

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WILLIAM LOPEZ,

Plaintiff-Appellee,

-against-

DAVID L. MILLER, Superintendent,
Eastern Correctional Facility,

Defendant-Appellant.

AFFIRMATION IN SUPPORT OF
STATE'S MOTION TO DISMISS
APPEAL

Docket Numbers
13-589-pr (L)
13-1421-pr (con)

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Leonard Joblove affirms the following to be true under the penalties of perjury:

1. I am an assistant district attorney, of counsel to Kenneth P. Thompson, the District Attorney of Kings County. I am admitted to practice in New York State and before this Court.
2. The District Attorney of Kings County represents the defendant-appellant, David L. Miller ("the State"), in the above-captioned matter.
3. I submit this affirmation in support of the State's motion, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, to dismiss the State's consolidated appeal in this case. I make the statements in this affirmation upon information and belief, based on the records and files of the Kings County District Attorney's Office.
4. The plaintiff-appellee, William Lopez, was convicted in 1990, after a jury trial in a New York state court, of murder in the second degree (felony murder) and criminal possession of a weapon in the second and third degrees. Lopez was sentenced, as a second felony offender, to concurrent prison terms of twenty-five years to life on the

murder count, seven and one-half to fifteen years on the second-degree weapon possession count, and three and one-half to seven years on the third-degree weapon possession count.

5. Lopez unsuccessfully appealed from the judgment of conviction to the Supreme Court, Appellate Division, Second Department, and he later unsuccessfully petitioned in that court for a writ of error coram nobis.

6. In 2002, Lopez filed a pro se petition for a writ of habeas corpus in the United States District for the Eastern District of New York, pursuant to 28 U.S.C. § 2254. Following further proceedings -- including the assignment of counsel on the habeas petition, Lopez's exhaustion of certain claims in state court, and two evidentiary hearings in the district court -- the district court, by memorandum and order dated January 16, 2013, granted the habeas petition and ordered the State to release Lopez within sixty days unless the State, by that point, had taken concrete and substantial steps expeditiously to retry Lopez. A judgment was entered on January 18, 2013.

7. On January 23, 2013, following a conference on this case in the district court, Lopez was produced in a New York state court, where, with the State's consent, Lopez was released on his own recognizance pending further proceedings, including an appeal to this Court.

8. On February 15, 2013, the State filed a notice of appeal from the judgment of the district court that granted the habeas petition. This Court assigned the case Docket Number 13-589-pr.

9. By memorandum and order dated March 20, 2013, the district court in effect amended the judgment entered on January 18, 2013 by ordering as a final remedy:

(a) that the State immediately and unconditionally release Lopez from state custody, (b) that the indictment pending against Lopez be dismissed, (c) that the State be barred from retrying Lopez, and (d) that the State expunge Lopez's conviction from its records and from the public record.

10. On April 15, 2013, the State filed a notice of appeal from the district court's memorandum and order of March 20, 2013. This Court assigned the case Docket Number 13-1421-pr and consolidated the case with Docket Number 13-589-pr.

11. By order dated May 14, 2013, this Court granted the State's motion for permission to file one brief on the two consolidated appeals.

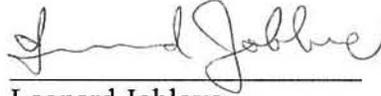
12. On August 1, 2013, the State perfected its consolidated appeal. On October 31, 2013, Lopez filed his brief in response. On November 13, 2013, the State filed a reply brief. This Court has calendared the consolidated appeal for oral argument on April 3, 2014.

13. At the request of the new District Attorney of Kings County, the District Attorney's Office has recently conducted a thorough reevaluation of the facts of this case. As a result of that reevaluation, the District Attorney's Office has concluded that there is a sufficient possibility that Lopez is not guilty of the crimes that are the subject of this habeas proceeding so as to render going forward with the consolidated appeal to this Court contrary to the interest of justice.

14. Richard Levitt, Esq., counsel for Lopez, has said that he does not oppose this motion to dismiss the State's consolidated appeal.

15. WHEREFORE, for the foregoing reasons, the State respectfully moves to dismiss the State's consolidated appeal to this Court.

I certify under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Leonard Joblove", written over a horizontal line.

Leonard Joblove
Assistant District Attorney
(718) 250-2511

Dated: Brooklyn, New York
March 26, 2014