return date three times upon the

Respondent's request, each time in violation of the CPLR (§ 2214(b)), and still the Respondent failed to appear by failing to submit a sworn affidavit in opposition to the Petitioner's Writ of Habeas Corpus (in violation of CPLR § 7008(a) & (b)). Such disregard for motion practice by the Assistant Attorney General, Ray A. Kyles, can not later be forgiven because the Petitioner decided to exercise his right to proceed thereafter ex parte.

3) The aforesaid Petition with undisputed documentary evidence submitted by Petitioner as a verifiable truth, attested under the penalty of perjury, has established ab initio that Petitioner's detention has always been in violation of his civil rights and liberty.

4) The Petitioner is being held as an illegal captive against his will at AUBURN CORRECTIONAL FACILITY, 135 State Street- Box 618, Auburn, New York 13024, and files this Petition with this Honorable Court to compel, Justice Thomas G. Leone, of the Supreme Court of Cayuga County: Special Term, 154 Genesee Street, Auburn, New York 13021, to Show Cause why he should not Enter his Order to Show Cause, dated April 5, 2012, as a final Judgment, performing his ministerial duty, as the facts before him prohibits the exercise of discretion, and mandates the immediate release of the Petitioner forthwith.

5) The Petitioner having initially attempted to file this

Petition on September 25, 2012, did have his moving papers returned with instructions from the Clerk of the New York Supreme Court, Appellate Division: Fourth Judicial Department, M. Dolores Denman Courthouse, 50 East Avenue, Rochester, New York 14604, that the Petitioner send an original with ten (10) copies and enclose \$315.00 filing fee (See, Exhibit "I").

6) The Petitioner by way of personal service did serve the Honorable Thomas G. Leone, on the 24th of September, 2012 (See, Exhibit "I"), all papers contained within the Petitioner's Writ of Mandamus, with the exception of the Affidavits contained in the Writ of Mandamus (Exhibit "E") as they were mistakenly left out by the server, the Order to Show Cause and the Affidavit in Support of An Order to Show Cause for A Writ of Mandamus, Ex parte, which the Petitioner now will serve upon the Honorable Thomas G. Leone, by way of return receipt (# 7011 1570 0001 1146 2519) and Affidavit of Service.

7) The Petitioner will immediately, upon receiving this Court's selected RJI # from the Clerk's Office, serve Justice Thomas G. Leone, with the afore-mentioned Order to Show Cause and attached Affidavit in Support of an Order to Show Cause for a Writ of Mandamus, Ex parte, baring the selected RJI #, as the record is clear that Justice Leone, has been personally served with copies of the moving papers regarding this proceeding and the Petitioner

should not be penalized twenty-five (25) additional days for the motion to be heard from the Notice of return.

8) The Petitioner, in compliance with the mandates of the CPLR, did move the Court Pro se, to enter it's Order as a final Judgment (See, Exhibit "G"). Yet the Court failed to even acknowledge said motion, as it appears that the Petitioner is being penalized for exercising his Constitutional right to move Pro se, as it is evident from the record that all that remains is the process as set forth under the CPLR § 5017(a) & (b), which requires an attorney to prepare a judgment-roll for the party, at whose instance the judgment is entered, bringing the proceedings to a conclusion; where in the instant matter, absent an attorney, it is clear that the Clerk shall bring the proceedings to a conclusion by entering on the judgment-roll the prepared document submitted by the Petitioner on the Petitioner's behalf.

9) The Petitioner recognizes that this Court has Original Jurisdiction in this Special Proceeding for a Writ of Mandamus pursuant to CPLR §§ 2213(a); 2217(b); 217(1); 506(b)(1); 7801; 7803(1); & 7804; and the Rules of the Court for the Appellate Division: Fourth Department §§ 1000.9(a) & (b)(1); 1000.13(b)(1).

10) No previous application for the relief prayed for has been made to this Court or one of competent jurisdiction.

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

Nancy E. Smith, Justice
Appellate Division:
Fourth Judicial Department
50 East Avenue
Rochester, New York 14604

November 2, 2012

Re: In re Nelson Rodriguez

Dear Justice Smith:

Good day! Please be advised that the Petitioner in the above referenced matter has respectfully decided to address this Honorable Court with regards to the Petitioner having to re-submit the \$315.00 required filing fee in this action/proceeding, due to the Court Clerk's assumption that the Petitioner failed to send petition and ten (10) copies along with the afore-mentioned filing fee.

Additionally, Petitioner seeks and/or hopes that this delay will not further prejudice him anymore then he has already been made to endure by the lower Court throughout the entire process and/or proceedings in this matter while seeking adjudication of said Court's Order, by way of Entering a final judgment.

The Petitioner is aware of CPLR § 2001 providing a remedy in any stage of an action where a "...mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected,..." Here the Petitioner submits that this Court has both the Jurisdiction and Statutory Authority to overlook the Court Clerk's erroneous returning of the statutorily required filing fee, which