

ORIGINAL

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No.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Largo

— PETITIONER

(Your Name)

vs.

New York State

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of New York State, County of Queens

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Largo

(Your Name)

Elmira Correctional Facility  
P.O. Box 500

(Address)

Elmira, New York 14902-0500

(City, State, Zip Code)

(607) 732-3901

(Phone Number)

## QUESTION(S) PRESENTED

Robert Largo has been incarcerated since 1996. Largo is serving a 45 years to life sentence as a persistent violent felony offender due his conviction under Queens County Indictment No. 291-1997, for burglary, rape and robbery.

In light of Johnson v. United States, 135 S.Ct. 2551 (2015), United States v. Powell, 423 U.S. 87 (1975), United States v. Mazurie, 419 U.S. 544 (1975), and other precedents of this Court, addressing the void-for-vagueness doctrine and holding that "The government violates the Due Process Clause by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" (Johnson, at 2556), Largo filed a state postconviction motion to set aside his illegal sentence on the ground that trial counsel was ineffective where he failed to challenge, as applied, part of New York Penal Law Section 70.02, subdivision one (c), that purports to define as violent one of the predicate felony convictions used to adjudicate Largo a persistent violent felony offender, specifically his prior conviction for attempted burglary in the second degree, subdivision two, as unconstitutionally vague and violates the Fourteenth Amendment's Due Process mandate of notice.

The trial court denied the motion pursuant to Criminal Procedure Law Section 400.21, a statute having nothing to do with

the process of adjudicating a defendant as a violent felon, erroneously finding Largo waived his right to contest the constitutionality of Penal Law Section 70.02, subdivision one (c), and that in the event were it to reach the merits of the claim it would find Largo's motion devoid of any proof to show the statute unconstitutional. The New York State Appellate Division court and the New York State Court of Appeals both denied Largo's applications requesting permission for leave to appeal. The question presented is:

Did the New York State Supreme Court err in holding that, as-applied, the part of Penal Law Section 70.02, subdivision one (c), challenged as being void for vagueness is not unconstitutional?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

**TABLE OF CONTENTS**

OPINIONS BELOW.....	1
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	4
STATEMENT OF THE CASE .....	10
REASONS FOR GRANTING THE WRIT .....	13
CONCLUSION.....	22

**INDEX TO APPENDICES**

APPENDIX A - Opinion of New York State Supreme Court, Queens County

APPENDIX B - Decision and Order of New York State Supreme Court, Appellate Division, Second Department

APPENDIX C - Decision and Order of New York State Court of Appeals

APPENDIX D - Petitioner's state post-conviction Motion to set aside sentence

APPENDIX E

APPENDIX F

V

**TABLE OF AUTHORITIES CITED**

CASES	PAGE NUMBER
Connally v. General Construction Co., 269 U.S. 385 (1926) .....	13, 21
Ex parte Siebold, 100 U.S. 371 (1880) .....	17
Giaccio v. Pennsylvania, 382 U.S. 399 (1966) .....	19, 20
Johnson v. United States, 135 S.Ct. 2551 (2015) .....	1, 11, 13, 14
Kolender v. Lawson, 461 U.S. 352 (1983) .....	19, 20
Lanzetta v. New Jersey, 306 U.S. 451 (1939) .....	19, 20
People v. Largo, 282 A.D.2d 548 (2d Dept., N.Y. 2001) .....	10
Strickland v. Washington, 466 U.S. 688 (1984) .....	17

**STATUTES AND RULES**

28 U.S.C. § 1257 (a) .....	3
N.Y. Penal Law § 70.02 .....	4, 8, 10, 11, 13, 14, 16, 18,
<del>N.Y. Penal Law § 110.00</del> .....	21
N.Y. Penal Law § 110.00 .....	4
N.Y. Penal Law § 140.25 .....	5
N.Y. Penal Law § 400.15 .....	16
N.Y. Penal Law § 400.16 .....	8, 16
N.Y. Penal Law § 400.21 .....	5, 15
18 U.S.C.A. § 924 (Armed Career Criminal Act) .....	14

**OTHER**

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the N.Y. State Supreme Court, Appellate Division court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the N.Y. State Court of Appeals court appears at Appendix C to the petition and is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.  
\_\_\_\_\_

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was November 26, 2018. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.  
\_\_\_\_\_

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Penal Law Section 70.02. Sentence of imprisonment for a violent felony offense.

1. Definition of a violent felony offense. A violent felony offense is a class B violent felony offense, a class C violent felony offense, a class D violent felony offense, or a class E violent felony offense, defined as follows:

(b) Class C violent felony offenses . . . , burglary in the second degree as defined in section 140.25, . . .

(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b).

New York State Penal Law Section 110.00. Attempt to

commit a crime.

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

New York State Penal Law Section 140.25. Burglary in the second degree.

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

2. The building is a dwelling.

Burglary in the second degree is a class C felony.

New York State Criminal Procedure Law Section 400.21.

Procedure for determining whether defendant is a second felony offender or second felony drug offender.

1. Applicability. The provisions of this section govern the procedure that must be followed in any case where it appears that a defendant who stands convicted of a felony has previously been convicted of a predicate

felony and may be a second felony offender as defined in section 70.06 of the penal law or a second felony drug offender as defined in either paragraph (b) of subdivision one of section 70.70 of the penal law, or paragraph (b) of subdivision one of section 70.71 of the penal law.

2. Statement to be filed. When information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction and whether the predicate felony conviction as that term is defined in subdivision one of section 70.02 of the penal law, or in any other jurisdiction of an offense which includes all of the essential elements of any such felony for which a sentence to a term of imprisonment in excess of one year or death was authorized and is authorized in this state regardless of whether such sentence was imposed. Where the provisions of subparagraph (v) of paragraph (b) of subdivision one of section 70.06 of the penal law apply, such statement also shall set forth the date of commencement and the date of termination as well as the state or local incarcerating agency for each period of incarceration to be used for tolling the ten year limitation set forth in subparagraph

(iv) of paragraph (b) of such subdivision.

3. Preliminary examination. The defendant must be given a copy of such statement and the court must ask him or her whether he or she wishes to controvert any allegation made therein. If the defendant wishes to controvert any allegation in the statement, he must specify the particular allegation or allegations he wishes to controvert. Uncontroverted allegations in the statement shall be deemed admitted by the defendant.

7. Manner of conducting hearing. (b) A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to such a predicate felony conviction. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause

be shown for such failure to make timely challenge.

8. Subsequent use of predicate felony conviction finding. Where a finding has been entered pursuant to this section, such finding shall be binding upon that defendant in any future proceeding in which the issue may arise.

New York State Criminal Procedure Law Section 400.16. Procedure for determining whether defendant is a persistent violent felony offender.

1. Applicability. The provisions of this section govern the procedure that must be followed in any case where it appears that a defendant who stands convicted of a violent felony offense as defined in subdivision one of section 70.02 of the penal law has previously been subjected to two or more predicate violent felony convictions as defined in paragraph (b) of subdivision one of section 70.04, and may be a persistent violent felony offender as defined in section 70.08 of the penal law.

New York State Criminal Procedure Law Section 440.20. Motion to set aside sentence; by defendant.

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.

## STATEMENT OF THE CASE

Robert Largo has been incarcerated since 1996. He is serving a 45 years to life sentence resulting from his conviction for burglarizing the residence of Bronislava Iofe, and for robbing and raping her during the burglary.

Largo was thirty-six years old when he was arrested for the above stated offense, and because of New York's opinion that as-applied the part of Penal Law Section 70.02, subdivision one (c), that purports to define attempt burglary in the second degree, subdivision two, as a violent crime is not unconstitutionally vague, he will not be eligible for parole until he is 81 years old. It is not unlikely Largo would die of old age in prison before he is eligible for parole.

Largo was convicted of attempt burglary in the second degree, subdivision two, in 1988. This conviction was used to establish him as a persistent violent felony offender and subject him to the enhanced sentence of 45 years to life imprisonment.

Following his conviction in 1999 for the instant offense Largo appealed the conviction on the grounds police lacked probable cause to arrest him and that all evidence obtained as a result of that unlawful arrest must be suppressed. The appeal was denied. People v. Largo, 282 A.D.2d 548 (2d Dept. 2001). Largo also challenged, pro se, his conviction in two state post conviction motions raising claims of ineffective assistance

of counsel for trial counsel's failure to adequately cross-examine a detective about the procedures he employed to conduct a lineup Largo was identified in following the detective's direct testimony that he had shown Largo's clothes to Ms. Iofe prior to the lineup viewing. Without conducting any hearings, both motions were denied. Largo also challenged his conviction upon a petition for a writ of habeas corpus in the Federal District Court for the Eastern District of New York, raising the unlawful arrest and ineffective counsel claims. The petition was denied in an unpublished opinion.

In February, 2017, primarily in light of Johnson v. United States, 135 S.Ct. 2551 (2015), as well as other well settled decisions of this Court, Largo moved pro se pursuant to Criminal Procedure Law Section 440.20, to set aside his life sentence on the grounds that the sentence was illegal due to trial counsel's failure to challenge as constitutionally vague Penal Law Section 70.02, subdivision one (c), because it does not define as violent a prior conviction of attempt burglary in the second degree, subdivision two, that the state sought use of to establish Largo as a persistent violent felony offender and subject to enhanced sentencing. Largo's CPL 440.20 motion is attached as Appendix D.

Without conducting a hearing the New York State Supreme Court denied Largo's motion. It held that Largo "waived his"

right to contest his adjudication as a persistent violent felony offender because he failed to make his claim in a timely manner" (App. A, at pg. 4), and further opined that "Even if this Court were to reach the merits of Defendant's claim regarding the constitutionality of his attempted burglary conviction, Defendant's papers are devoid of any proof that the statute governing violent felonies is unconstitutional. Defendant's contention that his sentence was unauthorized, illegally imposed, or otherwise invalid as a matter of law is without merit." (App. A, at pg. 4).

Largo's application for permission to appeal to the New York State Supreme Court, Appellate Division, was denied. (App. B) Largo's application for permission to appeal to the New York State Court of Appeals was denied. (App. C)

## REASONS FOR GRANTING THE PETITION

Whether trial counsel was ineffective by failing to challenge part of Penal Law Section 70.02, subdivision one (c), as being ~~un~~ unconstitutional vagueness, as-applied, because it does not define attempt burglary in the second degree, subdivision two, as a violent crime, and that thus the State must not use Largo's prior conviction of this offense to adjudicate him a persistent violent felony offender and subject him to enhanced sentencing, is straightforward.

### I. THE NEW YORK STATE COURT DECISION CONFLICTS WITH DECISIONS OF THIS COURT

This case is worthy of and needs this Court's full address because the decision of the New York State Supreme Court denying Largo's postconviction motion to correct his illegal sentence largely on the grounds that the part of the statute used to impose an enhanced sentence upon him is unconstitutionally vague, drastically conflicts with this Court's well settled decisions addressing unconstitutionally vague criminal statutes in Connally v. General Construction Co., 269 U.S. 385 (1926); United States v. Batchelder, 442 U.S. 114 (1979); Kolender v. Lawson, 461 U.S. 352 (1983); and most recently Johnson v. United States, 135 S.Ct. 2551 (2015).

The judicious rationale applied, and the United States Supreme Court precedent relied upon, in Johnson, supra, for determining whether the "residual clause" under the Armed Career Criminal Act was void-for-vagueness, and consequently violates the Due Process Mandate of "notice", is indisputably applicable to the question now before the Court because 1) it is the settled rationale for determining whether a criminal statute, be it federal or state, is unconstitutionally vague, and moreover 2) the state penal statute, Penal Law Section 70.02, subdivision one (c), under attack herein is worst off than the ACCA's "residual clause" respecting the mandate of providing notice where elementally there is not single word or phrase that remotely hints at defining New York's attempt burglary in the second degree, subdivision two, as a violent crime.

It should be noted relative to the ACCA's "residual clause" some effort was made at using language to define violent conduct elementally, albeit an unsatisfactory effort; whereas under New York's Penal Law Section 70.02, subdivision one (c), other than the labeling PL Section 70.02 as "Sentence of imprisonment for a violent felony offense", relative to attempt burglary in the second degree, subdivision two, no word or ~~ph~~phrase within the elements of this offense is used to define violent conduct or the "intent to commit

violence. If this standard of defining a violent crime satisfies the mandate of Due Process, then essentially any crime now widely understood to be non-violent can be legislatively declared violent and simply categorized under a statute that does no more than label it as such. (App. D, pgs. 22-24).

The decision below was erroneously premised on Criminal Procedure Law Section 400.21, subdivisions three, seven (b), and eight, a statute that does not govern the process for adjudicating persons as persistent violent felony offenders. Furthermore, the decision amounted to a misjudgment where the lower court concluded Largo "waived his right to contest his adjudication as a persistent violent felony offender because he failed to make this claim in a timely manner" (App. A, pg. 4).

Despite the lower court citing falsely to a statute to support its opinion to deny, upon the post-conviction motion filed by Largo, he showed "good cause" for not making timely challenge to his adjudication as a violent felony offender, and specifically the use of his prior attempt burglary conviction to establish him as such, due to trial counsel failing to familiarize himself with the facts and law as it pertained to the prior attempt burglary conviction

and as a consequence failed to challenge the part of Penal Law Section 70.02, subdivision one (c), as being unconstitutionally vague where it purports to define said attempt burglary offense as a violent crime. (App.D, pg. 7, 22,25). The lower court overlooked and left unaddressed Largo's claim of good cause for not making timely challenge, although Criminal Procedure Law Section 400.16, subdivision two, provides for a showing of good cause where it incorporates the good cause provision of CPL 400.15, subd. seven (b).

Criminal Procedure Law Section 400.15, subdivision seven (b), states in pertinent part:

Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

The state court, in its opinion and decision, did not concern itself at all with Largo's claim of ineffective assist-

ance of counsel; presumably, concluding that since Largo presented no proof that the challenged statute was unconstitutional thus no need to address the claim of ineffective counsel. (App. A).

Ultimately, Largo claimed as an alternative the paramount principle respecting an unconstitutional statute, that where in fact the statute in question is unconstitutional "it should be noted that the general rule that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law but is wholly void. (citation omitted) No repeal of such enactment is necessary since the situation is the same as that which would exist had no law been passed." (citation omitted) (App. D, pg. 26). See also Ex parte Siebold, 100 U.S. 371 (1880), where this Court stated that "an unconstitutional law is void, and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." id., at 376-377.

Under Strickland v. Washington, 466 U.S. 688 (1984), wherein this Court established a two pronged test with which to evaluate ineffective assistance of counsel claims, 1) that counsel's performance fell below an objective standard

of reasonableness, and 2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceedings, it should be deemed Largo's trial counsel rendered ineffective assistance leading up to and during the sentencing proceedings where he failed to familiarize himself with the facts and law concerning Largo's prior attempt burglary conviction that the State sought use of to establish him as a persistent violent felony offender.

Concerning the 1987 incident that resulted in the attempt burglary conviction the facts counsel should have been familiar with were that Largo possessed no weapons, threatened no one, neither used force against nor caused harm to the flesh and body of any person, and no persons were at or inside the residence targeted for the burglary (App. D, pgs. 5, 14, 25).

As for the well settled law counsel should have been familiar with that supports the claim and conclusion that Penal Law Section 70.02, subdivision one (c), is as-applied to Largo unconstitutionally vague where it purports to define attempt burglary in the second degree, subdivision two, as a violent crime, however merely labels and categorizes it as such, counsel should have been familiar with this Court's

decisions in the following cases: Lanzetta v. State of New Jersey, 306 U.S. 451 (1939); Giaccio v. State of Pennsylvania, 382 U.S. 399 (1966); and Kolender v. Lawson, 461 U.S. 352 (1983).

In Lanzetta, (supra), it was held "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." 306 U.S., at 453.

In Giaccio, (supra), it was held "Both liberty and property are specifically protected by the Fourteenth Amendment against any State deprivation which does not meet standards of due process, and this protection is not to be avoided by simple label a State chooses to fasten upon its conduct or its statute." 382 U.S., at 402. It was also reiterated in Giaccio, that "It is established that a law fails to meet requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." id., at 402-403.

In Kolender, (supra), it was held "... the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people understand what conduct is prohibited and in a manner that does not encourage arbitrary or

discriminatory enforcement (citations omitted). Although the doctrine focuses both on actual notice and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement." (citation omitted) 461 U.S., at 357-358.

The three cases referenced above were cited by Largo in his motion filed in state court (App. D, Lanzetta, at pg. 18, Giaccio, at pg. 17, and Kolender, at pg. 11). However, to the state court they rung hollow.

## II. THE QUESTION PRESENTED RAISES AN ISSUE OF NATIONAL IMPORTANCE THAT WARRANTS THIS COURT'S IMMEDIATE RESOLUTION

The New York State court's decision in this case raises issues of great constitutional significance and practical importance meriting this Court's intervention. The issue of whether part of a state sentencing statute is as-applied void-for-vagueness has arisen, and is likely to recur with frequency. This Court has acknowledged the importance of this issue as referenced in the cases cited upon this petition.

Resolving this issue will certainly establish needed

clarity for the lower courts, and very likely bring relief to hundreds of defendants across this nation, especially in New York, who have similarly been unjustly adjudicated a violent felon and consequently subjected to enhanced sentencing.

Connally v. General Construction Co., 269 U.S. 385, and its progeny dictate that the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement. The part of New York's Penal Law Section 70.02, subdivision one (c), drawn in question does not satisfy said requirement and is repugnant to the Constitution of the United States.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Largo

Date: January 13, 2019