No._____

In the Supreme Court of the United States

DENNIS E. (ANONYMOUS),
PETITIONER,
V.

ANN MARIE T. SULLIVAN, M.D., COMMISSIONER OF THE NEW YORK STATE OFFICE OF MENTAL HEALTH, ET AL,
RESPONDENTS,

WAI-KIM C. (ANONYMOUS),
PETITIONER,
V.

ANN MARIE T. SULLIVAN, M.D., COMMISSIONER OF THE NEW YORK STATE OFFICE OF MENTAL HEALTH, ET AL,
RESPONDENTS,

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, STATE OF NEW YORK

JOINT PETITION FOR WRIT OF CERTIORARI

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Date: March 11, 2019

QUESTIONS PRESENTED FOR REVIEW

In 1970, New York State enacted its Criminal Procedure Law, and conferred to defendants who lacked the capacity to assist in their own defense the rights to the dismissal of their indictments, and discharge from criminal custody, upon being confined for a period equivalent to two thirds of the sentence for the highest charged crime in their indictments.

Two years later, in Jackson v. Indiana, 406 US 715 (1972), this Court held that it violated the due process and equal protection clauses of the fourteenth amendment to indeterminately, psychiatrically confine incapacitated defendants, who had never been convicted and were unlikely to attain capacity in the foreseeable future (or were not making progress towards that goal). This Court further held that such defendants could only be confined under the same standards of commitment as other civil patients.

Twenty eight years later, in People v Lewis, 95 NY 2d 539 (2000), reargument denied, 96 NY 2d 755 (2001), cert. denied, 534 US 833 (2001), the New York Court of Appeals, New York's highest court, held that a defendant who invokes Jackson v Indiana in order to be discharged from criminal custody loses the benefits of automatic dismissal of his indictment and automatic discharge from criminal custody provided under State law.

The questions presented here are:

1. Whether the State may compel relief under Jackson, over a defendant's objection, claiming in substance that the State law is unconstitutional, and thereby eviscerate the defendant's rights to automatic discharge from criminal custody and the dismissal of his indictment under State law?

2. Whether the State has the standing or authority to exercise a defendant's constitutional rights over his objection, and thereby create a conflict between the defendant's Jackson rights, and his State-created rights to liberty in order to invalidate State law to advance its own policy preferences?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

This petition seeks Supreme Court review of two cases in which the State of New York, via the Commissioner of the New York State Office of Mental Health ("Commissioner"), purported to exercise the defendant's rights under Jackson v Indiana, 406 US 715 (1972), and thereby create a conflict between the United States Constitution and State law, in order to deprive the defendants of their State-created liberty interests to effect the Commissioner's preferred policies.

Dennis E. (Anonymous) is petitioner in Dennis E. (Anonymous) v Sullivan. Respondents from Dennis E. (Anonymous) v Sullivan are Commissioner Ann Marie T. Sullivan, M.D.; the Hon. Matthew J. D'Emic, Supreme Court, Kings County, and Eric Gonzalez, District Attorney, Kings County.

Wai-Kim C. (Anonymous) is petitioner in Wai-Kim C. (Anonymous) v Sullivan. Respondents from Wai-Kim C. (Anonymous) v Sullivan are Commissioner Ann Marie T. Sullivan, M.D.; the Hon. Wayne M. Ozzi, Supreme Court, Richmond County, and Michael E. McMahan, District Attorney, Richmond County.

In both cases, Commissioner Sullivan brought applications for relief under Jackson v. Indiana, 406 US 715 (1972), and continued the applications after the defendants, who seeking to retain their rights to the dismissal of their indictments in addition to their discharge from criminal custody, objected. The two judges were nominal parties required to be named under State procedural law, and the two District Attorney's were required statutory parties. There are no corporate parties.

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Dennis E. (Anonymous) and Wai-Kim C. (Anonymous) respectfully petition the Court to grant a writ of certiorari to review the judgments of the Supreme Court of the State of New York, Appellate Division Second Department. This joint petition is permitted by Supreme Court Rule 12.4 and warranted because of the virtual identity of the legal issues and interests involved in these cases.

OPINIONS BELOW

In both cases presented by this joint petition, the courts denied the defendant, his rights to the dismissal of his indictment and discharge from criminal custody under State law, at the behest of the State, and ordered Jackson relief over the defendant's objection. The Commissioner purportedly exercised the defendants' rights under the due process and equal protection clause of the United States constitution, over the defendant's objection, in order to justify her own policy preferences in derogation of each defendant's rights to liberty under State law.

The orders of the highest state court to review the merits of Matter of Dennis E.,v. D'Emic, the New York State Court of Appeals are reported at __ N.E.3d __, 31 N.Y.3d 1111 (2018)(denying appeal as of right) and __ N.E.3d __, 32 N.Y.3d 1081(2018)(denying discretionary review)(App. 9a-10a).[1] The order of the New York State Court of Appeals in Matter of Wai-Kim C. v. Ozzi, is reported at __ N.E.3d __, 32 N.Y.3d 911 (2018)(denying discretionary review)(App. 25a). The opinions of the New York Supreme Court, Appellate Division, Second Judicial Department, in Matter of

[1] "App__" refers to pages of the Appendix submitted with this Petition.

Dennis E.,v. D'Emic and Wai–Kim C. v. Ozzi, are, respectively, reported at 159 A.D.3d 699 (2d Dept. 2018), and 164 A.D.3d 1444 (2d Dept. 2018)(App. 1a-2a & 11a-12a).

The decision and order of the trial court in People v [Dennis E. (Anonymous)], is reported at 56 Misc.3d 1141 (2017)(App. 3a-8a)(name redacted), and the order of the trial court the New York State Supreme Court, Richmond County in People v. Wai-Kim C. (Anonymous), Indictment No. 00257 (Sup. Richmond Cty, January 31, 2018), is unreported, as is its decision, see, People v. Wai-Kim C. (Anonymous), Indictment No. 00257 (Sup. Richmond Cty, November 31, 2017) (App. 13a-15a & 16a-24a).

JURISDICTION

The last denial of review in the New York State Court of Appeals was entered for each case on the same date, December 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent portions of the relevant constitutional, and statutory provisions are set forth below. (Additional provisions are set forth in Appendix I hereto.)

U.S. Const. amend. XIV, § 1

> . . . 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.

CPL 730.50 (1)

> When a superior court, following a hearing . . .is satisfied that the defendant is ... incapacitated . . . it must adjudicate him or her an incapacitated person, and . . . issue . . . an order of commitment. . .
> . . . .

When the indictment charges a felony. . . [the court] must... issue an order . . . committing the defendant...for a period not to exceed one year...

CPL 730.50 (2)

When a defendant is in the custody of the commissioner immediately prior to the expiration of the period prescribed in a temporary order of commitment and the superintendent . . . is of the opinion...the defendant continues to be . . . incapacitated . . . such superintendent must apply...for an order of retention. .

Upon receipt of such application, the court may. . . conduct a hearing to determine . . . capacity, and . . . must ...[do so] if a demand. . . is made by the defendant . . If, at the conclusion of a hearing. . .the court is satisfied ...the defendant continues to be . . . incapacitated. . . the court must adjudicate him an incapacitated person and . . . issue an order of retention . . . not to exceed one year

CPL 730.50 (3)

When a defendant is in the custody of the commissioner immediately prior to the expiration of the . . . first order of retention, the procedure set forth in subdivision two shall govern. . . , except. . .any subsequent orders of retention must. . .not. . .exceed two years. . .provided, . . .that the aggregate of the periods . . . in the temporary order of commitment, the first order of retention and all subsequent orders of retention must not exceed two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment . . . .

CPL 730.50 (4)

When a defendant is in the custody of the commissioner at the expiration of the authorized period prescribed in the last order of retention, the criminal action pending against him. . .shall terminate for all purposes, and the commissioner must promptly certify to . . .[the] court and. . . appropriate district attorney that the defendant was in his custody on such expiration date. Upon receipt of such certification, the court must dismiss the indictment, and such dismissal constitutes a bar to any further prosecution of the charge or charges contained in such indictment.

CPL 730.70

> When a defendant is in the custody of the commissioner . . . on the expiration date of the last order of retention, . . . the superintendent . . . may retain him for care and treatment for. . .thirty days. . .
>
> If the superintendent determines that the defendant is so mentally ill or . . . defective as to require continued care and treatment in an institution, he may, before the expiration of such thirty day period, apply for an order of certification in the manner prescribed [for civil commitments].

STATEMENT OF THE CASE

These cases are about liberty and whether States may deprive individuals of their State-created rights to liberty under the pretext of having to comply with the United States Constitution. Here, the State used the defendants' Constitutional rights not as a shield against injustice, but as a sword of deprivation.

States in our federal system may afford greater rights under their laws than are afforded under the federal constitution. State-created rights to liberty are protected against arbitrary State deprivation by the due process clause of the United States Constitution. See, Wolff v. McDonnell, 418 US 539, 557 (1974). And States as a general rule have no standing to assert the rights of third parties, see, Singleton v. Wulff, 428 U.S. 106, 114 (1976), and even exceptions to that general rule, require "that the relationship between the litigant and the third party ...[are] such that the former is fully, or very nearly, as effective a proponent of the right as the latter". See, id at 115.

Certainly, States which act adversely to third parties, seeking to override their objections, as here, have no standing or authority to invoke their constitutional rights

against them. Nor can the State "force" individuals to "accommodate" or "host" its viewpoint, when it conflicts with those individuals' own. See, Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 63 (2006).

A. New York's Criminal Procedure Law

Prior to passage of New York Criminal Procedure Law ("CPL") Article 730's in 1970,[2] incapacitated criminal defendants in New York lived in a legal dark age, forgotten men and women, under laws that deprived them of their liberty indeterminately without due process, and placed them in a legal purgatory, maintaining their indictments indefinitely without repose.

> The laws of New York State governing hospitalization of mentally ill defendants...[thus] made it possible for an uneducated 19-year-old boy accused of committing a burglary in Brooklyn in 1901...[who had never received] an opportunity to prove his innocence, to...be[] confined beyond his 83rd birthday in a maximum-security institution operated and staffed by the New York State Department of Correction. On November 1, 1965, that individual was the patient longest in residence at Matteawan State Hospital. There was no indication...the indictment against him had ever been dismissed and...he [, therefore,] was still liable to be put to trial if he should ever recover. This patient [was] a "forgotten man," but it [was] not the staff at Matteawan that ha[d] forgotten him. He, and hundreds like him, ha[d] been forgotten by the laws of New York...For 64 years the law ha[d] denied him not only a speedy trial but even periodic judicial review of his condition; and... confined him for decades longer than even proof of his guilt would have supported, in what for many years was an overcrowded and understaffed state correctional institution.
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> On November 1, 1965, there were 1,062 patients at Matteawan who, like him, were there because they were mentally ill and could not be tried for

[2] The New York Criminal Procedure Law was signed into law on May 20, 1970, see, L. 1970, ch. 996. It became effective on September 1, 1971.

crimes of which they had merely been accused.[3]

To redress these injustices the New York State Legislature enacted CPL 730.50 (3) and (4) into law as a part of a major revision to New York State's Code of Criminal Procedure, which was spearheaded by the Temporary Commission on Revision of the Penal Law and Criminal Code.[4] Those provisions gave incapacitated defendants the right to discharge from continuing retention under a criminal order of commitment, and to dismissal of their indictment (which is a "bar to any further prosecution"), and terminations of their "criminal action[s] ...for all purposes", CPL 730.50 (4), upon being held in custody of the Commissioner for a period equivalent to "two-thirds of the ... maximum term of imprisonment for the highest class felony charged in the[ir] indictment". CPL 730.50 (3).

The two-thirds figure was based on the notion that someone who had not been convicted, and could not be punished, should not be held longer than persons found guilty, who were afforded a one-third reduction of their sentences for good behavior. As Richard Denzer, the Executive Director of the Temporary Commission explained:

> [CPL 730.50 (3)] is new. It provides that a defendant under indictment may not be confined under a criminal order of commitment for a period in excess of two-thirds of the authorized maximum term of imprisonment for the highest class felony charged ...The two-thirds figure derives from

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[3] Mental Illness, Due Process and the Criminal Defendant: a Second Report and Additional Recommendations by the Special Committee on the Study of Commitment Procedures and the Law Relating to Incompetents of the Bar City of New York, (1968)(Due Process and the Criminal Defendant), at p. 72-73.

[4] Office of Legislative Research, Major Provisions of the Proposed Criminal Procedure Law (June 17, 1969) ("Major Provisions") at p. 1.

> the fact that under the revised Penal Law (§ 70.30 [4]), a defendant serving an indeterminate sentence may receive, for good behavior, time allowances of one-third of his maximum term. The CPL scheme materially changes the former practice ... Of course, if, at the expiration of such period, the defendant continues to be mentally ill, a civil order of commitment may be obtained to assure continued hospitalization whenever necessary.[5]

CPL Article 730 also "mandate[d] periodic court review of the need for hospitalization".[6]

While the two-thirds figure was intended to afford those unable to stand trial because of mental incapacity the equivalent of good time credit, similar to that afforded to those criminally convicted, it wasn't predicated on good behavior, but simply time spent under a criminal order of commitment. Thus, the two-thirds provision was based on crediting accused defendant's for the time they were deprived of liberty under criminal orders of commitment. Time under a CPL 730.50 criminal order of commitment has been, and is currently, credited to persons, if eventually convicted

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[5] See, McKinney's (1971) , CPL 730.50, Richard Denzer, Practice Commentaries, at p. 354, appended as Exhibit 2E to Dennis E. Verified Petition for Writs of Certiorari and Prohibition ("DE Pet."), dated October 25, 2017; see also, Major Provisions, supra n. 4, at 17 (""[T]he two-thirds figure derives from the fact that ... a defendant serving an indeterminate sentence may receive ... time allowances of one-third of his maximum term."); Comment, The Effect of the New York Criminal Procedure Law on the Treatment of Incompetent Defendants, 20 Buffalo L. Rev. 646, 655 n.61 (1971)["The two-thirds figure derives from the fact that under the revised penal law a defendant serving an indeterminate sentence may receive for good behavior, time allowance of one third of his maximum term. N.Y. Penal Law §70.30 (4)(Mckinney 1968)"].

[6] Memorandum In Support and Explanation of Proposed Criminal Law, Commission on Revision of the Penal Law and Criminal Code, March 1970 (Memorandum in Support), at pp. 8-9

after restoration, and counts towards the completion of their sentences. See, People v Pugh, 51 AD 2d 1047 (2d Dept. 1976).

CPL 730.50 (3) & (4) consequently create a right to discharge and dismissal of the defendant's indictment, when the jail time credited under a criminal order of commitment is equivalent to the maximum good time a criminal defendant would be allowed under criminal sentence, if convicted.

By enacting these provisions, the State created a constitutionally protected right to liberty, similar to the State created right to liberty created in good time for those under criminal sentence found constitutionally protected by the Court (albeit not predicated on good behavior). See, Wolff v. McDonnell, 418 US 539, 557 (1974) ("the State having created the right to good time..., the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him ...Due Process...").[7]

Defendants' State-created rights to liberty under CPL 730.50 (3) & (4) remain New York law.

B. Jackson v Indiana

Two years after New York enacted CPL Article 730 (in 1972), this Court in Jackson v. Indiana held that a person in State custody under a criminal order of commitment, who, because he lacks the capacity to stand trial, and therefore cannot

[7] See also, e.g. Vitek v Jones, 445 US 480, 488 (1980) ("We have repeatedly held that state statutes may create liberty interests....").

receive a due process determination of his guilt or innocense,[8] "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability...he will attain ...capacity in the foreseeable future".[9] If it is determined he won't attain capacity in the foreseeable future, or "even if...[he] probably ... will", but is not making "progress toward that goal", he has the right to either be released, or to be committed through the same "civil commitment proceeding[s] [using the same civil commitment standards]...required to commit...any other [State] citizen". [10]

C. Intervening New York Law

After Jackson, both defendants and the State via the Commissioner regularly brought applications for discharge from criminal orders of commitment, seeking either release or commitment under civil standards and procedures. In New York civil commitment is generally governed by Mental Hygiene Law ("MHL") Article 9.

In 1995, the New York Court of Appeals in People v Schaffer, 86 NY 2d 460 (1995) recognized that given the supremacy of federal constitutional rights, that a defendant entitled to Jackson relief could not be compelled to wait for completion of CPL Article 730's statutory commitment procedures and time periods. See, id at 468. It also found that the dismissal of a defendant's indictment was not constitutionally

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[8] All persons, including defendants, are presumed innocent unless proven otherwise. See, e.g.s, Coffin v United States, 156 US 432, 453 (1895); In re Winship, 397 US 358, 363 (1970)

[9] Jackson, 406 US at 738.

[10] Jackson, 406 US at 738 & 727-730.

mandated under Jackson. See, id at 468-469.

After Schaffer, New York courts, following CPL 730.50 (3) & (4), continued to dismiss the indictments of defendants who were civilly committed under MHL Article 9 after Jackson relief and remained in the Commissioner's custody. See, e.g., Matter of Mollen v Matthews, 269 AD 2d 42, 47 (3d Dept. 2000) (finding indictment would be dismissed under CPL 730.50 (3) & (4) after Jackson relief); People v. Lewis, 268 A.D.2d 599 (2d Dept. 2000)(finding that "[s]ince the incapacitated defendant has been in the custody of the Commissioner...for more than two-thirds of the authorized maximum term of imprisonment for manslaughter in the first degree, the indictment was properly dismissed"), reversed, 95 NY 2d 539 (2000).

That changed in 2000 in People v Lewis, 95 NY 2d 539 (2000), reargument denied, 96 NY 2d 755 (2001), cert. denied, 534 US 833 (2001). Mr. Lewis had initially been committed under CPL Article 730 (in May 1981) until such time as he regained capacity to stand trial. Lewis, 95 NY 2d at 542. His commitment was extended in 1982 through a CPL Article 730 retention order. Id at 542-543. In 1983, he petitioned for a writ of habeas corpus, pursuant to Jackson, and his status was converted from a criminal status (under a CPL an Article 730 order of commitment) to civil status (under MHL Article 9). Id at 543. Afterward, he remained in the Commissioner's custody continuously pursuant to civil commitment orders. In 1998, he sought dismissal of the pending 17-year-old indictment pursuant to CPL 730.50 (3) and (4) on the ground that he had been in the Commissioner's custody for more than two-thirds of the maximum term of the highest crime charged in his indictment.

The Court of Appeals held that because CPL 730.50 (3) referred to orders of commitment and retention issued by a superior court exercising criminal jurisdiction, it did not apply to periods a defendant was held in custody under civil commitment orders. See, id at 546-547.

It also found that denying the defendant, who sought and obtained Jackson relief, the benefit of the automatic dismissal of his indictment afforded by CPL Article 730 did not place an unwarranted and impermissible burden on the exercise of his constitutional rights under Jackson, because:

> defendant...only exchanged his right to automatic dismissal of the indictment against him -- after criminal commitment under...CPL 730.50 for the requisite time period -- for the benefits of civil commitment well before the expiration of that time period... Incidental to the exercise of his rights under Jackson v Indiana, th[e] defendant brought himself outside the four corners of CPL article 730 and, thus, was no longer entitled to avail himself of CPL 730.50's dismissal provisions, a prospective benefit that existed before he invoked his rights under Jackson.

Id. at 549 (emphasis added).

Thus, after Lewis, defendants who elected to bring applications for Jackson relief before the two-thirds period had been reached could no longer obtain the benefit of the automatic dismissal provisions in CPL Article 730.

After Lewis, New York courts, nevertheless, preserved defendants' State-created-rights to liberty under CPL 730, by holding that defendants who elected not to exercise their federal rights under Jackson, and remained under CPL 730 orders of commitment, retained their "right to automatic dismissal of the indictment" under CPL 730.50 (3) & (4). See, e.g., People v Miliokov, 18 Misc3d 816 (Sup. Ct. Kings Cty. 2008)

As one court explained after reciting pertinent portions of the above quoted language from Lewis:

> ...Prosecutors are not permitted to assert a defendant's right against self-incrimination, right to an attorney, right to a trial-by-jury, right to confront a witness or similar rights granted to a defendant in a criminal proceeding over a defendant's objection. In this Court's view, Jackson rights are subject to the same principle. For...those reasons, the Court finds that Mr. A. continues to be an incapacitated person under Article 730. [And the] State's application for Jackson relief... is denied.

People v Juan A., Ind. No. 0518/01, 06409/05 (Sup. Ct., NY Cty. December 8, 2017), at pp. 8-9.

In the cases in this Joint Petition, the trial courts no longer protected the defendant's State-created rights to liberty. At the behest of the State, they prohibited Petitioners from choosing not to exercise their Jackson rights. They sub silento held that the State may exercise a defendant's Jackson rights over his or her objection and that defendant's State-created rights to automatic discharge and dismissal of their indictments under CPL 730.50 were thereby unconstitutional under Jackson. In substance, the courts held that the State may brings a Jackson application, exercise the defendant's federal rights, over his or her objection, create a conflict between the defendant's Jackson rights and its own laws, and thereby, invalidate the defendant's State-created rights to liberty. As a consequences, Petitioners are now subject to indeterminately pending indictments without repose, and in substance a form or indeterminate parole without conviction.

D. Petitioners

1. Dennis E.

Dennis E. was arrested and charged with assault in the second degree on or about March 17, 2014.[11] "After[ward,] ... he was examined by psychiatric examiners, ...adjudicated...incapacitated... pursuant to [CPL Article 730]...[and by Order, dated October 16, 2014, was]... committed to the custody of the ... Commissioner... for a period not to exceed one year [that is, until October 15, 2015]." Khan Aff. at p. 5 and Kahn Aff. Ex. A thereto.

According to Ms. Khan: "[d]efendant's treating [p]sychiatrist...[diagnosed him with]...Schizophrenia and Major Neurocognitive Disorder." See, Khan Aff. at par. 7; see also, affidavit of Dr. Elliot Singer, dated September 30, 2015 ("Singer Aff."), Kahn Aff. Ex. C.

"According to the Report [of State psychologist, Dr. Melissa Schroers], [Dennis E.] ha[d] a long history of mental illness requiring multiple inpatient hospitalizations...[that] led to...disorganized thinking, [a cognitive impairment and inability] to understand basic legal concepts[, which]...rendered...[him] unable to assist with his...[own] defense." Khan Aff at pars. 7-8; see also, the report of Dr. Melissa Schroers, Ph.D, dated September 17, 2015 ("Schroers Rep."), Kahn Aff. Ex. C, at 2.

In September 2015, the Commissioner's doctors concluded that "even with optimal psychiatric treatment, it is unlikely that...Defendant will ever regain fitness

[11] DE Pet. at Exhibit 2A, Commissioner's Motion, at Khan Aff. at par. 4.

to stand trial, due to the severity of his Mental Illness", that "the psychiatric treatment available" would be "unlikely to substantially improve ...[his] ability to work with his attorney and consider his legal options", and therefore, he should have his status converted from a CPL 730 status to a civil status. See, Khan Aff. at pars. 11-12.

2. Wai-Kim C.

On August 11, 2009, Wai-Kim C. was indicted for assault in the first degree and related charges stemming from an alleged attack on a female staff person at the South Beach Psychiatric Center, where he was an inpatient. On August 13, 2009, Wai-Kim C. was transferred to the Kirby Forensic Psychiatric Center ("Kirby"), a secure psychiatric center operated by the Office of Mental Health ("OMH").[12]

Following an examination pursuant to CPL Article 730, he was found to be mentally incapacitated to stand trial and was committed to the custody of the Commissioner pursuant to CPL 730.50(1). Order of Commitment dated November 30, 2009, WKC Pet, Exh. 2.

E. Proceedings in State Trial Courts

1. Dennis E.

By motion, dated May 16, 2016, the Commissioner moved in Kings County Supreme Court pursuant to Jackson to have Dennis E.'s status converted from a CPL 730.50 status to a civil status to effect his "eventual transfer to a civil hospital setting", i.e., his involuntary civil commitment and continued custody under MHL Article 9. See,

[12] Wai-Kim C.'s Verified Petition for Writs of Certiorari and Prohibition ("WKC Pet."), dated April 11, 2018, at par. 2.

DE Pet., Exh. 2A ("Com. Mot."), and the Affirmation of Sania Khan, (Khan Aff.), dated May 16, 2016, annexed to Com. Mot. at p. 3.

Dennis E. moved to dismiss the Commissioner's application for Jackson relief. See, DE Pet., Exh. 2B. He argued that the rights afforded under Jackson were his and not the State's, and therefore, it was his ultimate decision, not the Commissioner's, whether to exercise those rights, or to instead, elect to retain his rights to discharge from a CPL order of commitment and dismissal of the pending indictment, under CPL 730.50, after being retained for a period equivalent to two thirds of the maximum sentence for highest charged crime. He argued, alternatively, that he be afforded his right to be restored to capacity and to stand trial on the charges against him. See, Caporal Aff. at pars. 10, 12-14.

Defendant further argued that to deny him the right to not exercise his Jackson rights and to elect those under State law would be contrary to the New York Court of Appeals' decision in Lewis, supra, which was predicated on the right of defendants to choose between obtaining Jackson relief, or the relief afforded by CPL 730.50 (3) & (4). See, Caporal Aff. at par. 11. He noted that the same trial court had previously held in People v Miliokov,18 Misc3d 816 (Sup. Ct. Kings Cty. 2008), that it was defendant's right to choose whether to exchange civil status under Jackson for the right to have his indictment dismissed. See, Caporal Aff. at par. 12. Thus, under both Lewis and Miliokov, it was the defendant's choice alone that took precedence. See, id at par. 13.

Defendant argued that the Commissioner sought to divest him of State-created rights under CPL Article 730 to the dismissal of his indictment upon being retained for

a period equal to two thirds of his maximum sentence.[13] He thus argued that he would be denied relief from the ongoing burden, and lack of repose, caused by having pending felony charges. See, id at par. 15.

Defendant further noted that the Commissioner's application for Jackson relief, suggested that she intended to seek his involuntary commitment under Article 9, evidencing no intent to discharge him to liberty. See, id at par. 15.

And the Commissioner's claimed purpose in seeking to compel Jackson relief, purportedly to transfer defendant to a "civil hospital setting", was unnecessary, he argued, because he was already in a civil hospital, albeit one classified as a secure facility. See, Caporal Aff. at pars. 16-17. And to the extent the Commissioner's claim was that Jackson relief was necessary to transfer him to a non-secure setting, she erred; as she could already do so; and indeed, was obligated to do, as a matter of law, if a secure setting was unwarranted, as committees must only be held in the least restrictive settings necessary. Id at pars. 18-19.

The Commissioner responded that the defendant did not have the exclusive right to seek relief under Jackson, and that the State had a duty to bring such action, if its professional staff opined there was no substantial likelihood that the defendant would regain capacity to proceed to trial. See, DE Pet., Exh. 3, Memorandum of Law In Opposition to Defendant's Motion to Dismiss the New York State Office of Mental Health's and Kirby Forensic Psychiatric Center's Application for Jackson Relief, dated

[13] Under State law Dennis E. would additionally be entitled to automatic discharge from criminal custody and civil status. See, CPL 730.50 (3) & (4).

January 11, 2017 ("Com. Mem."), at pp. 3-4. Jackson, she argued, therefore permitted her to compel defendants over their objection to forego their rights under the CPL Article 730. See, Com. Mem. at 4-5.

She defended her efforts to compel Jackson relief by claiming (1) that defendants had no rights to discharge from CPL Article 730 orders of commitment and the dismissal of their indictments under CPL 730.50, see, Com. Mem. at pp. 1, 7-8; and (2) that defendant would ostensibly receive the "benefits" of civil status, albeit without dismissal of his indictment, nearly two and one-half years before CPL 730.50 (3) & (4) would require the automatic dismissal of the indictment and the defendant's statutory conversion to civil status. See, Com. Mem. at p. 11. That is, the automatic statutory conversion to civil status and the dismissal of his indictment under CPL 730.50 (3) & (4) would occur on June 16, 2019.

The Commissioner argued the trial court should overrule its previous Miliokov decision. See, Com. Mem. at pp. 14-17.

Defendant replied that he had a right to civil status both under New York law, pursuant to CPL 730.50 (3) & (4), and the United Stated Constitution, pursuant to Jackson. Neither Jackson nor decisions of the New York Court of Appeals, required that the State-created liberty interest, established by Article 730, be extinguished when elected by a patient. Both constellations of liberty interests were the his alone, and while he agreed that the State was obligated to bring a Jackson application, when it appeared that he lacked capacity to assist in his own defense and was unlikely to attain capacity in the foreseeable future, the choice of which constellation of rights to

elect was his, not the Commissioner's. See, DE Pet. at par. 21.[14] In substance, the State's duty ended once the application was brought.

Defendant further argued that the asserted additional "benefits" of being in a less restrictive setting upon the issuance of Jackson relief was illusory, as such "benefits" were not only already required (e.g., the asserted "benefits" of general, as opposed to restorative, psychiatric treatment, and being treated in the least restrictive setting necessary, were already required by law); but that the Commissioner's system of assuming dangerousness and placing defendants in secure facilities to provide restorative services was unconstitutional. He thus further argued that the trial court should adhere to its prior decision in Miliokov, supra, which was in accord with Supreme Court, New York County's decision in People v Elizabeth P., Index No. 00971/2009 (Sup. Ct. N.Y. Cty. January 23, 2012) (with name redacted). See, DE Pet. Exhibits. 2 & 2G.

Trial Court's Decision

In sum, the trial court held the Commissioner may unilaterally and involuntarily extinguish the rights conferred by CPL 730.50 (3) & (4). See, Appendix B (App. 7a-8a).

The decision implied that compelling involuntary conversion to civil status pursuant to Jackson, while retaining a pending indictment, in contravention of the

[14] It should be noted that in Dennis E.'s Petition for the writs of certiorari and prohibition at Appellate Division, Second Department, formal written paragraph nomenclature was used to denominate paragraphs, e.g., Twenty First. For clarity and ease numeric numbering will be used here.

Legislature's explicit language, see, CPL 730.50 (3) & (4) and the rights they conferred, was permissible to protect the public's safety, see, Appendix B (App. 8a); and notwithstanding that maintaining such indictments, subjected defendants (who had never been convicted, and could not be punished, or be presumed to be guilty or dangerous)[15], to overbroad orders that effectively established, in perpetuity, a form of parole, including perpetual surveillance, criminal retainers, and state prosecutorial intrusion into highly personal and confidential medical and psychiatric records and treating relationships.[16]

2. Wai-Kim C.

In November 2011, the Commissioner moved, pursuant to Jackson, to have Wai-Kim C.'s status under CPL Article 730 converted to civil status under MHL Article 9. The Commissioner asserted Wai-Kim C. was unlikely to ever regain capacity to stand trail and assist in his own defense. See, WKC Pet., Exh. 3, Notice of Motion dated November 2, 2011, with supporting Affirmation of Assistant Attorney General ("AAG") Sania Kahn, dated November 2, 2011 ("Kahn Aff.") and Exhibits.

Wai-Kim C., moved to dismiss the Commissioner's application.[17] Like Dennis E., he argued that the choice of whether or not to accept the "benefit" of Jackson relief was his, and should not be imposed over his objection. See, WKC Pet., Exh. 4,

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[15] See, Jones v United States, 463 US 354, 369 (1983)("As he was not convicted, he may n ot be puni shed")

[16] See, e.g., DE Writ, Exhibit 4, People v George C., Indictment No.: 9383/09, Order (redacted), (Sup. Ct. Kings Cty. March 24, 2016).

[17] WKC Pet. Exh 4, Notice of Motion dated July 17, 2012, with supporting Affirmation.

Affirmation of Vincent Lomangino, dated July 11, 2012 ("Lomangino Aff."), at pars.10-13.

He argued that he had a substantial liberty interest in opposing conversion from criminal to civil status. Should his status be converted from criminal to civil, he would no longer be entitled to the statutory benefits available under CPL Article 730, e.g., credit toward a potential sentence if he should regain fitness, and was tried and convicted. See, WKC Pet. Exh. 4, at Lomangino Aff., par. 15. He would also lose the right to the dismissal of his indictment after the expiration of the two-thirds statutory maximum period of custodial retention under CPL 730.50. See, WKC Pet. Exh. 4, at Lomangino Aff., pars. 11-15.

He likewise explained that People v Lewis, supra, held that by seeking Jackson relief, a defendant exchanged his right to the dismissal of his indictment under CPL Article 730 for more expeditious release under civil standards of commitment. Consequently, once a person's status was converted pursuant to Jackson he could not obtain the dismissal of his pending upon being in custody for two-thirds of the authorized maximum sentence for the highest class felony in his indictment. See, WKC Pet. Exh. 4, at Lomangino Aff., para. 11.[18]

The Commissioner responded that the Jackson proceeding should not be dismissed because the State had the duty to initiate civil commitment proceedings upon finding there was no substantial probability that the defendant would attain

[18] People v Lewis, supra, never addressed the issue, at bar, of whether the State may compel Jackson relief over a defendant's objection.

capacity to stand trial in the foreseeable future. WKC Pet. Exh. 5, Memorandum of Law dated August 7, 2012. The Commissioner further argued that other methods of transferring Wai Kim C. to a non-secure facility would not achieve the same purpose as converting him to civil status. WKC Pet. Exh. 5 at 8-9.

In an August 21, 2012, decision and order, the trial court didn't reach the merits of Wai-Kim C.'s motion to dismiss, but instead held the Jackson proceeding in abeyance, and directed the Commissioner to petition for an appointment of a Special Guardian for Wai-Kim C, finding that Wai-Kim C. was not communicative and could not himself provide meaningful input. WKC Pet., Exh 7, Decision and Order dated August 21, 2012; see also, Appendix G (App. 18a-19a).

A Special Guardian was subsequently appointed to determine and protect Wai-Kim C.'s best interests in the Jackson proceeding. WKC Pet. at par. 13.

The Resumption of the Jackson Proceeding: In April 2017, the Commissioner moved to lift the stay of the Jackson proceeding. See, WKC Pet., Exh. 10, Notice of Motion to Lift Stay, dated April 7, 2017, with supporting Affirmation of Assistant Attorney General Owen T. Conroy ("Conroy Aff."), and Exhibits thereto. The Commissioner noted that although Wai-Kim C. continued to receive care and treatment while in her custody,[19] his condition had not improved: he remained psychotic, and was disorganized and unable to discuss his legal case or assist his

[19]A retention order pursuant to CPL § 730.50 dated March 23, 2017, issued following a hearing, which extended Wai Kim C.'s involuntary commitment for a period not to exceed two years. WKC Pet. Exh. 10, at Conroy Aff. par, 12, & Exhibit K thereto.

counsel. WKC Pet. Exh. 10, at Conroy Aff. par. 13.

The Commissioner, while acknowledging courts were divided on whether a Jackson application could be adjudicated over a defendant's objection, WKC Pet. Exh 12 at par. 23, nevertheless, urged the Court to resume the proceedings and grant Jackson relief. See, WKC Pet. Exh. 12 , at par. 24. She claimed Jackson relief was in Wai-Kim C.'s best interest because he would otherwise be subject to futile treatment to restore his fitness, and even if not in his best interest, "just resolution of this criminal proceeding", i.e., in substance maintaining his indictment in perpetuity was in the public's best interest. See, WKC Pet. Exh. 12 at pars. 29-32.

Wai-Kim C. responded that the issue was not whether the Commission had a duty to institute Jackson proceedings, but rather, once initiated, whether the Court could adjudicate the application over a defendant's objection. WKC Pet., Exh. 13, Sur-Reply Affirmation by Felicia B. Rosen, dated August 4, 2017. Decisions in both People v Miliokov, 18 Misc.3d 816 (2008, Sup. Ct., Kings Cty), and People v Elizabeth P., Indictment No. 00971/2009 (Sup. Ct., NY Cty., Jan. 23, 2012), he argued, upheld defendants' rights to oppose Jackson relief, and dismissed the applications. See, WKC Pet., Exh. 13

Wai-Kim C. also denied Jackson relief was in his best interest. Contrary to the Commissioner's assertions, under 14 NYCRR 27.3(a) futile restorative treatment was not required. See, WKC Pet., Exh. 13, par. 10. Finally, appellant noted that any claim to representing the public's best interest in relation to the criminal proceedings was not hers, but the District Attorney's, to make, and that the public had no interest in

obtaining unfair convictions, based upon evidence that, due to a defendant's lengthy incapacity, was lost or stale. See, WKC Pet., Exh. 13 at par. 11. In an Affirmation dated August 7, 2012, the District Attorney of Richmond County indicated that the People were taking no position on whether the Commissioner's Jackson application should be dismissed. See, WKC Pet., Exh. 6, Affirmation dated August 7, 2012.

The Special Guardian, appointed to determine and protect Wai-Kim C.'s best interests, also opposed the Commissioner's Jackson application on his behalf. She found Mr. "C[. . .] would be at a severe disadvantage if the court were to permit his status to be converted from a criminal status to a civil status" because "[i]f Mr. C[. . .] were to be converted to civil status...he would not receive any jail credit toward incarceration." WKC Pet. Exh. 14, Affirmation by Julie Clark, Esq. dated August 11, 2017.

Trial Court's Decision and Order

In November 2017, the trial court denied Wai-Kim C.'s motion to dismiss, and granted the Commissioner's Jackson application, involuntarily converting Wai-Kim C.'s CPL Article 730 status to a civil status. See, Appendix G (App. 16a-24a), Decision dated November 30, 2017. Wai-Kim C. was subsequently committed under MHL Article 9. See, WKC Pet. Exh.18. On January 31, 2018, the Supreme Court issued the order granting the defendant Jackson relief over his objection. See, Appendix F (App. 13a-15a).

F. Writs for Review in the State Intermediate Appellate Court

Both, Dennis E. and Wai-Kim C., sought review of their trial court's decisions,

by commencing original proceedings for the writs of certiorari and prohibition in the intermediate appellate court, the Appellate Division, Second Judicial Department.[20] See, Verified Petition for Writs of Certiorari and Prohibition, dated October 25, 2017 of Dennis E.; Verified Petition for Writs of Certiorari and Prohibition, dated April 11, 2018 of Wai-Kim C..

In both cases defendants sought a judgment finding that the actions of the trial court (1) was affected by errors of law and (2) exceeded its authority, when it issued its determination, holding that relief pursuant to Jackson v. Indiana, 406 US 715 (1972) could be compelled in contravention of petitioner's clear right to liberty created under CPL 730.50 (3) & (4). See, DE Pet., pars, 1, 28-31, 110-130; See, WKC Pet. par. 1..

Dennis E.

The trial court's order, Dennis E. argued, permitted the Commissioner to unilaterally, involuntarily extinguish petitioner's State-created rights to liberty, established by CPL 730.50 (3) & (4), which State-created rights were, in turn, protected by the due process clause of the United States Constitution. See, DE Pet., pars. 1 & 32-56.

He further argued that the order denied him his right to elect his State-created

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[20] Based on the theory that there continues to be a ongoing criminal proceeding, it has been the practice in New York courts to deny incapacitated defendants with mental disabilities the right to appeal afforded to all other defendants, because in substance they cannot be tried, and no criminal judgment can be issued. The State's appellate law is thus likely to be unconstitutional under the equal protection clause of the United States Constitution, as well as the Supremacy clause, via the Americans with Disabilities, and Rehabilitation Acts. See, e.g., Tennessee v Lane, 541 US 509 (2004)

rights to liberty, by allowing the Commissioner to compel petitioner to involuntarily exercise his alternative rights under Jackson that were his alone to exercise, based on what was effectively the Commissioner's policy choice as to where to treat patients. See, DE Pet., par. 1, & pars. 53-56.

Both his rights under Jackson, and CPL 730.50 (3) and (4), were independent of each other and both were only his to exercise. See, DE Pet pars. 35-37, & pars. 29-35; see also, DE Pet. at pars. 38-45. Compelling Jackson relief consequently denied him his clear State-created rights to liberty. See, DE Pet. pars. 38-45.

In short, the order deprived Petitioner of his State-created rights to liberty under CPL Article 730, by impermissibly permitting the Commissioner to exercise his Jackson rights, which were his alone to exercise.

Wai Kim C.

Wai-Kim C. similarly argued that the State had created clear rights to liberty, by enacting CPL 730.50 (3) & (4), which mandated the dismissal of his indictment and discharge from further retention under a CPL Article 730 criminal order of commitment, upon being confined in the Commissioner's custody for a period equivalent to two thirds of the maximum sentence of his highest charged crime. See, WKC Pet. pars. 29-34.

Like Dennis E., he further argued that his Jackson rights, and CPL 730.50 (3) and (4), rights were independent of each other, both were only his to exercise, see, WKC Pet pars. 35-37, & pars. 29-35; see also, WKC Pet. at pars. 38-45, and that compelling Jackson relief denied him his right to his State-created rights to liberty. See, WKC Pet

pars. 38-45.

Decisions of the Appellate Division

In nearly identical decisions, the Appellate Division, Second Department, found in perfunctory opinions, issued without meaningful explanation, that appellant had "no clear legal right to the relief sought", and thus, dismissed the Writs. See, Appendices A & E (App. 1a-2a & 11a-12a)

G. Appeal and Review in the State's Highest Court

Both Dennis E. and Wai-Kim C. sought review in the State's highest Court, the New York Court of Appeals. The Court dismissed Dennis E.'s appeal as of right and also denied his subsequent motion for leave to appeal. It also denied Wai Kim C.'s motion for leave to appeal. All were simple orders issued without opinions. See, Appendices C, D, H (App. 9a-10a, 25a).

REASONS FOR GRANTING THE PETITION

At issue here is whether the State may deny incapacitated defendants their rights to liberty under State law through the pretext of complying with the United States Constitution and thereby subject those defendants in perpetuity to what is in substance a without conviction.

The Court should grant this Petition to protect defendants' State-created rights to liberty, and to prevent a fundamental subversion of the Constitution itself. When a State seeks to clothe its own actions in derogation of liberty in the constitutional rights of those it would intern or deprive, it irreparably harms the Constitution, by undermining the very nature of the rights it is intended to confer. A right is no right

at all, if it can be used by the State for its own purposes against the preferences of the rights holder. Worse still, such State use of Petitioners' rights, here, deprived Petitioners of their State-created rights to discharge from not only their criminal orders of commitment, which Petitioners recognize would also be effected under Jackson, but the dismissal of their indictments, and repose from further prosecution, which are not afforded by Jackson – thus, in the long-term denying them rights to greater liberty.

The State's exercise of Petitioners' Jackson rights to thus deprive them of liberty may be considered a fraudulent use of our Constitution -- one neither intended by its authors, or this Court when it decided Jackson. This Court should grant this joint Petition to prevent the State from using Jackson in such an amerceable fashion, and thus abase the Constitution.[21]

Further, this Court should grant this Petition, because the decisions below are contrary to Jackson and other decisions of this Court. Jackson never held that State laws, which provide independent avenues to discharge from criminal orders of

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[21] The State's fraudulent use of the Constitution is so anomalous that not only does it act contrary to numerous decisions of this Court, its counsel acts in derogation of their duty to uphold the constitutionality of State law to do so. In substance it argues that CPL Article 730 is unconstitutional if elected by an incapacitated defendant. But State's counsel has the duty to defend State statutes. See, e.g., Ruotolo v. State, 83 N.Y.2d 248, 260-261 (1994) ("[T]he Attorney General is under a paramount duty to defend legislative action in enacting statutes"); Sweeny v . State of New York, 251 N.Y. 417, 419-420 (1929)("Certain it is that the state which enacted [a law] may not be heard to complain that the enactment is void as a violation of 'due process.'"); see also, Mendez v. Heller, 530 F.2d 457, 460 (2d Cir. 1976)("The Attorney General ...has a duty to support the constitutionality of challenged state statutes")

commitment, and dismissals of defendants' indictments, upon being in custody for a time certain, are unconstitutional. Jackson sought to protect the rights of defendants, not eliminate them. Given that the rights under Jackson are the Petitioners, their election of their alternative rights under CPL Article 730, cannot be prohibited by Jackson, as there is simply no conflict between the two, when a defendant selects his State rights over his federal. State law in such circumstances cannot be unconstitutional.

This Court has regularly found that States are not prohibited from affording greater rights through State law than are afforded by federal law. The decisions below are inconsistent with those holdings of the Court.

This Court should also grant the Petition, because it has regularly rejected the exercise of one party's constitutional rights by another, and there is simply *no precedent* of this Court that supports permitting an adverse party, here the State, to exercise another's constitutional rights in derogation of their liberty.

Finally, this Court should grant the petition, because by denying Petitioners their rights under State law, elevates the prospect of unfair trials in the unlikely even that Petitioners ever do attain capacity. By allowing indictments to pend indeterminately, proceedings commenced after long delay, would likely be predicated on stale or lost evidence, contravening fundamental notions of due process. Alternatively, if Petitioners never recover, as is likely, it denies them the repose afforded by the dismissal of their indictments afforded by State law, and in instead, effectively institutes a form of parole, without conviction – in which their movements

are tracked (both in civil institutions, and if discharged, in the community), and in which, given their outstanding indictments, their highly confidential medical information, is perpetually subject to disclosure to State prosecutors.

I. This Court Should Grant Certiorari to Prevent the State From Illegitimately Compelling or Exercising a Defendant's Constitutional Rights

It is contrary to precedent of this Court to permit the State to either compel another, or to exercise another's constitutional rights over their objection. A right is no right at all, if it can be compelled by the State. Thus, in Wooley v Maynard, 430 US 705, 714 (1977), this court held that the constitution protects "both the right to speak freely and the right to refrain from speaking". By in substance compelling Petitioners to exercise their Jackson rights over their objection, the State "invade[s] the sphere of [his] intellect and spirit which it is the purpose of...our Constitution to reserve from all official control." Id. at 715 (citation and internal quotations omitted). The State seeks to exercise a form of minor tyranny, but tyranny none-the-less, to advance its own self-interests at the expense of Petitioners' liberty. It is prohibited by our constitution from doing so. "The [constitution] protects the right of individuals to hold a point of view different from... [that which the State] commands". Id; see also, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641 (1943) (Our "government [was set up] by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."). The State cannot "force" the Petitioners to "accommodate" or "host" its viewpoint, when it conflicts with their own. See, Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 63 (2006).

Compelling Petitioners to exercise their Jackson rights, then, not only eviscerates their State-created rights to liberty under CPL 730.50 (3) & (4), but also their constitutional right not to seek Jackson relief.

Put another way, the State cannot, and does not have the standing or authority to exercise the Petitioners' rights in derogation of their liberty.

> The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks [the] personal...right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained.

See, Ashwander v. TVA, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring)(citations and footnote omitted). "[I]t may be that in fact the holders of those rights...do not wish to assert them". Singleton v. Wulff, supra, 428 U.S. at 113-114. "Ordinarily, one may not claim standing...to vindicate the constitutional rights of some third party." Id at 114, citing, Barrows v. Jackson, 346 U.S. 249, at 255 (1953). While there may be exception to this rule where the litigant will be fully, or very nearly, as effective a proponent of the right as the third party, and there is a genuine obstacle to the third party for asserting his own rights, see, Wulf, 428 US at 115-116, neither condition has been met here. There is simply no basis for the State to exercise Petitioners' Jackson rights over their objection, and to their detriment.

Indeed, as one trial court noted, the State cannot waive a defendant's right to a jury trial, or to counsel, or to remain silent, or to a non-discriminatory venire, and

thereby exercise those rights in derogation of the defendant's liberty to its own advantage. And it should not be able to do so here.

II. This Court Should Grant Certiorari to Prevent the State from Using the Constitution to Fraudulently to Limit State Law That Affords Greater Rights than the Federal Constitution

"Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." Mills v. Rogers, 457 U.S. 291, 300 (1982); see also, Danforth v. Minnesota, 552 U.S. 264, 267 (2008)(holding federal law did not constrain the authority of state courts to give broader effect to new rules of criminal procedure than federal decisional law); see also, id, at 295 (Roberts, J. dissenting)(agreeing that the Court's "precedents ma[k]e clear that States could give greater substantive protection under their own laws than was available under federal law..."); id. at 308 (confirming that "[p]rinciples of federalism protect the prerogative of States to extend greater rights under their own laws than are available under federal law.") [22]

It is thus contrary to this Court's precedent to preclude New York from affording defendants greater protections than federal law through statutory law that mandates the dismissal of their indictments upon being confined in the Commissioner's custody for an aggregate period equivalent to two-third of the maximum sentence of their highest charged crime.

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[22] See, e.g., Maine Revised Statutes Title 15 §101-D (5)(A)(providing for dismissal of indictment after being found eligible for Jackson relief, although not constitutionally required by Jackson)

Certiorari should be granted to prevent the State's fraudulent use of Petitioners' Jackson rights to unilaterally deprive them of State-created liberty -- liberty fully permitted in our federal system.

III. This Court Should Grant Certiorari to Prevent Unfair Trials and the Institution of a Form of Parole Without Conviction

By enacting CPL 730, the New York Legislature also intended to protect unconvicted defendants from other founts of unfairness. Not only was CPL Article 730 intended to afford charged, but never convicted defendants, credit for their time spent under criminal orders of commitment, but also to ensure that they would not be coerced into accepting pleas, and to address due process concerns and unfair trials caused by long delays in prosecutions, which could result from the long-term pendency of indictments without prosecution.

As Due Process and the Criminal Defendant explained:

> So far as we can determine only 11 defendants [who were held because they were unfit for trial and committed to a secure correctional hospital] were actually tried, ...of those only two were acquitted...By far the largest number [137 of 235 defendants] chose to plead guilty to a reduced charge which in many of the older cases may have led to a sentence of "time served."
> ....
>
> Our study indicated that a defendant may be hospitalized, and the opportunity for trial delayed, for months, years, decades, or even a lifetime. There obviously are cases of such great delay that it is manifestly unfair to require the defendant to anticipate even the possibility of a prosecution. A defendant who has been hospitalized longer than the maximum period for which a conviction could have (or probably would have) sent him to prison receives credit for that time and is unlikely to demand a trial. A plea of guilty and sentence costs him nothing - except the innumerable social and economic impediments that automatically follow upon the fact of a conviction. It is not unreasonable

> to suppose that an innocent defendant returned to court recovered may elect to plead guilty simply to achieve immediate and complete release from custody.
> ....
>
> Upon application made by or on behalf of the defendant hospitalized, the court should be expressly authorized to dismiss the information or indictment whenever the nature of the charge, the maximum or probable sentence that would be imposed if he were convicted, and the length of actual delay would, in its opinion, make it unfair to further postpone the case.

Id at 114 (footnote omitted); 120 (footnotes omitted)(emphasis added)

The two-thirds provision, in part, helped to address the problem of possibly coerced pleas, and the unfairness caused by delay attendant to prosecutions, based on stale evidence after years of delay, if the prosecution was ultimately restored; by requiring the indictment be dismissed and barring further prosecution.[23]

By compelling Jackson relief, these cases effectively undermine the Legislature's efforts to redress the unfairness caused by such delays. An indictment, after Jackson relief, may linger indeterminately, because there can be no trial, nor automatic dismissal. And while interest of justice dismissals may be available, they are rarely granted. More importantly, the orders void the clear language of the statute.

Even if prosecutors cannot be faulted, if years later, a defendant is restored to capacity, evidence may be stale or lost, and the fairness of any trial after such

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[23] The Committee also recommended that defendants' attorneys not be prevented from adjudicating issues during the defendant's commitment, which did not require their assistance or depended on their testimony, see, Id at 115, which development was looked upon favorably by this Court in Jackson. See, Jackson, 406 US at 740 & n. 30.

considerable delay is questionable. The result the State in substance advocated for, and sought to compel, acceded to by the trial courts, is the very opposite of that intended by the Legislature, a perpetually pending indictment without repose.

Both New York Courts and this Court have recognized that long delays in trials may deprive defendants of their rights to due process. See, e.g., People v. Singer, 44 NY 2d 241 (1978); Jackson, 406 US at 740. "Dismissal of charges against an incompetent accused has usually been thought to be justified on grounds not squarely presented here: particularly, the Sixth-Fourteenth Amendment right to a speedy trial, or the denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence.". Id (emphasis added; footnotes omitted).

This Court should grant the Petition, because as a result of these cases, incapacitated defendants may be subjected to such unfairness if they recover, and if they do not, they effectively in perpetuity will be subject to a form of parole, without conviction, as they will by reason of outstanding indictments be subject to constraints not placed on others with a civil status.

"[A person who has] not [been] convicted, ... may not be punished." Foucha v Louisiana, 504 US 71, 80 (1992), citing, Jones v United States, supra, 463 US at 369 (1983). But orders issued pursuant to Jackson in New York regularly (and effectively in perpetuity) require that prosecutors be made aware of the defendant's whereabouts, and provide prosecutors the right to re-calendar the defendant's criminal case (and compel his or her attendance), and the right to seek disclosure of the defendant's

confidential psychiatric records, and to discuss his or condition with the defendant's medical providers.[24]

Such orders issued based on compelled Jackson relief force the defendant to relinquish his or her rights to privacy, effective treatment, and/or immunity from prosecution (afforded in examinations ordered under CPL Article 730). See, e.g., Hirschfeld v Stone, 193 FRD 175 (SDNY 2000)(finding irreparable harm from disclosure of highly confidential psychiatric information, given that confidentiality is essential prerequisite to effective treatment).

Indeed, such orders are contrary to this Court's decision in Jackson, itself, because they subject unconvicted defendants by reason of pending indictments, indictments which would otherwise have been dismissed under State law, to constraints on liberty not imposed on other civil patients. See, Jackson, 406 US at 727-730.

If these cases stand, New York Law will have come full circle and returned to a form of injustice it was intended to eliminate, indeterminate deprivations of liberty based on unproven, and untriable allegations in indictments. This Court should grant the joint Petition to ensure the Constitution is not misused by the State to deny Petitioners, their State-created rights to liberty. It should also be granted as the decisions below are contrary to the precedent of this Court.

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[24] See, George C., supra, n16

CONCLUSION

For the foregoing reasons the Joint Petition for a writ of certiorari should be granted.

_____/S/_____
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