Court of Appeals of the State of New York

The People of the State of New York,

Respondent,

v.

Jakim Grimes,

Appellant.

APL: 2017-00167

Brief of Amicus Curiae
New York County Lawyers Association
Committee on Appellate Courts

MATTHEW BOVA
WILLIAM D. BUCKLEY
SCOTT M. DANNER
DANA E. HEITZ

Attorneys for Amicus Curiae
New York County Lawyers Association
Committee on Appellate Courts
14 Vesey Street
New York, NY 10007
Telephone: (212) 267 6646
Facsimile: (212) 406 9252

Dana E. Heitz
Of Counsel
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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The New York County Lawyers Association ("NYCLA") is a not-for-profit organization founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence and has continuously played an active role in legal developments and public policy. NYCLA's Appellate Courts Committee is committed to promoting access to appellate review, and to furthering the efficiency and effectiveness of New York's appellate courts.[1]

In this appeal, the government argues that, even if Appellant's counsel was ineffective for violating a leave-application deadline, this Court should nevertheless bar relief because he did not act diligently in discovering his lawyer's error. Because this proposed due diligence rule would curtail access to the appellate courts and undermine the fairness of the appellate process, the NYCLA Appellate Courts Committee has a direct interest in this case. Specifically, we ask that the Court reject a due diligence requirement.

[1] This amicus brief has been approved by NYCLA's Appellate Courts Committee and approved for filing by NYCLA's President; it has not be reviewed by NYCLA's Executive Committee and does not necessarily represent the views of its Board.

SUMMARY OF ARGUMENT

This Court should reject a common-law rule barring ineffective assistance claims on the grounds that the defendant did not exercise "due diligence" in investigating and analyzing counsel's blunders—here, the failure to file a timely leave application. See C.P.L. § 460.10(5)(a) (counsel must file a leave application within 30 days of an Appellate Division order in order to seek permission to appeal); C.P.L. § 460.30(1) (establishing a one-year "grace period" for filing a late leave application).

A due diligence rule illogically requires the accused to suffer the consequences of counsel's ineptitude. And it would unfairly punish vulnerable defendants, leaving them without a remedy for a constitutional injury. Likely for that very reason, the Legislature has never required that defendants asserting ineffective assistance of counsel must exercise "due diligence" in investigating their own lawyers' compliance with professional obligations. See C.P.L. §§ 440.10(1), 440.20(1).

Although Mr. Grimes exercised due diligence here, see Appellant's Brief 15-19 (Mr. Grimes, who was incarcerated, wrote to counsel about the status of the leave application just over a year after

counsel promised to file a leave application), a narrow holding that Mr. Grimes satisfied an illogical "due diligence" rule will perpetuate that flawed rule. Thus, it is essential that this Court, in setting the law of New York and protecting constitutional rights, categorically reject that rule once and for all. Reed v. McCord, 160 N.Y. 330, 335 (1899) (this Court was created to "authoritatively declare and settle the law uniformly throughout the state"); Crawford v. Washington, 541 U.S. 36 (2004) ("readily conced[ing]" that the Court could resolve the defendant's Sixth Amendment claim in defendant's favor by applying the flawed rule of Ohio v. Roberts, 448 U.S. 56 (1980), but nevertheless categorically overruling Roberts because anything less would "perpetuate" a flawed regime).

As for the merits question presented here, we agree with Mr. Grimes that counsel was ineffective for failing to comply with the deadline for filing a leave application. N.Y. Const. Art. I § 6; Office of the Clerk of the New York Court of Appeals, The New York State Court of Appeals Criminal Leave Application Practice Outline, p. 1 (2018) ("The rules of all four Departments of the Appellate Division require [counsel] to advise defendants of their right to appeal, and to timely file an application for leave to appeal to the Court of Appeals . . . if the defendant requests that such application be made.

Thus, even [if] counsel [has] no intention of pursuing an appeal to this Court[,] [counsel] must be familiar with the procedure for timely filing a Criminal Leave Application, as it is part of that counsel's representation responsibilities.").[2] Amicus will not address that point further.

[2] Fourth Department Rules: 22 N.Y.C.R.R. § 1015.7(b) ("Counsel shall ascertain whether defendant wished to apply for permission to appeal and, if so, make timely application therefor."); Second Department Rules: 22 N.Y.C.R.R. § 671.3(a) (same); Third Department Rules: 22 N.Y.C.R.R. § 821.2(a) (same); 22 N.Y.C.R.R. § 606.5(b)(2); New York State Bar Assn., Revised Standards for Providing Mandated Representation, I-10(h) (eff. 2015) (counsel has an obligation to file a leave application); New York State Office of Indigent Legal Services Appellate Standards and Best Practices, Section XV (eff. 2015) ("If the intermediate appellate court does not grant the full relief sought, counsel must make an application for leave to appeal to the Court of Appeals, unless the client instructs counsel not to do so."); ABA Defense Function Standards 4-9.1(c) (2015) ("Defense counsel should take whatever steps are necessary to protect the client's rights of appeal."); New York Rules of Professional Conduct Rule 1.3(a) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); id. at Rule 1.3(b) ("A lawyer shall not neglect a legal matter entrusted to the lawyer."); id. at Rule 1.3, Comment [3] ("Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed.").

STATEMENT OF THE CASE

On March 2, 2012, Mr. Grimes was convicted of felonies and sentenced to prison time. Appellant's Brief 3. The chronology of Mr. Grimes's appeal is as follows:

- **November 13, 2015**: The Appellate Division affirmed Mr. Grimes's convictions.
- **November 19, 2015**: Appellate counsel receives decision with Notice of Entry (served on November 17, 2015).
- **November 20, 2015**: Appellate counsel wrote a letter to Mr. Grimes informing him that his convictions had been affirmed and told Mr. Grimes that counsel would apply for leave to appeal to this Court.
- **December 19, 2015:** The 30-day deadline for filing a leave application expired. C.P.L. § 460.10(5)(a).
- **November 23, 2016**: Mr. Grimes was released from prison.
- **December 19, 2016**: C.P.L. § 460.30's one-year-and-thirty-day deadline for filing a late leave application elapsed.
- **January 9, 2017**: Mr. Grimes wrote appellate counsel asking about his appeal.
- **January 20, 2017**: After appellate counsel informed Mr. Grimes that he had failed to file a leave application due to law-office failure, Mr. Grimes moved for permission to file outside of C.P.L. § 460.30's deadline, claiming counsel's failure to comply with the deadline was ineffective assistance of counsel.

Appellant's Brief 3-5.

The government now contends that even if counsel was ineffective, this Court should reject relief because Mr. Grimes did not

exercise due diligence by personally investigating and detecting counsel's blunder before January 2017. Respondent's Brief 21-23.

ARGUMENT

This Court should reject a common-law rule that would require defendants to "diligently" investigate counsel's compliance with his/her professional obligations in order to obtain relief for ineffective assistance of counsel.

The prosecution proposes a common-law rule barring ineffective assistance of counsel relief because the defendant did not "diligently" investigate counsel's ineptitude. Respondent's Brief 21-23. While previously suggesting such a common-law rule in dicta, this Court has never actually held that "due diligence" is required. People v. Arjune, 30 N.Y.3d 347, 361 (2017); People v. Andrews, 23 N.Y.3d 605, 615-16 (2014); People v. Rosario, 26 N.Y.3d 597, 604 (2015).

This Court should now reject that rule. A due diligence bar is illogical, violates the core principles underlying the right to counsel, clashes with the Legislature's rejection of such a requirement in numerous other circumstances, and will produce arbitrary results in our appellate courts.

* * *

In People v. Syville, 15 N.Y.3d 391, 397-98 (2010), this Court held that when counsel's failure to comply with C.P.L. § 460.10(1)'s notice-

of-appeal deadlines constitutes ineffective assistance, the Constitution requires that the courts excuse the procedural default. Syville's holding hardly broke new ground; it built on a wide body of state and federal precedent confirming that when the failure to comply with procedural rules constitutes ineffective assistance, the State cannot "mak[e] [a] defendant suffer for his attorney's failing." People v. Montgomery, 24 N.Y.2d 130, 132 (1969); Syville, 15 N.Y.3d at 397 (citing Evitts v. Lucey, 469 U.S. 387, 391-97 (1985) (a state cannot enforce an appellate procedural rule against a defendant when the failure to comply with that rule constitutes ineffective assistance of counsel)); Martinez v. Ryan, 566 U.S. 1, 12 (2012) (because the right to effective assistance of counsel is a "bedrock principle in our justice system," counsel's unreasonable failure to raise a claim in a post-conviction proceeding will not bar a defendant from raising that claim in habeas court); Murray v. Carrier, 477 U.S. 478, 488 (1986) ("[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State," not the defendant); People v. Montgomery, 24 N.Y.2d 130, 132 (1969) (there is "no justification for making [a] defendant suffer for his attorney's failing"). As held in Coleman v. Thompson, 501 U.S. 722, 754 (1991),

"Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that [appellate] review entails."

Nevertheless, dicta from this Court's recent cases suggests that the State need not "bear the cost of" counsel's ineffective assistance if the defendant did not "diligently" investigate that constitutional claim. Arjune, 39 N.Y.3d at 361; Andrews, 23 N.Y.3d at 615-16; Rosario, 26 N.Y.3d at 604.

This Court should now reject that dicta and hold that there is no "due diligence" requirement governing the litigation of ineffective assistance claims stemming from the failure to comply with Article 460's filing deadlines.

A. This Court has never held that due diligence can bar a meritorious ineffective assistance of counsel claim.

In Andrews, Arjune, and Rosario, this Court held that counsel's failure to file a notice of appeal (Andrews and Rosario) and assist with an application for assignment of appellate counsel (Arjune) did not constitute ineffective assistance. Andrews, 23 N.Y.3d at 615

(counsel specifically confirmed that he spoke to defendant about appealing and defendant instructed him not to file notice of appeal); Arjune, 30 N.Y.3d at 350 ("Because defendant has not met his burden of proving that counsel was ineffective, we decline to expand Syville under the circumstances presented here."); Rosario, 26 N.Y.3d at 603-04 ("Simply put, defendants here failed to show that their attorneys were unconstitutionally ineffective and therefore they are not entitled to the relief they seek.")

Having made those constitutional determinations, Arjune, Rosario, and Andrews added, in dicta, that, "[i]n order to obtain exceptional relief beyond the time permitted under C.P.L. § 460.30, a defendant must show that he exercised due diligence." Rosario, 26 N.Y.3d at 604; Arjune, 30 N.Y.3d at 358-59; Andrews, 23 N.Y.3d at 616 ("Nor did Andrews attempt to explain why he waited more than two years to seek coram nobis relief after he obtained an attorney to represent him on collateral review."); C.P.L. § 460.30(1) (permitting a defendant to file a late notice of appeal "not more than one year" after the 30-day notice-of-appeal deadline expires). Because this Court, in Arjune, Rosario, and Andrews, found that counsel was effective, commentary regarding due diligence was unnecessary to the resolution of those appeals. That commentary was dicta. E.g.,

Saratoga County Chamber of Com., Inc. v. Pataki, 100 N.Y.2d 801, 824 (2003). And that dicta should now be disavowed.

B. A due diligence rule—which requires lay defendants to investigate and monitor counsel's compliance with professional mandates—unfairly and illogically forces defendants to suffer the consequences of ineffective assistance.

A due diligence rule unfairly requires lay defendants to understand the law and its procedural nuances. The rule therefore collides with the right to counsel itself, which is rooted in the basic recognition that even "the intelligent and educated layman has small and sometimes no skill in the science of law." Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Halbert v. Michigan, 545 U.S. 605, 621 (2005) ("Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like [petitioner], who have little education, learning disabilities, and mental impairments.").

For instance, to employ "due diligence" in investigating counsel's compliance with C.P.L. § 460.10(5)(a)'s leave-application deadlines, the lay defendant must:

- Know the time limits imposed by C.P.L. § 460.10(5)(a) and § 460.30(1);

> • Know that, even though the governing statutes do not say so, Syville excuses the procedural default if it stems from ineffective assistance of counsel; and
>
> • Investigate and monitor his/her attorney's compliance with the professional obligation to comply with filing deadlines.

Further, when counsel has, as in Mr. Grimes' case, promised to file a leave application, defendants must know the amount of time it "typically" takes an application to be decided in order to begin the investigation.[3] If an appellate judge determines that the defendant "waited too long" before investigating counsel's performance, the defendant loses access to the appellate forum.

A due diligence rule also illogically requires clients to make sure their lawyers do their jobs. Strickland v. Washington, 466 U.S. 668, 688, 689 (1984) (there is a presumption that counsel will comply with their "basic duties"). Under Article I § 6's right to counsel—and a basic understanding of an attorney's role—the client has no obligation to double-check the work of the legal professional charged with protecting the client's interests. E.g., Matter of Cooperman, 83 N.Y.2d 465, 471-72 (1994) ("Sir Francis Bacon observed, '[t]he greatest trust between [people] is the trust of giving counsel.' This

[3] In our experience, criminal leave applications can remain pending for more than a year.

unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf—'giving counsel'—is imbued with ultimate trust and confidence. The attorney's obligations, therefore, transcend those prevailing in the commercial market place. The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including . . . operating competently . . . .") (quoting Bacon, Of Counsel, in The Essays of Francis Bacon, at 181 (1846)).

A defendant's ability to personally investigate counsel's compliance with Article 460 deadlines would also be complicated by the fact that ineffective counsel would still represent the defendant before, during, and after the blunder occurred. A defendant's investigatory prodding could damage the attorney-client relationship. In the law governing legal malpractice, this concern is significant enough to toll the statute of limitations until the lawyer's representation of the injured client ends:

> The continuous representation doctrine, like the continuous treatment rule, its counterpart with respect to medical malpractice claims, "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which

> the services are rendered." The doctrine also appreciates the client's dilemma if required to sue the attorney while the latter's representation on the matter at issue is ongoing: "Neither is a person expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person. Since it is impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed."

Shumsky v. Eisenstein, 96 N.Y.2d 164, 167-68 (2001) (emphasis added) (quoting Greene v. Greene, 56 N.Y.2d 86, 94 (1982) and Glamm v. Allen, 57 N.Y.2d 87, 94 (1982)).

Defendants who trust "presumptively effective" counsel, Strickland, 466 U.S. at 688, 689, may very well fail to exercise due diligence precisely because they trust their lawyers. Thus, a due diligence bar undercuts the natural intuition that "a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." Greene, 56 N.Y.2d at 94. This is especially true of a person who is in prison, and whose only channel of information about his appeal is his lawyer.

Here, Mr. Grimes's leave application was not timely filed precisely because he trusted counsel and lacked information about criminal procedure. He should not be punished for trusting his lawyer or for his unfamiliarity with procedural rules. Nor should first-time offenders, young people, uneducated people, non-English speakers, and mentally ill or handicapped people—the defendants who are least likely to question their attorneys' professional judgment. Indeed, the burden of discovering a lawyer's previously undiscoverable ineffectiveness would fall most heavily on the people least able to navigate appellate procedure or "diligently" inquire into their lawyers' conduct.

As a due diligence rule is illogical, it's not surprising that it simply does not exist in any other context. Suppose, for instance, a defendant informs counsel (days after his arrest) that the police performed an unconstitutional search. Counsel, however, does not move to suppress within 45 days of arraignment. C.P.L. § 255.20(1) (suppression motions must be made within 45 days of arraignment). The case remains in a pretrial posture for years and the defendant does not "diligently" investigate counsel's error before trial. No one would seriously argue (and to our knowledge no one ever has) that

this defendant has "waived" the ineffective assistance claim, thus precluding him from raising the claim on direct appeal.

Similarly, coram nobis petitions alleging ineffective assistance of appellate counsel are not encumbered by a due diligence rule. See generally People v. Bachert, 69 N.Y.2d 593, 600 (1987) (explaining that the courts and legislature can adopt procedural rules governing the litigation of ineffective assistance of appellate counsel claims; to date, no such procedural rules have been promulgated); People v. D'Alessandro, 13 N.Y.3d 216, 221 (2009) ("[A]lthough we acknowledge that a significant period of time has passed since defendant's conviction was affirmed on appeal, we should not allow the lengthy passage of time, in itself, to bar review of a defendant's" ineffective assistance of appellate counsel claim). There is no requirement that the defendant scrutinize appellate counsel's brief with diligence lest he lose an ineffective assistance claim forever. Yet that is precisely the result of the due diligence bar proposed here.

At bottom, though, a due diligence bar ignores a precedential juggernaut of state and federal law confirming that when a defendant "defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default

and the harm to state interests that [appellate] review entails." Coleman, 501 U.S. at 754 (emphasis added); Montgomery, 24 N.Y.2d at 132; Syville, 15 N.Y.3d at 397; see generally Evitts, 469 U.S. at 391-97; Martinez, 566 U.S. at 12; Murray, 477 U.S. at 488. A due diligence procedural bar turns that longstanding rule on its head, placing the "responsibility" for the lawyer's failure, and its "cost," right back on the defendant.

Syville inadvertently laid the groundwork for this inversion. Syville held that counsel was ineffective for failing to file a notice of appeal after the defendant had made a "timely request to file [that] notice." 15 N.Y.3d at 397-400; id. at 397 ("When defense counsel disregards a client's timely request to file a notice of appeal, the attorney 'acts in a manner that is professionally unreasonable.' In such a situation, a defendant justifiably relies on the lawyer to carry out the purely ministerial task of taking the first step to preserve the right to appellate review.") (quoting Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)).

While Syville's conclusion is correct, its expression of that holding, which suggested that a defendant has an obligation to ask counsel to comply with professional obligations (such as the obligation to file a notice of appeal), mistakenly suggested that the onus of protecting

appellate rights is on the client. On the contrary, blowing a deadline because a client did not "request" compliance with the deadline is an egregious dereliction of duty. E.g., Office of the Clerk of the Court, above, at 1; 22 N.Y.C.R.R. § 1015.7(a)-(b) (imposing a duty on counsel to file the notice of appeal and leave application); New York State Bar Assn., Revised Standards for Providing Mandated Representation, I-7(j) (eff. 2015) (after a conviction, counsel must file a notice of appeal unless the client make an informed waiver of the right); ABA, Criminal Justice Standards for the Defense Function § 4-9.1(c) ("Defense counsel should take whatever steps are necessary to protect the client's rights of appeal, including filing a timely notice of appeal in the trial court, even if counsel does not expect to continue as counsel on appeal."). That is particularly true in the Article 460 context, which merely requires the "ministerial" filing of a notice of appeal (C.P.L. § 460.10[1]; Syville, 15 N.Y.3d at 399), and later a short leave application. C.P.L. § 460.10(5)(a).

Syville's suggestion that a defendant must protect his own rights also ignored Roe, which imposes an affirmative obligation on counsel to file a notice of appeal unless, after informed consultation, the defendant instructs counsel not to do so. 528 U.S. at 475-481. Under

that holding, counsel cannot sit back and wait for client to "request" that counsel act.

A due diligence rule carries forward and accents Syville's misreading of the authoritative understanding that navigating the appellate process is, at bedrock, counsel's obligation. And it does so by foisting a punishing burden onto vulnerable people.

C. A common-law requirement that defendants must exercise due diligence would clash with the Legislature's determination—in numerous other contexts—that no such requirement exists.

No statute imposes a due diligence rule. Instead, the only possible source for such a rule would be judge-made common law.

A common-law requirement that defendants exercise due diligence in investigating counsel's ineffectiveness would violate the legislative policies expressed in Article 440. See generally Tzolis v. Wolff, 10 N.Y.3d 100, 117 (2008) ("[T]he modern Legislature reasonably expects the judiciary to respect its policy choices.") (citing Sherman v. Robinson, 80 N.Y.2d 483, 489 (1992) ("Given the Legislature's choice not to provide liability for [particular conduct], we decline to expand the common law to impose such liability.")).

C.P.L. § 440.10(1)(h), the most common vehicle for the litigation of ineffective assistance claims, imposes no due diligence requirement. Instead, a defendant can assert such a claim "[a]t any time after the entry of a judgment . . . ." C.P.L. § 440.10(1) (preamble); accord C.P.L. § 440.20(1) ("At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law."). A common-law due diligence bar in the Article 460 context would, therefore, disturb the Legislature's policy judgment that ineffective assistance claims are not subject to a due diligence rule.

Similarly, C.P.L. § 440.10(1)(g), which requires that a newly-discovered-evidence claim be "made with due diligence after the discovery of such alleged new evidence" (emphasis added), does not require that the defendant exercise due diligence in investigating whether new evidence exists. Nevertheless, Respondent asks this Court to craft a common-law rule that would impose that precise mandate for the investigation of constitutional claims.

Respondent's proposal would also create an arbitrary regime: Defendants alleging that counsel was ineffective for failing to comply with Article 460's deadlines must exercise due diligence, while

defendants asserting every other kind of ineffective assistance of counsel need not. This random regime makes little sense. If anything, the rule should be the other way around, as the failure to file a notice of appeal/leave application results in the "even more serious denial of the entire judicial proceeding itself." Roe, 528 U.S. at 483.

D. A due diligence rule is unworkable.

A flimsy due diligence rule is unworkable. When should a "reasonably diligent defendant" begin second-guessing the attorney's competence? Months after the Appellate Division's affirmance? A year later? Two years later? Does due diligence consider the personal characteristics of a defendant? If a defendant is educated and has resources, is that defendant's obligation greater than an uneducated poor defendant's obligation?

The Appellate Division departments, faced with deciding what constitutes due diligence on a case-by-case basis, would inevitably produce inconsistent rulings.

E. Rejecting a due diligence rule will not meaningfully undermine state interests.

As counsel has an ethical, professional, and reputational interest in complying with Article 460's deadlines—and as doing so is rather simple—ineffective assistance claims in this context will be rare.

Therefore, there will not be a deluge of coram nobis litigation in the absence of a due diligence bar.

In any event, this Court should not shut the courthouse door because the State has violated the constitutional rights of "too many" defendants. See, e.g., People v. Tiger, __ N.Y.3d __, 2018 N.Y. Slip Op. 04377, *13 (June 14, 2018) (Wilson, J., dissenting) ("The majority is focused on the importance of the finality of the plea process, and the appropriate conservation of judicial resources. Those concerns are weighty. But 'conservation of judicial resources' does not appear alongside 'life, liberty and the pursuit of happiness.'"); Toby J. Stern, Comment, Federal Judges and Fearing the Floodgates of Litigation, 6 U. Pa. J. Const. L. 377, 395 (2003) ("[T]he floodgates argument has structural problems: it fosters inconsistencies between judges, usually has no explicit factual basis, is ancillary to the central holding of a case, and has a high potential for misuse."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts 56 (5th ed. 1984) ("It is the business of the law to remedy wrongs that deserve it, even at the expense of a flood of litigation."); Dillon v. Legg, 68 Cal. 2d 728, 735 n. 3 (1968) (en banc) ("To the extent that this argument shades into the contention that such claims should be denied because otherwise courts would experience a flood of litigation, we point out that courts

are responsible for dealing with cases on their merits, whether there be few suits or many; the existence of a multitude of claims merely shows society's pressing need for legal redress.").

The prosecution in Syville also suggested another concern: Defendants may strategically delay ineffective assistance claims so that they can, if successful on the coram nobis petition and then the ultimate appeal, benefit from stale evidence at the new proceeding. Syville, 15 N.Y.3d at 401 n. 4.

This strained speculation is absurd. Certainly it has not captivated the Legislature—the body charged with protecting the Penal Law—which has not required due diligence in Article 440. See Point C, above. And throughout Article 440's almost 50 years of existence, 440 courts have not been plagued by dilatory defendants who strategically allow their convictions to remain intact under the hope that evidence may grow stale. See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 304 (2001) (rejecting a floodgates argument because experience had proven that theory wrong). On the contrary, defendants have ample incentive to pursue relief quickly as criminal convictions work devastating consequences.

It is also highly improbable that rejecting a due diligence rule would force the prosecution into a stale-evidence position. For that problem to arise, the following conditions would have to be met:

> **1.** The defendant must succeed on the merits of the ineffective assistance of counsel claim.
>
> **2.** The relief obtained must be vacatur of a conviction, not modification of the sentence or dismissal.
>
> **3.** The prosecution's evidence would actually have to be stale as a result of the defendant's delay.
>
> **4.** The defendant is guilty (staleness is certainly not a concern when the defendant is actually innocent).

Given this improbable constellation of factors, a staleness concern is overblown.

In the end though, it is irrelevant whether permitting relief for a constitutional violation will undermine the State's interest in further prosecution. "Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that [permitting further] review [would] entail." Coleman, 501 U.S. at 754 (emphasis added). Although significant, the State's interest in the successful prosecution of crime "occupies a lower place in the American pantheon of noble objectives than" the "bedrock" right to

effective assistance of counsel. Maryland v. King, 569 U.S. 435, 480 (2013) (Scalia, J., dissenting); Martinez, 566 U.S. at 12; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009) (the Sixth Amendment "may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The [Amendment]—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."). Rejecting constitutional claims because of a speculative stale-evidence concern would ignore that fundamental reality.

* * *

The law should not punish a defendant who relies on counsel to perform adequately in an opaque system woven from complex rules—about which the defendant likely knows nothing—simply because the defendant did not discover counsel's blunders through independent investigation. This punishing rule, which would inevitably lead to arbitrary justice, cannot be tolerated. This Court should reject a due diligence rule.

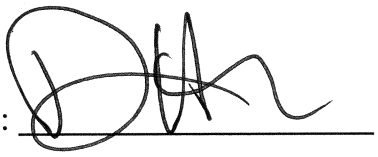
CONCLUSION

This Court should reject a due diligence rule and permit Mr. Grimes to file a leave application with this Court.

Respectfully Submitted,

MATTHEW BOVA
WILLIAM D. BUCKLEY
SCOTT M. DANNER
DANA E. HEITZ

Attorneys for Amicus Curiae
New York County Lawyers Association
Committee on Appellate Courts

By: 

Dana E. Heitz
Of Counsel
August 31, 2018

WORD-COUNT CERTIFICATION

The body of this brief contains 5008 words.