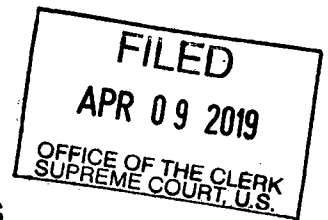


19-5542  
No.

ORIGINAL



\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

Robert T Maloy II — PETITIONER  
(Your Name)

VS.

THE PEOPLE OF THE STATE OF NEW YORK — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NEW YORK STATE, SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

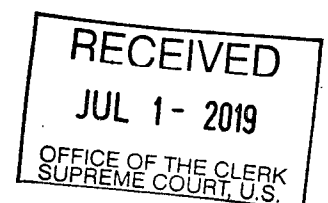
PETITION FOR WRIT OF CERTIORARI

Robert T Maloy II  
(Your Name)

Winton Correctional Facility, P.O. Box 2001  
(Address)

Dannemora, N.Y. 12929  
(City, State, Zip Code)

N/A  
(Phone Number)



### QUESTION(S) PRESENTED

1. Did the Sullivan County Supreme Court violate Petitioner's right to the due process of the law and right to the equal protection of the law by failing to impose post release supervision?
2. Does a discrepancy that exists between Petitioner's sentence (3/10/05)/resentence (3/11/05) transcripts and Petitioner's certificate of conviction entitle Petitioner to a resentencing?
3. Did the Sullivan County Supreme Court violate Petitioner's right to the due process of the law and right to the equal protection of the law by failing to impose post release supervision at Petitioner's resentencing hearing of 3/11/05?
4. Did the Sullivan County Supreme Court violate Petitioner's right to the freedom of expression and right to the due process of the law by considering Petitioner's tattoos as relevant sentencing factors while imposing sentence upon Petitioner?
5. Did the Sullivan County Supreme Court violate Petitioner's right to the due process of the law by imposing sentence upon Petitioner according to misstatements of facts and materially untrue assumptions?
6. Did the Sullivan County Supreme Court violate Petitioner's right to be free from cruel and unusual punishment by sentencing Petitioner to a sentence grossly disproportionate to the offenses committed?
7. Did the Sullivan County Supreme Court violate Petitioner's right to be free from cruel and unusual punishment by sentencing Petitioner to statutory maximum terms of imprisonment on all counts Petitioner is convicted?

### QUESTION(S) PRESENTED

8. Did the Sullivan County Supreme Court violate Petitioner's right to be free from cruel and unusual punishment by sentencing Petitioner to consecutive sentences?

9. Did the Sullivan County Supreme Court violate Petitioner's right to the equal protection of the law by sentencing Petitioner according to irrelevant factors and dissimilarly from the treatment Petitioner's codefendants received?

~~10.~~

10. Did Petitioner receive ineffective assistance of counsel in violation of Petitioner's Constitutional right during Petitioner's sentencing hearing of 3/10/05?

11. Did Petitioner receive ineffective assistance of counsel in violation of Petitioner's Constitutional right during Petitioner's resentencing hearing of 3/11/05?

12. Did the Sullivan County Supreme Court render a decision of denial on July 31, 2018 and September 5, 2018 violating Petitioner's right to the due process of the law and right to the equal protection of the law by basing such a denial on incorrect facts and law?

13. Did the New York State, Supreme Court, Appellate Division, Third Judicial Department violate Petitioner's right to the due process of the law and right to the equal protection of the law by failing to review Petitioner's reply affidavit before denying Petitioner leave to appeal?

## 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:

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and three general evaluations

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 B and C 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 Sullivan County Supreme court appears at Appendix C and D to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ 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 Sept. 26, 2018 and Nov. 15, 2018. A copy of that decision appears at Appendix D and E.

☒ A timely petition for rehearing was thereafter denied on the following date: Nov. 15, 2018 and Jan. 25, 2019, and a copy of the order denying rehearing appears at Appendix E and F.

☐ 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

1. United States Constitutional Amendment I
2. United States Constitutional Amendment IV
3. United States Constitutional Amendment V
4. United States Constitutional Amendment VIII
5. United States Constitutional Amendment XIV, Section 1
6. New York State Constitution, Article 1, Section 5
7. New York State Constitution, Article 1, Section 6

## STATEMENT OF THE CASE

1. On June 12, 2004, Petitioner was involved in a fight with Petitioner's three codefendants, Michael Krom, Christopher Quick, and Luis Martinez. The fight took place in Sullivan County's Woodbridge housing authority and during the fight, Michael Williams, Mitchell Pinales, Jose Martinez, and Martin Acosta were attacked. Williams suffered a cut to the neck from Petitioner attacking him with a knife; Pinales was attacked with a golf club by Petitioner's codefendants, fracturing his skull; Jose Martinez was stabbed by Petitioner; and Acosta was stabbed once by an accomplice, Christopher Quick, which resulted in his death.

### Trial and Direct Appeal

2. On August 11, 2004, Petitioner and Petitioner's three codefendants were indicted for the crimes of intentional murder in the second degree, depraved indifference murder in the second degree, gang assault in the first degree (three counts), attempted murder in the second degree, attempted gang assault in the first degree, assault in the first degree (two counts), criminal use of a firearm in the first degree (two counts), criminal possession of a weapon in the second degree, criminal possession of a weapon in the fourth degree (two counts).

3. Petitioner was severed from Petitioner's codefendants and trial was held at the L.H.C. Courthouse, 414 Broadway, Monticello, New York 12701 before the Honorable Frank J. LaBuda, Sullivan County Supreme Court Judge where a jury rendered a verdict of guilty on all indictment counts except intentional murder in the second degree.

4. On March 10, 2005, Petitioner was sentenced to a 25 year to Life indeterminate sentence for the depraved indifference murder in the second degree charge, a concurrent 25 year determinate sentence for one gang assault in the first degree charge, two consecutive 25 year determinate sentences on two gang assault in the first degree charges, a consecutive 25 year

## STATEMENT OF THE CASE

determinate sentence for an attempted murder in the second degree charge with an additional five years for use of a weapon, a concurrent 15 year determinate sentence for an attempted assault in the first degree charge, two concurrent 25 year determinate sentences for two assault in the first degree charges, two consecutive 25 year determinate sentences for two criminal use of a firearm in the first degree charges, a concurrent 15 year determinate sentence for a criminal possession of a weapon in the second degree charge, and two concurrent 1 year misdemeanor sentences for two criminal possession of a weapon in the fourth degree charges for a total aggregate sentence of 130 years to Life.

5. The following day on March 11, 2005, Petitioner was resentedenced to "post release supervision".

6. Timely notice of appeal was filed to the New York State, Supreme Court, Appellate Division, Third Judicial Department on March 14, 2005, where Petitioner raised the following claims: (1). The conviction for depraved indifference murder is based on insufficient evidence; (2). The jury returned inconsistent verdicts; (3). Petitioner was deprived of Petitioner's right to a fair trial by the admission of irrelevant and prejudicial evidence; (4). County Court improperly ~~allowed~~ the People to introduce evidence after the proof closed; (5). Petitioner was denied effective assistance of counsel; (6). Petitioner was deprived a fair trial by the misconduct of the prosecutor; (7). The court improperly imposed an illegal sentence; (8). The court improperly imposed consecutive sentences; (9). The sentences are harsh and excessive.

7. On January 11, 2007, the New York State, Supreme Court, Appellate Division, Third Judicial Department modified Petitioner's judgment, on the law, by vacating the consecutive five year sentence imposed under Penal Law § 265.09(2) and directing that Petitioner's sentence for criminal use of a firearm in the first degree under counts 10 and 11 of the indictment shall run concurrent with the sentence for attempted murder in the second degree under count 6 of the indictment, and, as so modified, affirmed, for a new aggregate sentence of 100 years to Life. People v. Malay, 36 A.D.3d 987 (3d Dept. 2007).

## STATEMENT OF THE CASE

8. Petitioner timely applied for permission to appeal to the New York State, Court of Appeals on February 7, 2007, where Petitioner raised the following claims: (1). Leave to appeal should be granted to review the sufficiency of the evidence in support of the conviction for murder in the second degree under a theory of depraved indifference; (2). Leave to appeal should be granted to resolve the question left unanswered by *People v. Whipple*, 97 NY2d 1 (2001); (3). Leave to appeal should be granted to review the inconsistency of the verdicts; (4) Leave to appeal should be granted to review the issue of the effectiveness of Petitioner's counsel; (5). Leave to appeal should be granted to review the propriety of the consecutive sentences imposed for depraved indifference murder and gang assault.

9. On May 2, 2007, the New York State, Court of Appeals denied Petitioner leave to appeal. *People v. Maloy*, 8 N.Y.3d 987 (2007).

10. On July 25, 2008, Petitioner filed a habeas corpus petition in the United States District Court, Southern District of New York, where Petitioner raised the following claims: (1). The issue concerning the sufficiency of the evidence was not procedurally barred; (2). The evidence showed that Petitioner acted with intent providing the conviction for depraved indifference murder was not support by sufficient evidence.

11. On June 28, 2012, Honorable Kenneth M. Karas, District Court Judge agreed with Honorable George A. Yanthis, Magistrate Judge's Report and Recommendation to deny relief. *Maloy v. Fisher*, 2012 WL 2478473 (S.D.N.Y. Jun. 28, 2012) (NO. 08-CV-6647 KMK GAY).

12. On July 9, 2012, Petitioner petitioned the United States Court of Appeals, Second Circuit for a certificate of appealability from judgment dismissing Petitioner's petition ~~for~~ for a writ of habeas corpus and on October 18, 2012, Petitioner's leave to appeal was denied. Certificate of appealability denied (2nd Cir. 12-2121) (Oct. 18, 2012).

13. Pursuant to statute, Petitioner's sentence was reduced from 100 years to Life to a new aggregate

## STATEMENT OF THE CASE

sentence of 89 years to life.

### Writ of Error Coram Nobis

14. In a separate proceeding, on March 13, 2017, Petitioner petitioned the New York State, Supreme Court, Appellate Division, Third Judicial Department for a writ of error coram nobis, raising the following claims: (1). Appellate counsel failed to raise trial counsel's ineffectiveness for failing to object to unsworn jurors, (2). Appellate counsel failed to raise the issue of the gang assault and depraved indifference murder of Martin Acosta as verdicts being against the weight of the evidence, (3). Appellate counsel failed to raise trial counsel's ineffectiveness for trial counsel's failure to properly object to the insufficiency of the evidence of the depraved indifference murder charge.

15. On May 11, 2017, Petitioner was denied relief by the New York State, Supreme Court, Appellate Division, Third Judicial Department, People v. Maloy, 2017 WL 1966832 (3d Dept. 2017).

16. On October 8, 2017, Petitioner petitioned the New York State, Court of Appeals, Honorable Rowan D. Wilson, Associate Judge for leave to appeal from the order of denial of the New York State, Supreme Court, Appellate Division, Third Judicial Department dated May 11, 2017 and was denied leave on December 12, 2017. Leave to appeal denied People v. Maloy, 30 N.Y.3d 1062 (Ct. App. 2017).

17. Following the denial of leave to appeal to the New York State, Court of Appeals on December 12, 2017, Petitioner petitioned Honorable Rowan D. Wilson, Associate Judge on January 29, 2018 for permission to reargue Petitioner's error coram nobis claims and was denied permission on February 26, 2018, People v. Maloy, New York State, Court of Appeals Docket No. 109153.

## STATEMENT OF THE CASE

18. On April 30, 2018, Petitioner petitioned the United States Supreme Court for a writ of certiorari concerning Petitioner's writ of error coram nobis claims and was denied certiorari on October 1, 2018. Malay v. New York, United States Supreme Court Docket No. 17-9145.

19. Following the denial of Petitioner's writ of certiorari by the United States Supreme Court on October 1, 2018, Petitioner petitioned the Supreme Court on October 16, 2018 for rehearing for a writ of certiorari, raising the following claims: (1). Rehearing should be granted to review Petitioner's claim of the violation of Petitioner's right to the due process of the law and the equal protection of the law, due to the fact, Petitioner was not afforded a hearing pursuant to People v. Butler, 46 A.D.3d 1446 (N.Y.A.D. 4 Dept. 2007); Rehearing should be granted to review Petitioner's claim of the violation of Petitioner's right to the due process of the law, the right to the equal protection of the law, and the right to be free from cruel and unusual punishment, due to the fact, Petitioner was not afforded relief pursuant to People v. Bleakley, 69 N.Y.2d 490 (N.Y. 1987); (3). Rehearing should be granted to review Petitioner's claim of the violation of Petitioner's right to the due process of the law, due to the fact, Petitioner was denied effective assistance of appellate counsel and trial counsel.

20. On December 3, 2018, Petitioner was denied a rehearing by the United States Supreme Court. Malay v. New York, United States Supreme Court Docket No. 17-9145.

21. On November 20, 2018, Petitioner motioned the United States Court of Appeals, Second Circuit for permission to submit a second writ of habeas Corpus and was denied on December 26, 2018. Malay v. Fischer, United States Court of Appeals, 2nd Circuit Case No. 18-3525.

### The Reopening and Review of Petitioner's Federal Habeas Corpus

22. On November 27, 2018, Petitioner's federal habeas corpus was reopened by the United

## STATEMENT OF THE CASE.

State Court of Appeals, Second Circuit and Petitioner was granted a COA. Petitioner was docketed for November 27, 2018 and termed December 26, 2018. (2nd. Circ. 18-3525) (Nov. 27, 2018).

23. On January 16, 2019, the United States Court of Appeals, Second Circuit determined Petitioner's appeal and issued Mandate 2476241. Petitioner was not sent the Mandate 2476241 and is awaiting Petitioner's copy entered on January 16, 2019, which Petitioner has requested from the Clerk of the United States Court of Appeals, Second Circuit.

### C.P.L. §440.20 Motion

24. In a separate proceeding to the trial and sentencing court, Sullivan County Supreme Court, Honorable Frank J. LaBuda, Sullivan County Supreme Court Judge, on May 21, 2018, Petitioner moved to vacate Petitioner's sentence under C.P.L. §440.20, raising the following claims: (1) County Court failed to impose post-release supervision on Petitioner's determinate sentences; (2) There is a discrepancy between the sentencing minutes and the certificate of conviction; (3) Petitioner's sentence at Petitioner's resentencing amounts to an illegal sentence; (4) Petitioner's First Amendment and due process rights were violated when the sentencing judge sentenced Petitioner according to Petitioner's tattoos; (5) Petitioner was denied due process by sentencing court's misstatements of facts and the prosecutor's materially untrue assumptions; (6) Petitioner's sentence is grossly disproportionate and amounts to cruel and unusual punishment; (7) Petitioner's sentence is cruel and unusual punishment, as the sentencing maximums statutorily apply to Petitioner; (8) Petitioner's sentence, as consecutive sentences, statutorily apply to Petitioner, equals a cruel and unusual punishment; (9) Petitioner was sentenced in violation of Petitioner's right to the equal protection of the law; (10) Counsel was ineffective at Petitioner's sentencing hearing; (11) Counsel was ineffective at Petitioner's resentencing hearing.

STATEMENT OF THE CASE

25. On July 31, 2018, Petitioner was denied relief by Sullivan County Supreme Court, Honorable Frank J. LaBuda, Sullivan County Supreme Court Judge. (See, Appendix D, DECISION and ORDER, Dated July 31, 2018).

26. Following the denial of Petitioner's C.P.L. §440.20 motion by Sullivan County Supreme Court, Honorable Frank J. LaBuda, Sullivan County Supreme Court Judge on July 31, 2018, Petitioner moved for reargument of Petitioner's claims on August 7, 2018, raising the following claims: (1) Reargument must be permitted due to the denial of Petitioner's C.P.L. §440.20 motion being based on a misapprehension of facts and law in regard to Petitioner's claims of cruel and unusual punishment and ineffective assistance of counsel; (2) Petitioner's claims of the failure of County Court to impose post-release supervision on all Petitioner's determinate sentences, the discrepancy between the sentencing minutes and the certificate of conviction, Petitioner's resentencing amounting to an illegal resentencing, Petitioner's First Amendment and due process rights were violated when the sentencing judge sentenced Petitioner according to Petitioner's tattoos, Petitioner was denied due process by sentencing court's misstatements of facts and the prosecutors materially untrue assumptions, and Petitioner was sentenced in violation of Petitioner's right to the equal protection of the law; (3) The denial of Petitioner's C.P.L. §440.20 motion pursuant to C.P.L. §440.30(4)(b) is in error; (4) The order of denial by the Sullivan County Supreme Court "with prejudice" is without just cause.

27. On September 5, 2018, Petitioner's motion for reargument was entertained by Sullivan County Supreme Court, Honorable Frank J. LaBuda, Sullivan County Supreme Court Judge, but ultimately, denied Petitioner relief. (See, Appendix C, DECISION and ORDER, Dated September 5, 2018).

28. Following the denial of Petitioner's C.P.L. §440.20 motion by Sullivan County Supreme Court, Honorable Frank J. LaBuda, Sullivan County Supreme Court Judge on July 31, 2018, Petitioner moved on August 15, 2018 for leave to appeal to the New York State, Supreme Court, Appellate Division, Third Judicial

### STATEMENT OF THE CASE

Department, Honorable John C. Egan Jr., Associate Justice to review Petitioner's C.P.L. § 440.20 motion claims and was denied leave on September 26, 2018. (See, Appendix A, DECISION AND ORDER ON MOTION, Dated September 26, 2018).

29. Following the denial of Petitioner's motion to reargue by the Sullivan County Supreme Court, Honorable Frank J. LaBuda, Sullivan County Supreme Court Judge on September 5, 2018, Petitioner moved on September 25, 2018 for leave to appeal to the New York State, Supreme Court, Appellate Division, Third Judicial Department, Honorable John C. Egan Jr., Associate Justice to review Petitioner's motion to reargue claims and was denied leave on November 15, 2018. (See, Appendix B, DECISION AND ORDER ON MOTION, Dated November 15, 2018).

30. Following the denial of leave to appeal to the New York State, Supreme Court, Appellate Division, Third Judicial Department, Honorable John C. Egan Jr., Associate Justice on September 26, 2018, Petitioner moved on October 12, 2018 for reargument for leave to appeal to the Appellate Division, Honorable John C. Egan Jr., raising the following claims: (1) Reargument must be permitted, due to the fact, the Appellate Division rendered a denial to Petitioner without reviewing Petitioner's affidavit in reply to the People's opposition; (2) Reargument must be permitted upon the grounds that, matters of fact and law, were overlooked and/or misapprehended by the Appellate Division.

31. Petitioner's motion for reargument for leave to appeal to the New York State, Supreme Court, Appellate Division, Third Judicial Department, Honorable John C. Egan Jr., Associate Justice was denied on November 15, 2018. (See, Appendix E, DECISION AND ORDER ON MOTION, Dated November 15, 2018).

32. Following the denial of leave to appeal to the New York State, Supreme Court, Appellate Division, Third

### STATEMENT OF THE CASE

Judicial Department, Honorable John C. Egan Jr., Associate Justice on November 15, 2018, Petitioner moved on November 27, 2018 for reargument for leave to appeal to the Appellate Division, Honorable John C. Egan Jr., raising the following claims: (1) Sullivan County Supreme Court's overlooking and/or misapprehending matters of fact and law; (2) The New York State, Supreme Court, Appellate Division, Third Judicial Department's overlooking and/or misapprehending of facts and law.

33. Petitioner's motion for reargument for leave to appeal to the New York State, Supreme Court, Appellate Division, Third Judicial Department, Honorable John C. Egan Jr., Associate Justice was denied on January 25, 2019. (See, Appendix E, DECISION AND ORDER ON MOTION, Dated January 25, 2019).

34. On June 11, 2019, Petitioner motioned the United States Court of Appeals, Second Circuit for permission to submit a second writ of habeas corpus regarding Petitioner's C.P.L. § 440.20 motion claims. Petitioner's motion is awaiting a final judgment.

### C.P.L. § 440.20 Motion (Second Motion)

35. In a separate proceeding, on June 3, 2019, Petitioner motioned the trial and sentencing court, Sullivan County Supreme Court, for a vacating of Petitioner's sentence under C.P.L. § 440.20, raising the following claim: (1) Petitioner's sentence is unauthorized pursuant to Penal Law § 70.30(e)(vii)(A). Petitioner's C.P.L. § 440.20 motion is currently awaiting a final judgment.

### Petitioner's Instant Application To This Honorable Court

36. Petitioner now petitions this Honorable Court for a writ of certiorari to review Petitioner's C.P.L. § 440.20

## STATEMENT OF THE CASE

motion claims previously presented in the New York State courts. (See, STATEMENT OF THE CASE at pg. 9-12, PP. 24-34).

## Facts

37. The claims Petitioner presents to this Honorable Court are that which took place at the Sullivan County Supreme Court during Petitioner's sentencing hearing of March 10, 2005 and Petitioner's resentencing hearing of March 11, 2005.

38. On March 10, 2005, Petitioner was sentenced to a 25 year to Life indeterminate sentence for the depraved indifference murder in the second degree charge, a concurrent 25 year determinate sentence for one gang assault in the first degree charge, two consecutive 25 year determinate sentences on two gang assault in the first degree charges, a consecutive 25 year determinate sentence for an attempted murder in the second degree charge with an additional five years for use of a weapon, a concurrent 15 year determinate sentence for an attempted assault in the first degree charge, two concurrent 25 year determinate sentences for two assault in the first degree charges, two consecutive 25 year determinate sentences for two criminal use of a firearm in the first degree charges, running concurrent with each other, a concurrent 15 year determinate sentence for a criminal possession of a weapon in the second degree charge, and two concurrent 1 year misdemeanor sentences for two criminal possession of a weapon in the fourth degree charges for a total aggregate sentence of 130 years to Life.

39. Prior to imposing sentence upon Petitioner, the Sullivan County Supreme Court entertained Petitioner's counsel's concerns regarding a 330 motion, denying said motion. (Appendix H, Sentence Transcript (3/10/05) at pg. 1-2).

40. After giving a denial to Petitioner's counsel's 330 motion, the Sullivan County Supreme Court, offered Petitioner

## STATEMENT OF THE CASE

an opportunity to speak on Petitioner's behalf, as well as provided the People with an opportunity to read letters into the record supplied by the victims and victims family. (Appendix H, Sentence Transcript (3/10/05) at pg. 2-6).

41. Following the reading of the letters into the record by the People, the People expressed the People's concerns regarding the court's imposition of sentence upon Petitioner. (Appendix H, Sentence Transcript (3/10/05) at pg. 6-17).

42. Upon detailing the People's concerns, the People made assumptions as to the conduct of Petitioner during Petitioner's trial, prior to sentencing, stating the following: "I recognize Maloy is a young man without much of a criminal record, but he also is a young man who has shown absolutely, from my perspective sitting in my seat, no remorse for his conduct. There were even times during the trial when I looked at him, he was smirking." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 8, lines 15-22). Further, the People specifically provided the People's perspective concerning the victims' family regarding the imposing of sentence, stating the following: "We know that the time that the People seek is substantial and significant, and we recognize and reflect this defendant's age, but I also can't ignore the great harm that he brought to the lives of four people and their families, the loss of their brother and great injury that has occurred to these people, and I've gotten to know this family and the kids pretty well, and they're pretty nice people, ~~these people~~ <sup>Judge</sup> They're pretty nice people. Thank you." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 17, lines 10-20).

43. Following the People's concerns regarding Petitioner's sentencing, Petitioner's counsel stated a few words on Petitioner's behalf and corrected the error made by the People regarding Petitioner's criminal record. (Appendix H, Sentence Transcript (3/10/05) at pg. 17-19).

44. Following Petitioner's counsel's concerns, the Sullivan County Supreme Court proceeded to

## STATEMENT OF THE CASE

pronounce sentence upon Petitioner. (See, Appendix H, Sentence Transcript (3/10/05) at pg. 19-27).

45. Notably, during the imposition of Petitioner's sentence, the Sullivan County Supreme Court predicated, in part, the court's determination of a fair sentence based on the fact that Petitioner left the courtroom "a living man." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 20, lines 19-23).

46. The Sullivan County Supreme Court also based a large amount of consideration upon Petitioner's tattoos when imposing sentence, stating the following: "I've read over and over again your pre-sentence report, and I try to find rhyme or reason why you did what you did. It might be best summed up in the personal information that was provided to me by the Sullivan County Probation Department. You take fancy in decorating your body with a skull on the neck, with a grim reaper on your arm, the spider on your hand, a dragon, a gun on your chest. And on June 12th, you indeed were the grim reaper coming to Sullivan County." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 21, lines 2-13).

47. The Sullivan County Supreme Court believed people like Petitioner, based in part on the above, "ought never see the light of day." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 21, lines 19-20). The court took this position against Petitioner, even in the court understanding that Petitioner was only 20 years old at the time of the crime with no prior criminal history. (Appendix H, Sentence Transcript (3/10/05) at pg. 21, lines 20-22).

48. In continuation of the Sullivan County Supreme Court's sentencing of Petitioner, the court incorrectly characterized Petitioner as a gang member, stating the following: "My sentence will ensure and protect the people of this community from gangs such as you." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 21, lines 22-24; see also, pg. 24, lines 18, 19).

## STATEMENT OF THE CASE

49. Upon pronouncing sentence on Petitioner, concerning certain counts, the Sullivan County Supreme Court used Petitioner's tattoos as sentencing factors, stating the following: "And as you continued your grim reaper of destruction and havoc here in this county, you assaulted by a gang Mitchell Romales, who was seriously and permanently injured by the weapons, an unarmed man, assaulted by you folks with weapons, wasn't even a fair fight, 25 years consecutive with the two previously imposed sentences for a total of 75 years.

"With respect to Mike Williams, separate individual, separate assault, serious injuries, your dragon assault on those men could have been called off at any time but it wasn't, it continued until more lay wounded and dying, 25 years to run consecutively with the three sentences previously imposed." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 23, lines 4-20).

"Now, with respect to the possession of the weapons in Counts 10 and 11, that is Criminal Use Of a Firearm, the loaded handgun here, again the spiderhand had the opportunity to throw away the gun, not use it, but you had to pull the trigger three times. Clearly you intended to use it, but for the malfunctioning of the weapon, more havoc would have been wreaked upon our community, a bunch of innocent guys, one eating Chinese food minding his own business, having nothing to do with you or your three other gang members, the 15 year sentence with respect to Counts 10 and 11, each must run concurrently with each other." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 23-24).

50. On every determinate sentence imposed upon Petitioner by the Sullivan County Supreme Court, the court failed to impose a term of post-release supervision. (Appendix H, Sentence Transcript (3/10/05) at pg. 21-27).

51. After the Sullivan County Supreme Court finished pronouncing Petitioner's sentence, in totality, Petitioner was sentenced to an aggregate sentence of 130 years to life.

STATEMENT OF THE CASE

52. The following day, on March 11, 2005, in an attempt to add post-release supervision to Petitioner's determinate sentences, the Sullivan County Supreme Court, upon resentencing Petitioner, again, failed to impose any term of post-release supervision. (Appendix I, Sentence Transcript (3/11/05) at pg. 3).

## REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO REVIEW THE FAILURE OF COUNTY COURT TO IMPOSE POST RELEASE SUPERVISION ON ALL PETITIONER'S DETERMINATE SENTENCES

1. Petitioner respectfully submits that Sullivan County Supreme Court failed to impose post release supervision on all Petitioner's determinate sentences, approximately ten determinate sentences in all.

2. The failure of the Sullivan County Supreme Court to impose post release supervision is evident in Petitioner's sentencing transcripts of 3/10/05, as the court upon sentencing Petitioner, only pronounced the term of imprisonment on each count but never pronounced the necessary term of post release supervision. (See, Appendix H, Sentence Transcript (3/10/05) at pg. 22-26).

3. Pursuant to law and by mandate of statute, Petitioner must be sentenced to both the term of imprisonment and the term of post release supervision by the sentencing judge, when sentenced to a determinate sentence. (See, People v. Warner, 69 A.D.3d 1052; People v. Sparber, 10 NY, 3d 451 [2008]).

4. Therefore, because Sullivan County Supreme Court failed to pronounce the term of post release supervision when sentencing Petitioner, Petitioner is serving an illegal sentence in violation of Petitioner's rights to the due process of law and the equal protection of the law.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE DISCREPANCY BETWEEN THE SENTENCING MINUTES AND THE CERTIFICATE OF CONVICTION

5. Petitioner respectfully submits that there exists a discrepancy between Petitioner's sentencing minutes and the certificate of conviction.

## REASONS FOR GRANTING THE PETITION

6. A review of Petitioner's sentencing transcripts of 3/10/05 provide that the Sullivan County Supreme Court did, indeed, only pronounce the term of imprisonment when imposing sentence upon Petitioner and failed to pronounce the term of post release supervision. (See, Appendix H, Sentence Transcript (3/10/05) at pg. 22-26).

7. Contrary to the sentencing transcripts and in error, the certificate of conviction states that Petitioner was allegedly sentenced to, both, the term of imprisonment and the term of post release supervision. (See, Appendix I, Sentence & Commitment; and compare against Appendix H, Sentence Transcript (3/10/05) at pg. 22-26). Further, the sentence and commitment erroneously states that on "3-11-05 sentence modified to include post Release on all determinate sentences," but, a review of Petitioner's resentence on 3/11/05 details, specifically, that Petitioner was never sentenced on any count to post release supervision, but that, Mr. Zangla recommended "to impose five years post-release supervision by law," then, the court agreed, vaguely, "Yes. Maximum post-release supervision from Department of Parole. Defendant remanded. Thank you. (See, Appendix J, Sentence Transcript (3/11/05) at pg. 3).

8. The discourse of Mr. Zangla and the Sullivan County Supreme Court cannot be considered a proper and just resentencing, as no specific count was considered to have any added post release supervision included. Only a blanket statement exists, leaving a general and ambiguous reference to post release supervision that does not comport with the mandate of law, therefore, it was in error that the sentence and commitment was decided to reflect five years post release supervision on every determinate count because no such sentence was imposed by the Sullivan County Supreme Court.

9. Pursuant to People v. Ingram, 263 A.D.2d 959 and due to the fact Petitioner's sentence and commitment are erroneous, Petitioner must be resentenced to correct the discrepancy that exists between the sentencing transcripts of 3/10/05, the sentencing transcripts of 3/11/05, and the sentence and commitment.

## REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO REVIEW PETITIONER'S RESENTENCING AMOUNTING TO AN ILLEGAL SENTENCING

10. Petitioner respectfully submits that Sullivan County Supreme Court failed to impose a term of imprisonment and term of post-release supervision during Petitioner's resentencing on 3/11/05.

11. A review of Petitioner's resentencing of 3/11/05 provides that the Sullivan County Supreme Court resentedenced Petitioner to "Maximum post-release supervision from Department of Parole." (See, Appendix J, Sentence Transcript (3/11/05) at pg. 3, lines 8-10). This ambiguous and illegal sentence was the replacement/modification sentence for Petitioner's prior sentence of 130 years to Life, therefore, is the current sentence Petitioner is actually serving at this time.

12. This resentencing of Petitioner on 3/11/05 by Sullivan County Supreme Court is illegally imposed, as there was no pronouncement of the term of imprisonment nor the term of post release supervision, therefore, violating Petitioner's rights to the due process of law and the equal protection of the law. Also, in failing to properly sentence Petitioner, the Sullivan County Supreme Court failed to properly afford Petitioner the right to allocution and violated Petitioner's right to the due process of the law.

CERTIORARI SHOULD BE GRANTED TO REVIEW PETITIONER'S FIRST AMENDMENT AND DUE PROCESS RIGHTS VIOLATIONS WHEN THE SENTENCING JUDGE SENTENCED PETITIONER ACCORDING TO PETITIONER'S TATTOOS

13. Petitioner respectfully submits that during Petitioner's sentencing on 3/10/05, Petitioner was sentenced in violation of Petitioner's First Amendment and due process rights, when the sentencing judge considered Petitioner's tattoos as aggravating sentencing factors.

## REASONS FOR GRANTING THE PETITION

14. "The tattoo itself, the process of tattooing, and even the business of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment." Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061, (emphasis in bold underline).

15. In Petitioner's instant case, Petitioner's tattoos were used as aggravating sentencing factors by the judge, therefore, punishing Petitioner for exercising Petitioner's First Amendment right to be a tattooed person and increasing Petitioner's sentence.

16. When the judge sentenced Petitioner, the judge stated the following: "I've read over and over again your presentence report, and I try to find rhyme or reason why you did what you did. It might be best summed up in the personal information that was provided to me by the Sullivan County Probation Department. You take fancy in decorating your body with a skull on the neck, with a grim reaper on your arm, the spider on your hand, a dragon, a gun on your chest. And on June 12th, you indeed were the grim reaper coming to Sullivan County." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 21, lines 2-13).

17. As read above, the sentencing judge, upon considering an appropriate sentence, first looked to his bias against Petitioner because Petitioner was tattooed "with a skull on the neck, with a grim reaper... spider... a dragon... a gun" and, even based off of the grim reaper tattoo, specifically, the judge believed Petitioner was "indeed... the grim reaper coming to Sullivan County." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 21, lines 8-13).

18. Further into sentencing Petitioner, the judge applied his bias and unconstitutional sentencing factors to give reason to why Petitioner was deserving of the maximum sentence on certain counts, stating the following: "And as you continued your grim reaper of destruction and havoc in this county, you assaulted by a gang Mitchell Pinales, who was seriously and permanently injured by the weapons, an unarmed

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man, assaulted by you folks with weapons, wasn't even a fair fight, 25 years consecutive with the two previously imposed sentences for a total of 75 years.

"With respect to Mike Williams, separate individual, separate assault, serious injuries, your dragon assault on those men could have been called off at any time but it wasn't, it continued until more lay wounded and dying, 25 years to run consecutively with the three sentences previously imposed..

"Now, with respect to the possession of the weapons in Counts 10 and 11, that is Criminal Use Of a Firearm, the loaded handgun here, again the spiderhand had the opportunity to throw away the gun, not use it, but you had to pull the trigger three times. Clearly you intended to use it, but for the malfunctioning of the weapon, more havoc would have been wreaked upon our community, a bunch of innocent guys, one eating Chinese food minding his own business, having nothing to do with you or your three ~~gang~~ <sup>other</sup> gang members, the 15-year sentence with respect to Counts 10 and 11, each must run concurrently with each other." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 23, 24 (emphasis in bold underline)).

19. Clearly, what belief system the judge held and used to impose sentence upon Petitioner, was one riddled with unconstitutionality and lacked fundamental fairness. The judge, clearly incited by and focused on Petitioner's tattoos, made the tattoos elements of these above mentioned counts in structuring a sentence based on these irrelevant considerations. Through the judge's understanding, the tattoos, specifically, of the grim reaper, the dragon, and the spider all played significant roles in the crimes and, as the sentencing judge put it, had Petitioner not been tattooed, these crimes might not have occurred because "the spider hand had the opportunity to throw away the gun, not use it." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 24, lines 10-12).

20. These First Amendment considerations during Petitioner's sentencing are similar to the considerations in United States v. Kaba, 480 F.3d 152, where "the Court of Appeals held that district court's apparent suggestion that the sentence was based in part on defendant's identification with

## REASONS FOR GRANTING THE PETITION

the West-African community created the appearance of unfairness."

21. The court stated the following: "A defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing. United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994) (citations omitted); see also U.S.C. § 994(d) ('The [Sentencing] Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders'); U.S.S.G. § 5h1.10 ('National origin is] not relevant in the determination of a sentence'). It has long been settled in this Circuit that although interference to national origin and naturalized status is permissible during sentencing, it is allowed only 'so long as it does not become the basis for determining the sentence. United States v. Jacobson, 15 F.3d 19, 23 (2d Cir. 1994) (citing United States v. Tarricone, 996 F.2d 1414, 1424-25 (2d Cir. 1993)). Although deterrence is undoubtedly a proper consideration in imposing sentence, we reject the view that defendant's ethnicity or nationality may legitimately be taken into account in selecting a particular sentence to achieve the general goal of deterrence. Leung, 40 F.3d at 586 (citations omitted). Nor is proof of actual bias necessary to warrant vacatur of the sentence. Because 'justice must satisfy the appearance of justice', even the appearance that the sentence reflects a defendant's race or nationality will ordinarily require a remand for resentencing. Id. (citing United States v. Edwards-France, 885 F.2d 1002, 1005-06 (2d Cir. 1989) (internal citations omitted))." Kaba, *supra*, at 156.

22. The Court of Appeals made clear that actual bias is not necessary, "even the appearance," is enough to call for a remand for resentencing and because of the proof of actual bias in Petitioner's instant case, this same view elected by the Court of Appeals should be applied to the Petitioner's situation, finding that Petitioner's First Amendment and due process rights were violated when Petitioner was sentenced according to Petitioner being a tattooed person.

CERTIORARI SHOULD BE GRANTED TO REVIEW PETITIONER BEING DENIED DUE PROCESS BY

## REASONS FOR GRANTING THE PETITION

### SENTENCING COURT'S MISSTATEMENTS OF FACTS AND THE PROSECUTOR'S MATERIALLY UNTRUE ASSUMPTIONS

23. Petitioner respectfully submits that Petitioner's due process right was violated when Petitioner was sentenced according to misstatements made by the Sullivan County Supreme Court and materially untrue assumptions made by the prosecutor.

24. During Petitioner's sentencing, the Sullivan County Supreme Court made numerous misstatements of facts concerning Petitioner. The court, upon pronouncing sentence, mistakenly made reference to the Petitioner being a "gang member" (See, Appendix H, Sentence Transcript (3/10/05) at pg. 24, line 19) and interjected the court's own belief that Petitioner was "the grim reaper coming to Sullivan County." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 21, lines 12-13).

25. Further, when pronouncing sentence on each count, the Sullivan County Supreme Court made Petitioner's tattoos material elements of certain crimes Petitioner was convicted of and used the tattoos as aggravating sentencing factors. (See, Appendix H, Sentence Transcript (3/10/05) at pg. 23, 24).

26. These misstatement of facts altogether, were extrajudicial in nature, were unrelated to any necessary means of tailoring an appropriate sentence for Petitioner, and served only to penalize Petitioner for exercising Petitioner's right to the freedom of expression by being a tattooed person. "It is uncontroversial to conclude that a sentencing decision that relies on factual findings that were unsupported in the record, and thus could not possibly have been established by a preponderance of the evidence, seriously affects the fairness, integrity, and public reputation of judicial proceedings." United States v. Cassey, 632 F.3d 82, 88.

## REASONS FOR GRANTING THE PETITION

27. The prosecution, likewise, made materially untrue assumptions during Petitioner's sentencing concerning Petitioner and the families of the victims in order to secure an increased sentence. The prosecution, from his point of view, stated that "from my perspective sitting in my seat, no remorse for his conduct. There was even times during the trial when I looked at him, he was smirking." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 8, lines 18-22). In making this assumption and falsely presenting that Petitioner would make light of Petitioner's trial, the prosecution was allowed to insert his "perspective" and sway the Sullivan County Supreme Court to sentence Petitioner to a longer term of imprisonment.

28. The prosecutor also was allowed to place his "perspective" again into helping to form the court's decision making process during sentencing by explaining how genuinely nice he believed the victim's family to be. The prosecutor stated, "I've gotten to know this family and the kids pretty well, and they're pretty nice people, Judge. They're pretty nice people. Thank you." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 17, lines 17-20). This appealing to the sympathy of the victims by stating how nice the family was was improper and unnecessary for sentencing purpose, serving only to further push the Sullivan County Supreme Court to increase the severity of Petitioner's sentence to the maximum terms.

29. As is apparent from the entirety of Petitioner's sentencing, Petitioner was facing numerous counts and a multitude of possible years in prison. The prosecutor's materially untrue assumptions combined with the Sullivan County Supreme Court's misstatements of facts created an unfair sentencing scheme by the violation of Petitioner's due process right. "Because it appears that the court sentenced the defendant on the basis of materially untrue assumptions or misinformation, the defendant was denied due process and must be resentenced. (See, *People v. Naranjo*, 89 N.Y.2d 1047, 1049, 659 N.Y.S.2d 826, 681 N.E.2d 1272). *People v. Metellus*, 46 A.D.3d 578, 579.

## REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO REVIEW PETITIONER'S SENTENCE BEING GROSSLY DISPROPORTIONATE AND AMOUNTING TO CRUEL AND UNUSUAL PUNISHMENT

30. Petitioner respectfully submits that Petitioner's sentence is cruel and unusual punishment for the sentence being grossly disproportionate to the offenses committed.

31. Petitioner was originally sentenced by the Sullivan County Supreme Court to 130 years to Life and is currently serving a sentence of 89 years to Life. Petitioner's aggregate sentence is a combination of abuses of discretion by the court and violations of Petitioner's rights, under law and Constitution, that resulted in multiple sentences, approximately four consecutive sentences and ten concurrent sentences, where the maximum term of imprisonment was imposed on everyone of these sentences Petitioner is convicted. Though these convictions are serious, it is beyond fairness, logic, and the evolving standards of human decency to have Petitioner continue to serve such a sentence that is grossly disproportionate to the offenses committed, other than to serve the purpose of inflicting cruel and unusual punishment upon Petitioner. (See, People v. Diaz, 179 Misc.2d 946; Solem v. Helm, 463 U.S. 277; People v. Braddie, 37 N.Y.2d 100, cert. denied 423 U.S. 950).

32. The gross disproportionality is evidently unfair, not just because the sentence Petitioner is serving serves no penological purpose, but when also comparing Petitioner's sentence to the sentences of Petitioner's codefendants. Petitioner, not being the sole actor, but, being convicted of every offense through "acting in concert and together" with three equally culpable codefendants, has received approximately 105 years, plus Life, more than those equally culpable codefendants.

33. Petitioner's codefendants, namely, Christopher Quick, Michael Krom, and Luis Martinez were able to, plead to and receive, determinate sentences of 25 years, 25 years, and 20 years after Petitioner was convicted at

### REASONS FOR GRANTING THE PETITION

a severed trial. Though Petitioner did go to trial, exercising Petitioner's right to do so, Petitioner should not of been penalized with such a cruel and unusual punishment, which is exactly what occurred in comparison to Petitioner's codefendants significantly lesser sentences of punishment.

34. The sentences of Petitioner and Petitioner's codefendants reflect a disparity of outcome between them which is completely unfair to Petitioner that, the disparity itself, should be a considerable factor providing Petitioner's current aggregate sentence of 89 years to Life is grossly disproportionate to the offenses committed. Considerations of comparisons of codefendants' sentences and the disparity between them have been reviewed in cases as Diaz, *supra* and Broadie, *supra*. Respectfully, those cases where a review was given and, namely, in Diaz, *supra* where the disparity between codefendants was clear, are evidence that Petitioner qualifies for the same relief.

35. Considerable weight should be given to the fact also, that Petitioner, not being the murderer or personally responsible for the death of the deceased, is serving the only extremely lengthy sentence for the murder of the deceased, even, compared to the sole murderer, Christopher Quick. (See, Appendix K, Trial Transcript at pg. 472, 473, 544-547, 566, 567 [Three individual testimonies providing one person, Christopher Quick, killed the deceased, Martin Acosta, without aid from any other codefendants]). Logically, Petitioner, not being the murderer, could not be considered by the Sullivan County Supreme Court to be worthy to have a sentence imposed upon Petitioner, more in length and/or harshness of degree, than the actual murderer because, if not for Petitioner's murderous codefendants' conduct, Petitioner would not be convicted and sentenced for murder. In sum, Petitioner, not being the murderer or a participant to the murder, was found to be more culpable for the death of the deceased, while the murderer was able to plead to a 25 year sentence and avoid the responsibility of his murderous conduct.

36. In considering Petitioner's culpability in connection with the other two codefendants, Michael Krom and Luis Martinez, it is clear that Petitioner, if anything, shares the same degree of culpability that they

## REASONS FOR GRANTING THE PETITION

exhibited, as Petitioner and these mentioned codefendants did not kill or participate in the killing of Martin Acosta. Petitioner being closely comparable and equal in culpability to these two codefendants, in all fairness, logically provides that Petitioner could not pose, more or less, a risk to society than these two codefendants, therefore, it was improper that Petitioner was subjected to such disparate treatment by the Sullivan County Supreme Court in sentencing Petitioner to such a cruel and unusual punishment that is totally unequal concerning the groups collective guilt.

37. Though Petitioner is convicted of "acting in concert" with Petitioner's codefendants concerning every conviction, Petitioner's personal role in Petitioner's case was only with respect to Michael Williams and Jose Martinez, victims who both lived, sustaining injuries. Comparing this exhibited culpability of Petitioner with the culpability of Petitioner's three codefendants, provides that Petitioner's level of dangerousness is minimal compared to the murderer Christopher Quick and falls within a level of dangerousness of the other two codefendants, Michael Krom and Luis Martinez.

38. Upon sentencing Petitioner, the Sullivan County Supreme Court also failed to properly weigh any mitigating factors on Petitioner's behalf or truly consider Petitioner's individual situation. Petitioner, at the time of the crimes committed, was 20 years old without any prior criminal history. Petitioner even turn Petitioner's self in to the arresting officers and admitted Petitioner's guilt, willing to take the responsibility for Petitioner's actions as well as Petitioner's codefendants actions. Petitioner was not a hardened criminal continually in and out of jail/prison, nor was Petitioner a figure of trouble in society. Petitioner was merely a 20 year old young man caught in a situation most individuals, truly guilty, seek to push off their guilt to a next party/member or hide, yet didn't, went through the course of trial, as opposed to a 30 year to life plea that would have incorporated involving Petitioner's codefendants alleged guilt, and was sentenced in violation of Petitioner's rights to an unconstitutional and, quite frankly, underseving punishment.

## REASONS FOR GRANTING THE PETITION

39. The Sullivan County Supreme Court added to the cruelty already manifest in Petitioner's sentence by the court's abuse of discretion, concerning aggravating sentencing factors that were not relevant to, nor proper to, take into consideration upon sentencing Petitioner. In violation of Petitioner's right to the freedom of speech under the First Amendment and Petitioner's right to the due process of the law, Petitioner's sentence was increased because Petitioner is a tattooed person. Petitioner was also sentenced by the court on untrue facts and irrelevant assumptions and/or appeals for sympathy by the prosecution and, combined with this error, the truth of Petitioner's actual culpability was not considered equally with Petitioner's codefendants, depriving Petitioner of the right to the equal protection of the law as well. What resulted was the sentencing court sentencing Petitioner to a sentence that is, without a doubt, a cruel and unusual punishment.

40. Lastly, Petitioner has provided positive reinforcement for consideration of Petitioner's claim herein by drawing attention to Petitioner's rehabilitation as evidenced by a GED Diploma, Test Report, Certificate of Excellence, Certificate of Congratulations, and three past general evaluations from three different tailor shop civilians. (See, Appendix D). These rehabilitation factors were acknowledged in People v. Daud, 140 Misc.2d 436 (1988) and Diaz, supra at 953, where that court found "Defendant's rehabilitation as evidenced by the numerous certificates and achievement awards submitted on his behalf indicated his rehabilitation is genuine."

41. Petitioner's sentence is a product of pure retribution and violations of Petitioner's rights. The sentence rendered by the Sullivan County Supreme Court ignored the other key principles involved when considering an appropriate sentence and sought to obtain the highest term of imprisonment on each count to achieve the most outrageous overall aggregate sentence the court could impose. The court, in achieving its goal, created a sentence that serves no penological purpose and at the same time manages to continually violate Petitioner's rights.

## REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO REVIEW PETITIONER'S SENTENCE BEING CRUEL AND UNUSUAL PUNISHMENT, AS THE SENTENCING MAXIMUMS STATUTORILY APPLY TO PETITIONER

42. Petitioner respectfully submits that Petitioner's sentence, as the sentencing maximums statutorily apply to Petitioner, equates to a cruel and unusual punishment.

43. The Sullivan County Supreme Court, in sentencing Petitioner to Petitioner's prior aggregate sentence of 130 years to life, sentenced Petitioner to fourteen sentences altogether, ten concurrent and four consecutive, each sentence of imprisonment to the maximum term of imprisonment allowed by law. This aggregate sentence is the product of an abuse of discretion by the court in unjustly applying irrelevant considerations in aggravation of Petitioner's sentence, in combination with the court's violations of Petitioner's rights under the law and constitution of, both, New York State and the United States.

44. Whether from an abuse of discretion or a total lack of discretion, the Sullivan County Supreme Court has provided the quintessence showing of how to take lawful indeterminate and determinate sentencing ranges and twist them unlawfully and unconstitutionally into a tool to ensure that Petitioner receives, basically, a natural life sentence that serves no penological purpose. This misuse by the court of utilizing the maximum term of imprisonment allowed by statute to impose such a monstrous sentence, was done so to satisfy the court's personal justice, as the sentencing court's aim was to ensure Petitioner would "never see the light of day." (See, Appendix H, Sentence Transcript (3/10/05) at pg. 21, lines 19, 20).

45. The Sullivan County Supreme Court, considering that Petitioner was given a fair sentence because Petitioner left the courtroom alive, (See, Appendix H, Sentence Transcript (3/10/05) at pg. 20, lines 19-23), was not a consideration of "fairness", but, was an implied threat of vengeance and death towards Petitioner not acted

### REASONS FOR GRANTING THE PETITION

upon. Because a sentence of death in New York State courts is not acceptable punishment for any crime at the state level, the sentencing court obviously exposed its true intent and, not able to elect such punishment, settled for vindictively manipulating the statutory discretionary sentencing guidelines to impose the maximum sentence possible on every count Petitioner was convicted.

### CERTIORARI SHOULD BE GRANTED TO REVIEW PETITIONER'S SENTENCE, AS CONSECUTIVE SENTENCES STATUTORILY APPLY TO PETITIONER, EQUALING A CRUEL AND UNUSUAL PUNISHMENT

46. Petitioner respectfully submits that Petitioner's sentence, as consecutive sentences statutorily apply to Petitioner, equals a cruel and unusual punishment.

47. The Sullivan County Supreme Court, when sentencing Petitioner, sentenced Petitioner to ten concurrent sentences and four consecutive sentences. Though it was legally and totally within the sentencing court's discretion, sentencing Petitioner to four consecutive sentences, especially, consecutive sentences which were statutory maximum terms of imprisonment, was an abuse of discretion and unconstitutionally cruel and unusual punishment.

48. The Sullivan County Supreme Court, upon taking the view that a sentence of anything other than death is fair, completely undermined the purpose of the discretionary sentencing guidelines and consecutive/~~concurrent~~ concurrent sentencing structures. This view by the court provides these sentencing mechanism were discarded and replaced with the court's personal unconstitutional sentencing structures and that the necessary considerations relevant to impose a proper sentence were given no regard.

### CERTIORARI SHOULD BE GRANTED TO REVIEW COUNSEL'S INEFFECTIVENESS AT PETITIONER'S

## REASONS FOR GRANTING THE PETITION

### SENTENCING HEARING

49. Petitioner respectfully submits that during Petitioner's sentencing hearing of 3/10/05 Petitioner was deprived of the effective assistance of counsel based on counsel's poor performance pursuant to Strickland v. Washington, 466 U.S. 668 (1984) and People v. Baldi, 54 N.Y.2d 137 (1981).

50. In providing Petitioner with ineffective assistance, counsel failed to object to the 130 years to Life sentence imposed on Petitioner, nor argue the fact that such a sentence is a violation of Petitioner's right to the equal protection of the law and a cruel and unusual punishment under the New York State and the United States constitutions. Counsel also failed to defend Petitioner from being subjected to an increased sentence in violation of Petitioner's First Amendment right and the right to the due process of the law, when the sentencing judge exhibited bias towards Petitioner for being a tattooed person.

51. Upon the sentences Petitioner received that were determinate, counsel failed to make the Sullivan County Supreme Court aware that the sentencing court was imposing an illegal sentence upon Petitioner, when the court failed to include a period of post release supervision on each determinate sentence. Further, counsel failed to object to the misstatements of facts and the prosecutor's materially untrue assumptions that violated Petitioner's right to the due process of the law, allowing the court to unfairly give reason to an increase of the sentence Petitioner received.

52. Because counsel was silent in the face of the above mentioned violations of Petitioner's rights, Petitioner received an illegal sentence and was denied effective assistance of counsel. Had counsel been effective, counsel would have given more than a superficial effort, which is exactly the effort that is reflected in the sentencing transcripts, as counsel only offered a few meager words on Petitioner's behalf through the entire proceeding. (See,

## REASONS FOR GRANTING THE PETITION

Appendix H, Sentence Transcript (3/10/05) at pg. 2, lines 8-10, 14, 15; pg. 17, lines 24, 25; pg. 18, lines 5-25; pg. 19, lines 2, 3).

CERTIORARI SHOULD BE GRANTED TO REVIEW COUNSEL'S INEFFECTIVENESS AT PETITIONER'S  
RESENTENCING HEARING

53. Petitioner respectfully submits that during Petitioner's resentencing hearing of 3/1/05, Petitioner was denied the effective assistance of counsel based on counsel's poor performance pursuant to Strickland v. Washington, 466 U.S. 668 (1984) and People v. Baldi, 54 N.Y.2d 137 (1981).

54. Counsel's ineffectiveness was absolutely apparent from the entirety of the resentencing transcripts as counsel not only failed to place needed objections to the ~~fact~~<sup>failure</sup> of the Sullivan County Supreme Court to pronounce a proper sentence, but also failed to offer any words in mitigation of Petitioner's sentence or speak on behalf of Petitioner regarding the imposition of a sentence whatsoever.

55. This sentence rendered by the Sullivan County Supreme Court is not a valid sentence, as the sentence lacks a term of imprisonment and a period of post-release supervision. (See Appendix J, Sentence Transcript (3/1/05) at pg. 3, lines 5-10). Counsel being present, should have objected to the failure of the sentencing court to impose a lawful sentence.

56. Absent from Petitioner's resentencing hearing also is Petitioner's right to speak on Petitioner's own behalf to address the sentencing court in mitigation of punishment or otherwise. Counsel, knowing allocation is an important part of sentencing and that the court is required to pose the question to Petitioner, whether Petitioner would like to speak, should have made the sentencing court aware of the court's failure to do so.

### REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF DENIAL OF JULY 31, 2018 AND SEPTEMBER 5, 2018 BEING BASED ON INCORRECT FACTS AND LAW

57. Petitioner respectfully submits that the Sullivan County Supreme Court denied Petitioner's C.P.L. § 440.20 motion on July 31, 2018 and rehearing on September 5, 2018 based on a misapprehension of the facts and law.

58. In denying Petitioner's C.P.L. § 440.20 motion, the Sullivan County Supreme Court misinterpreted Petitioner's cruel and unusual punishment claims as harsh and excessive claims previously raised in Petitioner's direct appeal. (See, Appendix D, STATE OF NEW YORK, COUNTY OF SULLIVAN, DECISION and ORDER, July 31, 2018 at pg. 6, 7). This misinterpretation of Petitioner's cruel and unusual punishment claims as harsh and excessive claims was detrimental to a proper analysis of Petitioner's C.P.L. § 440.20 motion, in that, the error led the Sullivan County Supreme Court to pass over the merits of Petitioner's cruel and unusual punishment claims because the court was under the assumption that the claims were addressed prior on Petitioner's direct appeal.

59. The fact is, Petitioner did not raise a harsh and excessive claim and, in fact, Petitioner did raise three separate cruel and unusual punishment claims under the New York State Constitution and the United States Constitution, claims which are provided herein this petition at pages 26 to 31.

60. Further, in denying Petitioner's C.P.L. § 440.20 motion, the Sullivan County Supreme Court, was under the misunderstanding that, like above with Petitioner's cruel and unusual punishment claims, Petitioner's ineffective assistance of counsel claims were already addressed to the Appellate Division on Petitioner's direct appeal and in Petitioner's unrelated error coram nobis proceeding. (See, Appendix D, STATE OF NEW YORK, COUNTY OF SULLIVAN, DECISION and ORDER, July 31, 2018 at pg. 6, 7).

## REASONS FOR GRANTING THE PETITION

61. In fact, the ineffective assistance of counsel claims raised by Petitioner as well as the cruel and unusual punishment claims raised by Petitioner, were never presented to the Appellate Division for review. A review of Petitioner's APPELLANT'S BRIEF to the Appellate Division provides such proof and supports Petitioner's contention, also the fact, that Petitioner's claims of cruel and unusual punishment and ineffective assistance of counsel are claims that were presented for the first time ever to the Sullivan County Supreme Court and are reviewable on the merits. (See, Appendix L, Petitioner's APPELLANT'S BRIEF, POINTS V, IX and compare Petitioner's instant claims provided herein concerning cruel and unusual punishment and ineffective assistance of counsel at pg. 26-33).

62. This misunderstanding by the Sullivan County Supreme Court was most likely attributed to the confusion of the People's error in wrongly addressing Petitioner's cruel and unusual punishment claims as harsh and excessive claims and, further, stating wrongly that, both, Petitioner's cruel and unusual punishment and ineffective assistance of counsel claims were raised on direct appeal. (See, Appendix M, Portion of the People's AFFIRMATION IN OPPOSITION TO DEFENDANT'S C.P.L. §440.20 MOTION at pg. 8, 12-15).

63. This misunderstanding by the Sullivan County Supreme Court was harmful to a proper analysis of Petitioner's ineffective assistance of counsel and cruel and unusual punishment claims presented in Petitioner's C.P.L. §440.20 motion because Petitioner's claims were merely passed over by the court and given no proper review of the merits of the claims presented by Petitioner.

64. Had the Sullivan County Supreme Court not misunderstood the claims presented by Petitioner regarding the claims of cruel and unusual punishment and ineffective assistance of counsel, the court, being able to correctly understand and review these claims, would have potentially granted Petitioner the relief Petitioner sought.

### REASONS FOR GRANTING THE PETITION

65. In denying Petitioner's C.P.L. §440.20 motion, the Sullivan County Supreme Court, also applied inapplicable Criminal Procedure Law of Sections 440.10 and 440.20.

66. The Sullivan County Supreme Court, upon rendering a denial to Petitioner's C.P.L. §440.20 motion, stated the following: "There was sufficient facts on the record of the proceedings that permitted adequate review of Defendant's claim on his direct appeal... Any arguments made in Defendant's underlying motion have either previously been decided on the merits or should have been argued and were not, with no justifiable excuse given for the failure to argue same." (See, Appendix D, STATE OF NEW YORK, COUNTY OF SULLIVAN, DECISION and ORDER, July 31, 2018 at pg. 6, 7).

67. This understanding above provides that, not only did the Sullivan County Supreme Court erroneously deny Petitioner's C.P.L. §440.20 motion based on C.P.L. §440.20(2) and (3), but also, the court misused C.P.L. §440.10(2)(a) and (c) to deny Petitioner's C.P.L. §440.20 motion as well.

68. C.P.L. §440.20(2) and (3) were incorrectly applied to Petitioner's C.P.L. §440.20 motion, due to the fact, that Petitioner's cruel and unusual punishment and ineffective assistance of counsel claims were never raised before in any court and, in fact, were raised for the first time in Petitioner's C.P.L. §440.20 motion. Therefore, because C.P.L. §440.20(2) and (3) clearly state that, as grounds for a denial of a C.P.L. §440.20 motion the claims presented would have had to be "previously determined on the merits upon an appeal from the judgment or sentence" (See, C.P.L. §440.20(2)), or that the claims presented would have had to be "previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court" (See, C.P.L. §440.20(3)), a denial by the Sullivan County Supreme Court on these grounds provided in C.P.L. §440.20(2) and (3) were not applicable and improperly denied Petitioner's C.P.L. §440.20 motion.

### REASONS FOR GRANTING THE PETITION

69. The Sullivan County Supreme Court also relied on grounds for denying Petitioner's C.P.L. §440.20 motion based on C.P.L. §440.10(2)(a) and (c). C.P.L. §440.10(2)(a) and (c) are inapplicable to Petitioner's C.P.L. §440.20 motion, in that, C.P.L. §440.10(2)(a) and (c) are grounds solely permitted by the Legislature to deny a motion attacking a defendant's judgment of conviction under C.P.L. §440.10 (See, C.P.L. §440.10(2)(a); C.P.L. §440.10(2)(c)), and, here, in Petitioner's instant situation, a situation attacking only Petitioner's illegal sentence under C.P.L. §440.20, the use of C.P.L. §440.10(2)(a) and (c) to deny Petitioner's C.P.L. §440.20 motion is unauthorized by the Legislature.

70. The Sullivan County Supreme Court, in applying both C.P.L. §440.10(2)(a) and (c) in combination with C.P.L. §440.20(2) and (3) to deny Petitioner's C.P.L. §440.20 motion, ultimately, created an impossible hurdle to overcome by Petitioner, in which, even if Petitioner's claims were guaranteed successes for relief, these claims would not gain Petitioner that guaranteed relief because the court made a hybrid rule combining both these C.P.L.'s to unfairly bar review of any issue on the merits, *period*.

71. The denial of Petitioner's C.P.L. §440.20 motion pursuant to C.P.L. §440.30(4)(b) is incorrectly relied upon by the Sullivan County Supreme Court (See, Appendix D, STATE OF NEW YORK, COUNTY OF SULLIVAN, DECISION and ORDER, July 31, 2018 at pg. 7), as Petitioner, indeed, has provided sworn allegations substantiating the essential facts of Petitioner's case along with all the necessary documentation in the form of exhibits to support Petitioner's claims raised by Petitioner in Petitioner's C.P.L. §440.20 motion.

72. Petitioner's C.P.L. §440.20 motion is solely based on the proceedings which took place during Petitioner's sentencing hearing of 3/10/05 and resentencing hearing of 3/11/05. These transcripts were supplied to the Sullivan County Supreme Court as exhibits and clearly cited by Petitioner, marking the errors that occurred during those proceedings and providing accurate claims, that argued the law and facts, to correct those errors.

### REASONS FOR GRANTING THE PETITION

73. In reviewing the merits of Petitioner's claims presented in Petitioner's C.P.L. § 440.20 motion and based upon the misapprehension of the facts and law regarding Petitioner's instant case made by the Sullivan County Supreme Court, the resulting rejection of the merits of the claims presented by Petitioner and the order of denial "with prejudice" by the court is unsupported. The court in using incorrect facts and law to deny Petitioner's C.P.L. 440.20 motion, violated Petitioner's rights to the due process of law and the equal protection of the law by basing such a denial on those incorrect facts and law.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION AND ORDER BY THE NEW YORK STATE, SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT FOR FAILURE TO REVIEW PETITIONER'S REPLY BEFORE RENDERING A DENIAL OF LEAVE TO APPEAL ON SEPTEMBER 26, 2018

74. Petitioner respectfully submits that the decision of denial rendered by the New York State, Supreme Court, Appellate Division, Third Judicial Department on September 26, 2018 (Appendix A), is erroneous on the ground that the Appellate Division did not review Petitioner's reply to the People's opposition before rendering such a denial of leave against Petitioner and that Petitioner's rights to the due process of law and the equal protection of the law was violated as a result.

75. The fact that the New York State, Supreme Court, Appellate Division, Third Judicial Department failed to review Petitioner's reply is due to problems Petitioner experienced regarding being denied notary services at Petitioner's place of incarceration, Clinton Correctional Facility. (See, Appendix N, Portion of Petitioner's NOTICE OF MOTION FOR REARGUMENT with Exhibits B-D).

76. The failure of the New York State, Appellate Division, Third Judicial Department to review Petitioner's

## REASONS FOR GRANTING THE PETITION

reply, before rendering a decision, resulted in Petitioner suffering an unfair review that was fundamentally flawed, depriving Petitioner of the right to the due process of the law and the right to the equal protection of the law guaranteed to Petitioner under the New York State and United States constitutions.

77. The right to the due process of the law, guaranteed Petitioner under both constitutions, mandates that Petitioner receive a fair review of Petitioner's claims during any court proceeding and that, specifically, in Petitioner's instant case, the New York State Supreme Court, Appellate Division, Third Judicial Department fully review all relative documents to Petitioner's leave application before rendering any decision whatsoever.

78. The right to the equal protection of the law, also guaranteed Petitioner under both constitutions, mandates that the Petitioner receive equal treatment afforded any other petitioner, similarly situated, petitioning the New York State Supreme Court, Appellate Division, Third Judicial Department for leave to appeal.

79. Contrary to both these constitutional rights, the New York State Supreme Court, Appellate Division, Third Judicial Department, whether purposefully or unintentionally, has rendered a decision to deny Petitioner leave to appeal without reviewing Petitioner's reply and, therefore, deprived Petitioner of a fair review by treating Petitioner dissimilar to the review mandated according to the law and constitutions of New York State and the United States.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert T. Maloy III

Date: June 25, 2019