No. 19-6566

ORIGINAL

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Alexander Kates — PETITIONER
(Your Name)

vs.

New York — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

New York State Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alexander Kates
(Your Name)

Attica Corr. Facility - 639 Exchange st.
(Address)

Attica, N.Y. 14011
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether New York State residents are always actually innocent of felony and attempted felony criminal possession of a weapon offenses if they possess a loaded firearm within their home and had no previous convictions.

2. Whether petitioner is actually innocent of a felony or attempted felony criminal possession of a weapon offense under legal exceptions/defenses within New York Law.

3. Whether a defendant may make a freestanding claim of actual innocence under the rare occasion that he discovers that he is actually innocent of an offense on the laws of the state.

4. Whether New York State's home or place of business exception for criminal possession of a weapon offenses applies anytime possession of a firearm, loaded or not, actually occurs in the home or place of business regardless of whether the exception is contained within a separate subdivision of the same Statute.

5. When New York legislature has proscribed a misdemeanor offense for a defendant who has possessed a loaded firearm in his home who also had no previous convictions, may the State's prosecutors apply the presumption of unlawful intent under New York Penal Law 265.15(4) in order to raise that misdemeanor up to a felony or sustain a felony when only a misdemeanor occurred?

6. Does New York's Penal Law 265.15(4) override and circumvent New York's home or place of business and no previous conviction exemptions for criminal possession of a weapon offenses?

7. Whether it is legally impossible to commit attempted criminal possession of a weapon in the second degree in New York State when the offense is based solely on the Penal Law 265.15(4) presumption.

8. Whether a trial/sentencing court lacks authority and jurisdiction over a criminal matter in New York State when an indictment alleging criminal possession of a weapon fails to specifically articulate that the possession occurred outside of the home or place of business.

9. Whether an attorney's recognition of, and failure to challenge, the application of New York Penal Law 265.15(4) constitutes ineffective assistance of counsel when that statute is being relied upon by a prosecutor as the sole evidence to secure a conviction.

10. Whether petitioner's counsel rendered completely deficient assistance of counsel.

11. Whether a defendant is entitled to the appeal that was lost altogether no matter how much time has elapsed since sentencing when both the sentencing court and counsel failed to inform defendant of a right to appeal in addition to counsel's failure to file a notice of appeal.

12. Whether writ of error coram nobis is available no matter the length of time elapsed since imposition of judgment when counsel fails to file a notice of appeal and both counsel and the sentencing court failed to inform defendant of a right to appeal.

13. Does Roe v. Flores-Ortega, 528 U.S. 470(2000) extend or apply to dual deficiency instances when both counsel fails to file a notice of appeal and both the sentencing court and counsel fail to inform a defendant of the right to appeal?

14. Whether a defendant may file a writ of error coram nobis as soon as discovering the facts that entitle him to coram nobis relief no matter how much time has elapsed since the discovery of those facts.

15. Whether the harm and prejudice as a result of both a sentencing court and attorney's failure to inform a defendant of the right to appeal must be imputed to the State.

16. Whether a State's refusal to grant coram nobis relief to a defendant who has provided at least prima facie proof of innocence but lost an appellate proceeding altogether as a result of his counsel's failure to file a notice of appeal and both counsel as well as the sentencing court's failure to inform him of the right to appeal always results in a fundamental miscarriage of justice.

17. When the government claims that it notified a defendant that no notice of appeal was filed, does the burden ly with the government in proving that it did or with the defendant in proving that the government did not?

18. Whether the doctrine of laches can be asserted by the government to bar request for writ of error coram nobis.

19. Whether the doctrine of laches actually acts to prevent coram nobis on timeliness grounds.

20. Whether the State of New York has any power or authority to enforce petitioner's State judgment.

21. If a State has no authority or power to enforce a void and unenforceable criminal judgment, does it have any authority or power to deny requested relief on the same?

22. Whether cause and prejudice and the exceptions that allow consideration of claims defaulted in state courts under timeliness rules for habeas corpus apply to writs of error coram nobis as well.

23. Whether New York Penal Law 265.03, subdivisions 1(b) and 3, are void for vagueness

24. Must the language of "possesses any loaded firearm" within New York Penal Law § 265.03(3) encompass "a loaded firearm" as stated within New York Penal Law § 265.03(1)(b) so that subdivision 3 overrides subdivision 1(b)?

LIST OF PARTIES

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

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

TABLE OF CONTENTS

INDEX TO APPENDICES

APPENDIX J - Petitioner's Leave application to the New York State Court of Appeals seeking permission to appeal from the intermediate appellate court's denial of petitioner's motion for Writ of Error Coram Nobis

APPENDIX K - Petitioner's Additional submission to the New York State Court of Appeals

APPENDIX L - Government's Response to Petitioner's Court of Appeals Leave Application

APPENDIX M - Petitioner's Reply to the Government's Response to Petitioner's Court of Appeals Leave application

APPENDIX N - 2011 Plea Minutes

APPENDIX O - Legal Mail receipt form; acknowledgment of papers

APPENDIX P - C.P.L 440.10/.20 motion denial decision and order

APPENDIX Q - C.P.L 440.10/.20 motion Reargument/Renewal/Reconsideration motion denial Decision and Order

APPENDIX R - Decision and Order of Federal District Court pertaining to a civil matter

APPENDIX S - Notification of Pending Pardon request consideration

APPENDIX T - Police report indicating that arrest was made without warrant

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES and RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts**:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts**:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the New York State Supreme Court Appellate Division, Fourth Department court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

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 August 26, 2019
A copy of that decision appears at Appendix B.

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York Penal Law § 110.00 - A person is guilty of attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime. (pages 5 and 13)

New York Penal Law § 265.03

A person is guilty of criminal possession of a weapon in the second degree when:
(1) With intent to use the same unlawfully against another, such person:
(b) possesses a loaded firearm; or
(3) Such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business. (pages 5 and 13)

New York Penal Law § 265.15(4)

The possession by any person of the substance as specified in section 265.04 is presumptive evidence of possessing such substance with intent to use the same unlawfully against the person or property of another if such person is not licensed or otherwise authorized to possess such substance. the possession by any person of any dagger, dirk, stiletto, dangerous knife or any other weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, is presumptive evidence of intent to use the same unlawfully against another. (Pages 5, 12,13,14,15 and 17).

United States Constitution, Amend.4.

the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation...(page 25)

United States Constitution, Amend.5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.(page 16, 26)

United States Constitution, Amend.6.

In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defence...(pages 17,26)

United States Constitution, Amend 8.

Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.(page 26)

United States Constitution, Amend 14.

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.(page 12,17,26)

STATEMENT OF THE CASE

This case involves dual deficiencies of a sentencing court and defense counsel both failing to inform of the right to appeal in addition to counsel's failure to file a notice of appeal, whether seeking writ coram nobis has a limitation of time, and whether the length of time that has elapsed since these dual deficiencies affects or bars the relief a defendant is entitled to under this particular set of circumstances and to what that relief should be.

On April 30,2011 petitioner was arrested without warrant in his home in the city of Rochester,N.Y. and, via Monroe County indictment number 0406/2011, charged with violating New York Penal Law ("PL") sections 265.03(3)(count 1);265.03(1)(b)(count 2); 265.02(1)(count 3); 265.02(3)(count 4); 220.16(1)(count 5); and 220.50(2)(count 6).Appendix (App.) C.

On July 13,2011, at the high recommendation of counsel, petitioner took a plea to second degree attempt criminal possession of a weapon ("CPW") (PL 110;265.03[1][b]) in the Monroe county supreme court. On this same day, and petitioner having advised his counsel that he actually had no previous convictions and that having been relayed to the court, the Monroe County District Attorney ("D.A") moved to dismiss counts 1 and 3 of the indictment but offered two (2) years' incarceration in the New York State Department of Corrections plus two (2) years of Post-release supervision ("PRS") on count 2 rather than move to dismiss it like counts 1 and 3. In order to do this, however, the D.A applied the presumption of unlawful intent to use a weapon under PL 265.15(4). Petitioner's counsel "recognize[d] and d[id] not challenge" the application of that statute. On September 21,2011 petitioner was sentenced to the term above. No appeal waiver was required or executed. The plea and sentence satisfied a misdemeanor menacing charge in Rochester City court that was pending under CR # 11-125595 and a violation of probation (as a result of the plea) in which a one-year concurrent, local term was imposed.

On August 8,2018, having realized numerous differences between the appeals process in a currently-being-served 2015 judgment and the 2011 judgment at issue and wondering why he had still received no disposition on the 2011 appeal that he presumed was automatic and pending since 2011, petitioner requested 2011 counsel's Notice of appeal and inquired into whether such was ever even filed.App D.

On August 30,2018 petitioner discovered that 2011 counsel never filed a notice of appeal and, therefore, that no appeal was ever initiated or pending.App.E. Upon this discovery, petitioner filed a motion, dated September 9,2018, seeking vacatur and setting aside of the judgment pursuant to New York Criminal Procedure Law ("CPL") 440.10-.20 in the sentencing court (**Unaffixed hereto as immaterial**). In an October 30,2018 response to said motion the D.A included the 2011 indictment and the plea and sentencing minutes, documents and papers that petitioner never had or viewed prior since no appeal was ever initiated by counsel and thus no record was ever ordered or received.

Upon reviewing the newly received sentencing minutes petitioner discovered that the court never informed him of the right to appeal or to any appeal abilities, procedures or time limits, App.F,p.13, nor did counsel; petitioner never knew that he had such rights or abilities. With this additional discovery, on March 23,2019, petitioner filed motion for writ of coram nobis in New York State's intermediate appellate court, fourth department ("fourth department"), by Notice with a Return Date of April 22,2019, seeking not only the writ but Syville relief (**People v. Syville,15 N.Y.3d 391[2010]**), an opportunity to appeal the 2011 judgment, any other relief deemed just and proper, and for the fourth department to invoke its interest of justice powers since he is actually innocent on the laws of New York State (a development only discovered upon reviewing the newly received plea minutes) and lost an appeal proceeding altogether solely as a result of the dual deficiencies of the sentencing court and counsel, and never knew he had a right to appeal since he was never so advised.App.G.

In an April 23,2019 response to petitioner's application for the writ and relief, the D.A asserted a conclusory allegation that "[a]t the very least,[petitioner] was notified, by affirmation dated November 15,2012 (within 14 months of the imposition of sentence), that no notice of appeal was filed...,"App.H,p.2,point 7, that "[petitioner] was also told by the court, in a Decision and Order denying his CPL 440 motion (December 17,2012), that no notice of appeal was filed...," and falsely accused petitioner of "wait[ing] an additional 7 years to bring his current motion," id., at p.2,point 8, and that "[petitioner's] argument should also be rejected on the ground of laches..." id., at p.3.

In his April 30,2019 Reply to the D.A's response, petitioner asserted that the D.A had made nothing more than conclusory and speculative allegations, without support, that petitioner was notified that no notice of appeal was filed via the answering affirmation and Decision and Order above, as petitioner in fact never received either because (1) the D.A's office sent their November 15,2012 affirmation to Upstate Correctional Facility but petitioner was released from that facility on or about November 17,2012 and was on a weeks-long transit through multiple facilities, thus never receiving it, and (2) the court clerk's office also sent the court's December 17,2012 Decision and Order to Upstate Correctional Facility roughly two (2) whole months after petitioner had already been released from there, and thus, he never received that either.App.I,p.2 and 3.

The fourth department summarily denied the application, in less than 30 days, on May 15,2019 without opinion.App.A.

On May 17,2019 petitioner sought leave to appeal from the fourth department's summary denial, and seeking the same relief, in the New York State Court of Appeals, and not only arguing that he is actually innocent and that the State has no power or authority to enforce the judgment, among other things, but that the Doctrine of Laches did not apply to his writ of error coram nobis.App.J. The Leave application was assigned to New York STate Court of Appeals Associate Justice Rowan D Wilson.

On June 11,2019 petitioner submitted an additional submission to the State Court of Appeals, contending as follows:

1. He was never informed of a right to appeal by the court or his court-assigned attorney, and his attorney never filed a notice of appeal, therefore, any lapse of time was chargable to the State,App.K,p.2;

2. A presumption of prejudice applies, and prejudice should be presumed,id.;

3. He never received the papers that the D.A contends notified him that no notice of appeal was filed because he was no longer at the facility in which said papers were sent when they were purportedly sent there but that even assuming, arguendo, that he did it would be irrelevant because since the sentencing court never informed or advised him of any right to appeal or appeal abilities, procedures or time limits in any way, he would not have been able to know or interpret what those papers were saying or meant when alluding to the fact that no notice of appeal was filed,id. at 4;

4. It would be and result in a fundamental miscarriage of justice to not review and resolve the issues on this matter or grant the relief requested,id.,at 9-10;

5. His case is "rare" and "extraordinary," he is actually innocent on the laws of New York State, every single one of the constitutional rights and guarantees he was entitled to was violated and then he was hauled off to prison without ever being informed or advised of a right to appeal, and coram nobis relief was appropriate,id. at 10-11;

6. He is suffering a continuing wrong,id. at 11-12;

7. Any purported or presumed procedural bars or defaults is not adequate to support the 2011 judgment and any purported untimeliness asserted by the State is attributable to cause and prejudice and chargable to the State,id. at 14-15.

On June 20 ,2019 the D.A responded to petitioner's application seeking leave to appeal in the Court of Appeals, asserting nothing more than the contention they previously had, again, without support.App.L.

On June 25,2019 petitioner submitted a Reply asserting (1) that he was never notified that no notice of appeal was filed because he never received the papers that the D.A concluded and speculated he received, and (2) even if he would have, it could not be expected that a layman, untrained in law and 20 years old with only a G.E.D, would automatically know what a "notice of appeal" was, its significance or requirement, or what to do if one was not filed, which is why prejudice must be presumed, considering both the sentencing court's and counsel's failure to inform him of any right to appeal or appeal abilities, procedures or time limits, and thus, such an argument is unreasonable and of no weight.App.M,p.1-3.

The New York State Court of Appeals (Wilson,J.) summarily denied petitioner's leave application without opinion on August 26,2019.App B.

Neither the state intermediate appellate court nor the Court of Appeals made any findings or determinations of law or fact, rubber-stamping petitioner's pleadings.

REASONS FOR GRANTING THE PETITION

A. Petitioner is Actually Innocent on the Laws of New York State

1. Petitioner never committed a felony or an attempt felony in the first instance or at all. It is clear that "[u]nder New York's statutory scheme, the possession of an unlicensed loaded firearm is a violent felony, unless the defendant possesses the weapon in his or her home or place of business.If the possession takes place in the defendant's home or place of business, and he or she has not previously been convicted of a crime, the possession is punishable as a misdemeanor (see Penal Law § 70.02[1][b];§ 265.03[3],§ 265.02[1],§ 265.01[1]; People v. Powell,54 NY2d 524 [cit.omit.])." **People v. White,75 AD3d 109,120-121 (2nd dept.2010).**

This is so since "The [New York] Legislature's decision to impose a lesser degree of punishment on a person who possesses a loaded firearm in his or her home reflects a policy decision that possession of a weapon for the defense of one's home and family 'is less reprehensible than possession for other purposes' (citing People v. Powell,54 NY2d at 526)." **White, supra, at 121.**

As clear by the record in petitioner's case, the D.A conceded that (1) petitioner had no previous convictions when moving to dismiss counts 1 and 3,App.N,p.7-8, and (2) petitioner allegedly possessed a loaded firearm within his home.id at p.8-9. Therefore, petitioner is actually innocent of and never committed a felony and, at the very most, committed nothing more than a misdemeanor.

Furthermore, New York State's Court of Appeals has routinely held that a conviction for possession of a loaded firearm cannot stand in the absence of any proof that possession in fact occurred outside of the defendant's home or place of business, despite the fact that no evidence to the contrary was provided, since this element of the crime is not to be presumed and a defendant has no burden of going forward with evidence on this point in,e.g.,**People v. Rodriguez,68 NY2d 674(1986).** Thus, petitioner is actually innocent on the clearly established and interpreted laws of New York State and his conviction cannot stand.

Additionally, and as also conceded by the D.A, petitioner "denied guilt [and]...the only reason that he admitted guilt was at the advice of his attorney,"App.F,p.3.

Lastly, although this Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high" in **Herrera v. Collins**,506 U.S.,at 417,113 S.Ct. 853(1993), and "that whatever burden a hypothetical freestanding innocence claim would require,[Mr.House] ha[d] not satisfied it" in **House v. Bell**,547 U.S. 518 at 555(2006), petitioner has satisfied any "extraordinarily high" burden he had to satisfy not based solely upon the facts but instead upon the laws of the State in which his case lays,New York. So, despite the fact that this court has not resolved how or whether a prisoner may make a freestanding actual innocence claim absent demonstrating that "more likely than not, in light of...new evidnece, no reasonable juror would find him guilty beyond a reasonable doubt - or to remove double negative, that more likely than not any reasonable juror would have reasonable doubt'," **Rivas v. Fischer**,687 F.3d at 518 (quoting House,547 U.S. at 538), this Court should decide whether a petitioner can make a freestanding claim of actual innocence under the rare occasion that he discovers that he is actually innocent of the offense of which he stands convicted of on the laws of their State, as petitioner has, for then the question of guilt or innocence is not up to a jury or falls under this court's precedent on the matter,but is based solely upon the laws of the particular State and creates an entirely new category of what constitutes actual innocence that this court should address since the "fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free." **In re Winship**,397 U.S. 358,372,(cit. omit.)(1970)(Harlan,J., concurring).

This Court's decision in **Herrera** at 427(O'Connor,J., concurring), noting that because, in that case, the "[p]etitioner has failed to make a persuasive showing of actual innocence," "the court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence" need no longer be reserved, and this new category of actual innocence deserves this court's attention.

Petitioner's Conviction was Unjust and Unconstitutionally Obtained with Foul Blows and Malicious Calculation by an Overzealous Prosecutor

2. This Court has long determined that "[w]hile [the prosecutor] may strike hard blows,[the prosecutor] is not at liberty to strike foul ones.It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just

one." Berger v. United States,295 U.S. 78,88(1935).

It cannot be disputed that petitioner is actually innocent of a felony under the laws of New York State as evidenced above; at the very most, he committed only a misdemeanor. In order to secure petitioner's unlawful conviction, however, the D.A relied upon and applied PL 265.15(4), a presumption statute of unlawful intent to use a weapon based upon being loaded.App.N,p.10,line 8-15. This was unlawful, constitutionally impermissible, and a "foul blow...calculated to produce a wrongful conviction."

It is unlikely, unreasonable and unbelievable that "the Legislature intended [for PL 265.15(4)] to be employed to permit the State to extend the [PL 265.15(4) presumption]" to misdemeanor criminal possession of a weapon ("CPW") offenses for the purpose of raising, or in order to raise, that misdemeanor offense (based upon the home or place of business and no previous conviction exemptions/defenses [White,supra,at 120-121]) right back up to a felony. cf People v. Dozier,78 NY2d 242,250(1991); see generally, McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 141, 143, 145, 146, 148 (to the effect that statutes should be construed to avoid results which are absurd, unreasonable or mischievous or produce consequences that work a hardship or an injustice.)

This is especially so since New York Legislature intended for its proscription of a misdemeanor CPW offense to be the law in New York State and the final word on the matter when a person possesses a loaded firearm within their home or place of business and had no previous convictions.See White (supra) at 120-121. Legislature did not and would not circumvent, or put the prosecutors in this State in a position to override, its own intents and mandates -- and the State had no authority to do so here -- by applying or relying upon PL 265.15(4). This violated not only the rule of law but also petitioner's right to Due Process, the Equal Protection Clause which prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws," Amdt.xiv,§ 1, and the "fundamental

principals of liberty and justice which lie at the base of all our civil and political institutions." Palko v. Connecticut,302 U.S. 319(1937).

This Court should not only grant this petition in order to correct petitioner's case, but also to prevent the State from using these same tactics to prosecute and convict its residents and taxpayers who are actually innocent of, at least, felonies on the laws of New York State itself and committed, at most, only a misdemeanor on the laws of the State itself, as established and intended by Legislature and continually upheld by the courts.

The Offense petitioner Stands Convicted of was a Legal Impossibility in New York State

3. The offense petitioner was convicted of, Attempt CPW in the second degree (N.Y.PL 110;265.03[1][b]), was not a legally possible offense to commit in New York State. In the State of New York, "Where possession of a weapon would have been an intentional and knowing one rather than one based on a statutory presumption, an attempt to commit criminal possession is not a legal impossibility." People v. Saunders,200 AD2d 640(2nd dept.1994). The New York State Court of Appeals agreed and affirmed. Saunders (supra),aff'd,85 NY2d 339(1995).

In petitioner's case, however, the D.A conceded that petitioner had no previous convictions and allegedly possessed a loaded firearm in his home, App.N,p.7-9, which is only a misdemeanor (see White supra at 120-121; People v. Jones 103 AD3d 411 at 412[1st dept.2013]; People v. Green,84 AD3d 1499,1500[3rd dept.2011]), but as soon as the D.A elected to rely upon and apply the PL 265.15(4) statute to what was and could only be a misdemeanor CPW offense on the facts in order to secure a conviction on the higher, uncommitted offense of attempt CPW 2nd the application of PL 265.15(4) rendered the CPW offense as a felony or an attempted felony "one [solely] based on a statutory presumption" instead of an "intentional and knowing one" converse to that in Saunders and affirmed by the State Court of Appeals above, and thus, a legal impossibility in New York. This is why the offense/felony

petitioner stands convicted of could only have ever been, and was never anything more than, a misdemeanor CPW offense and was not authorized by the Legislature to be raised or transformed into the upper, uncommitted felony CPW offense by the D.A by way of PL 265.15(4). "A conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." **Montgomery v. Louisiana**,136 S.Ct. 718,731(2016).

Although the People should be able to rely on such a presumption, according to this Court, this is only so where "there is ample evidence in the record **other than the presumption** to support a conviction," **County Court of Ulster Cty. v. Allen**,442 U.S. 140,160(1979), and the People must do more than simply rely on a permissive presumption to meet their burden (see **Allen**,442 U.S. **at** 167); **United States v. Curcio**,712 **F.2d** 1532,1541(2d Cir.1983)("[a]s long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need meet only a more likely than not rather than a beyond a reasonable doubt standard"). The D.A in petitioner's case solely relied on the presumption and there was no evidence in the record other than the presumption. In doing so, the D.A raised the only level of offense that could have been committed on the facts -- a misdemeanor under **White** -- up to a felony, or unlawfully sustained a felony by relying solely upon and applying PL 265.15(4), that was only a misdemeanor to begin with under **White**. Petitioner's argument is not that PL 265.15(4) is an unconstitutional or impermissive statute standing alone; instead, petitioner argues that (1) PL 265.15(4) was unconstitutionally applied against him in this case, and (2) that PL 265.15(4) is not constitutionally permitted to be applied to misdemeanor CPW offenses solely -- or for any other reason -- so that a prosecutor can rely upon it to raise the misdemeanor upward to a felony or sustain a felony when only a misdemeanor was committed in the first instance.

4. Even assuming, arguendo, that the offense petitioner stands convicted of was legally possible to commit in New York State or could withstand petitioner's contentions above along with the

constitutional scrutiny attached, the New York State Court of Appeals has ruled that, with respect to felony CPW offenses, (1) "It must first be established that the defendant acted with specific intent;that is, that he intended to commit a specific crime" in People v. Bracey,41 NY2d 296(1977), and (2) where when the crime is the possession of a weapon with intent to use the same unlawfully against another the crime is a continuing offense only during the period the defendant possesses the weapon intending to use it against a particular person; a subsequently-formed additional intent to use it against a different person results in the commission of two separate and distinct offenses in People v. Okafore,72 NY2d 81(1988).

the record in petitioner's case is clear to the fact that the D.A did not, or even attempt to, establish that petitioner intended to commit "a specific crime" nor that petitioner intended to use the firearm against "a particular person" or that the firearm was ever outside of his home. Instead, the D.A unlawfully administered the "foul blow" of applying and relying upon the inapplicable PL 265.15(4) presumption, which was calculated to produce a wrongful conviction, and left it at that,App.N,p.10,line 8-15, and to which is contrary to this Court's determination of law in Allen and Curcio on the previous page. Therefore, despite the D.A's unlawful attempt to apply PL 265.15(4) against the on-the-facts-and-law misdemeanor CPW offense in order to raise it to and secure a conviction on a felony, the presumption and intent were never met or satisfied even if they could have been.

B. The State Court Lacked Jurisdiction and Authority to Impose Judgment Upon Petitioner

1. This Court has determined that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty," Menna v. New York,423 U.S. 61,62(1975), and that "[a] guilty plea does not bar

a claim on appeal where on the face of the record the court had no power to enter the conviction or impose the sentence." **Class v.** U.S.,138 S.CT. 798,804(2018).

As an indictment State, New York is bound by the Fifth (5th) amendment to the United States Constitution which, by its plain language, requires that "[n]o person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...," and the New York State Court of Appeals has ruled that "the validity and sufficiency of an accusatory instrument is a non-waivable jurisdictional prerequisite to a criminal prosecution," **People v. Ford,62 NY2d** 275, and that the "filing of an indictment in violation of statutory authority can never confer jurisdiction upon a court." **People v. Huston,88 NY2d 400.** A guilty plea does not waive jurisdictional defects.**People v. Case,42 NY2d 98(1977).**

Accordingly, see **People v. Hogabone,278 AD2d 525(3rd** dept.2000), reversing a judgment on the law because a count of indictment "alleging...possess[ion] of a loaded firearm...without specifically articulating that such possession took place outside of the home or place of business makes such count jurisdictionally defective...If the offense charged has an exception contained within the statute, the indictment must contain an allegation that defendant's conduct does not come within the reach of the exception (cit.omit.)." **id.,at** 525-526.

In petitioner's case, following a warrantless arrest, and despite the D.A stating that possession of a loaded firearm was within petitioner's home (App.N,p.8-9), the indictment made no such specific articulation.see App.C. Not only was this detrimental since the omission did not put petitioner, his counsel or the court on notice that the offense was only a misdemeanor, thus violating petitioner's constitutional right to be informed of the charges brought against him, but since the indictment did not contain the allegation that petitioner's conduct did not come within the reach of the home or place of business exception -- since his purported conduct actually did -- as it **must**, the

indictment and count of which petitioner was convicted were both jurisdictionally defective. See also **People v. Kohut,30 NY2d** 183,187.

The court lacked all jurisdiction and authority over petitioner's matter or to impose judgment and the conviction must be set aside under Menna (supra). In fact, "Since material element of the charged crime was not alleged and that count formed the basis of the plea, the matter must be dismissed." **Hogabone, supra** at 526.

C. **Petitioner's Public Defender Rendered Constitutionally Deficient Representation**

This court has routinely held that the **Sixth** and **Fourteenth** Amendments guarantee criminal defendants "the right...to have the Assistance of Counsel for [their] defence." **Strickland v. Washington,466 U.S. 668,686(1984)**(quoting Mcmann v. Richardson,397 U.S. 759,771,n.14[1970]). Under **Strickland**, a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's representation fell below an objective standard of reasonableness," 466 **U.S. at** 687-688, and (2) that any such deficiency was "prejudicial to the defense," **id.,at** 692.

Petitioner's counsel did not render a scintilla of effective assistance, as follows:

1. Counsel highly recommended that, and advised, petitioner to plead guilty.App.F,p.3. On July 13,2011, when the D.A relied upon and applied the aforementioned PL 265.15(4) presumption to what could only have been a misdemeanor in New York State in order to sustain or maintain the offense upward to an uncommitted felony, counsel "recognize[d] and d[id] not challenge that presumption,"App.N,p.10,line 8-18, which did not test the adversarial process. Prejudice is presumed "if counsel entirely fails to subject the prosecution's case to meanigful adversarial testing." **United States v. Cronic,466 U.S. 648,659(1984)**. The resultant harm and further prejudice was:

a) Counsel did not protect petitioner from, allowed, and even orchestrated and assisted the D.A in securing, a felony conviction -- on what was no more than a misdemeanor -- for an offense that (1) was never committed in the first instance (see **white[supra]**), and (2) was legally impossible to commit in New York State. see **People v. Saunders,200 AD2d 640(2nd dept.1994),aff'd,85 NY2d** 339(1995). Also see, on comparable grounds, **County Court of Ulster Cty. v. Allen,442** U.S. 140(1979);

b) Counsel allowed, and assisted the D.A in securing, a sentence for petitioner that was unfavorable, non-advantageous, illegal, invalid and excessive. Since petitioner, if anything, committed nothing more than a misdemeanor and misdemeanors carry a maximum penalty of one year in the local county jail, the two years' State imprisonment plus two years of PRS sentence was at least three years beyond the maximum allowed by law. Not only are defendants "entitled to the effective assistance of competent counsel," defined as receipt of legal advice that is "within the range of competence demanded of attorneys in criminal cases," **Mcmann v. Richardson,397 U.S. 759,771(1970)**, but it is well settled that "[d]uring plea negotiations defendants are 'entitled to the effective assistance of competent counsel'." **Lafler v. Cooper,566** U.S. 156,162(quoting McMann v. Richardson,[cit.omit]). Negotiating unlawful and excessive pleas and sentences for clients who didn't even commit the offense or initially charged offense upon which the negotiations were based is surely ineffective assistance of counsel. In fact, here the omission of material element of charge...from indictment, which rendered indictment jurisdictionally defective, invalidated negotiated plea to crime of attempted possession, which was based upon that indictment. **People v. Hogabone,278 AD2d 525(Headnote)(3rd dept.2000).** See Rodriguez (supra)(possession inside or outside of home or place of business exception is an element of CPW offenses, dictating the degree, level, and/or category of CPW offense).

c) Not only did counsel not advise petitioner of a right to appeal, appeal abilities, procedures or time limits, counsel **never**

filed a notice of appeal at all. This Court reasoned that because a presumption of prejudice applies whenever "'the accused is denied counsel at a critical stage'," it makes even greater sense to presume prejudice when counsel's deficiency forfeits an "appellate proceeding altogether" in Roe v. Flores-Ortega,528 U.S. 470 at 483-84(2000). Also see Garza v. Idaho,--S.Ct.--(2019 WL 938523).

2. Petitioner was the one who had to inform counsel that he was not a predicate felon and that he had no previous convictions;had he not done so, he would have been further railroaded and the degree of which petitioner's rights were violated would have been significantly heightened.Petitioner saved himself;counsel did not.

Petitioner's counsel was completely incompetent and deficient in his assigned representation of petitioner, petitioner's rights under the 6th and 14th amendments were violated, and petitioner met his burden under the Strickland standards, as well as the New York standard in People v. Baldi,54 NY2d 137,147(1983).

D. **Petitioner Lost an Appellate Proceeding Altogether due Solely to Dual-Deficiencies of Both his Counsel and the Sentencing Court; Collateral Relief was Proper and Federally Mandated**

1. In addition to petitioner's counsel's failure to file a Notice of Appeal, the sentencing court failed to inform petitioner of the right to appeal or to any appeal abilities, procedures or time limits.App.F,p.13.

As recently as in Garza v. Idaho,--S.Ct.--(WL 2019 938523) this Court reiterated its precedent from Roe v. Flores-Ortega,528 U.S. 470: When counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken, the defendant gets a new opportunity to appeal [,and] [t]hat is the rule already in use in 8 of the 10 federal Circuits to have considered the question. With respect to court failure to inform, "the failure to inform a defendant of his right to appeal, when combined with the defendant's lack of independent knowledge of and his actual failure to exercise this right, constitutes more than a mere

failure to comply with the formal requirements [of a court's duty to inform a defendant of the right to appeal]...Rather, the failure to inform under these conditions leads to the loss of an important -- albeit non-constitutional -- federal right which, by itself, is sufficient to merit collateral relief." **Soto v. U.S.**, 185 F.3d 48,54(2d Cir.1999).

In a dual-deficiency situation when **both** counsel and the sentencing court fail to inform a defendant of the right to appeal, on top of counsel's failure to file a notice of appeal, prejudice must certainly be presumed and the defendant is entitled to either a new opportunity to appeal or collateral relief or both, are they not? This Court should resolve this issue not only for petitioner but the public as well, as petitioner sought collateral relief in the form or error coram nobis and **Syville** relief simply in order to be afforded the opportunity to file a notice of, and/or pursue, appeal. The New York State Courts' summary denials of the relief petitioner sought was inconsistent with this Court's and New York's Circuit Court's rulings above.

Furthermore, in New York, for an intermediate appeal as of right, the coram nobis procedure is available to a criminal defendant seeking to "bypass" the CPL 460.30 one-year grace period because counsel did not comply with his timely request to file a notice of appeal.**People v. Grimes**,2018 N.Y. Slip Op 07038(10/23/18). The State's summary denial of the appropriate relef petitioner sought is not only even inconsistent with its own rulings, but "Where a sentencing court has failed to inform a defendant of his right to appeal, it shall be the government's burden to present clear and convincing evidence that the defendant has suffered no prejudice," **Soto (supra)** at 55. Here, in petitioner's case, the government did not assert, let alone sustain its burden of establishing, that petitioner suffered no prejudice or had independent knowledge of his right to appeal before or after sentencing, within the one-year grace period under CPL 460.30 nor based upon its contention that petitioner was "notified" that no notice of appeal was filed within 14 months of the imposition of sentence because it never submitted any proof or established that petitioner actually ever received the notifications, i n which event coram nobis and **Syville** relief were appropriate and the only forms of relief available under **Syville** and **Grimes** since what the government did allege -- although without support -- is that petitioner purportedly was notified that no notice of appeal was filed two (2) whole months **after** the one-year grace period under CPL 460.30 even though sent to the wrong facility.

2. In relation to that above, the Second Circuit, in **Reid v. United States**,69 F.3d 668,689(1995), established what has been described as a per se rule requiring vacatur of a sentence and remand for resentencing when a sentencing court fails to comply with its duty to inform, but in **United States v. Bygrave**,97 F.3d 708(1996) held that **Reid** did not require vacatur and remand despite the sentencing court's failure to comply...because the defendant in that case had actually filed an appeal. See **id.,at** 710. In petitioner's case, however, he never filed an appeal since he was never aware of the right to due solely to the dual-deficiency of counsel and the sentencing court.

Similarly, the Second Circuit, in **Valente v. United States**,111 F.3d 290(1997), held that **Reid** did not require vacatur and remand despite the sentencing court's failure to inform the defendant of his right to appeal because the defendant had pleaded guilty pursuant to a plea agreement in which he agreed to waive his right to appeal. See **id.,at** 293. Although petitioner pled guilty, (1) there was no requirement or actual waiver of the right to appeal;(2) the plea was invalid, unknowing, unintelligent, involuntary, infected by ineffective assistance of counsel, and to an uncommitted offense that was legally impossible to commit in New York State, as noted previously in this petition.

This Court, in **Peguero v. United States**,526 U.S. 23,119 S.Ct 961(1999), has explicitly curtailed any per se rule articulated by **Reid** to the extent of holding that a defendant is not entitled to collateral relief arising from a sentencing court's failure to inform of his right to appeal when the defendant "had independent knowledge of the right to appeal and so was not prejudiced by the trial court's omission," **id.,119 S.Ct. at 965**, but petitioner had no independent knowledge thereof because of the dual-deficiency of counsel and the sentencing court here; the government did not maintain its burden of establishing that petitioner did (**Soto,supra,at** 55); and, even if the government could have, the government conceded that it would have been "14 months" after the imposition of sentence and thus beyond the one-year grace period to seek relief allowed in New York State, and did not establish how petitioner would have known or have been able to interpret what a "notice of appeal" was or what to do if one was not filed considering never being informed of such by counsel or the court. And this is assuming, arguendo, that any notifications were received.

Therefore, **Bygrave, Valente** and **Peguero** did not apply; **Reid** applied, and t he State should have provided some form of relief for petitioner. Although these cases relate to the entitlement of "collateral relief," the term is vague. In light of these cases and the circumstances of petitioner's case, this court should determine if all of these standards from **Reid, Bygrave, Valente** and **Soto** apply to coram nobis instead of just "collateral relief," or whether that term encompasses coram nobis.

3. Although the government contends that petitioner had waited more than 6 years to file his error coram nobis motion, and notwithstanding the fact that the government failed to maintain its burden of establishing that petitioner had independent knowledge or received any notifications at all, in **U.S. v. Morgan**,346 U.S. 502(1954) this Court ruled that "[t]he writ of coram nobis was available at common law to correct errors of fact.It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment, and was used in both civil and criminal cases," id.,at 507. There has been no abrogation of **Morgan**. Also, see **Kovacs v. U.S.**,744 F.3d 44,54(2d Cir.2014)("**No statute of limitations governs the filing of a coram nobis petition.**")

Petitioner only discovered all of these issues pertaining to this matter on or about November 19,2018 (see **App.O**) when the D.A responded to petitioner's September 9,2018 CPL 440.10/.20 motion, in their October 30,2018 Answering Affirmation, and voluntarily included the 2011 indictment and plea and sentencing minutes, documents that revealed previously unknown "facts that affect the 'validity and regularity' of [his 2011] judgment." In fact, petitioner would have never even known of the issues surrounding this matter of the 2011 judgment had the D.A not have voluntarily relinquished and provided those documents to him.

Thus, the amount of time that elapsed from petitioner's sentencing is (1) immaterial under **Morgan**, and (2) to be imputed to the State. The States's summary denial of petitioner's motion for writ of error coram nobis and collateral relief is inconsistent with **Reid, Soto**, and now **Morgan**. Coram nobis relief was appropriate, allowed and mandated for petitioner.

E. The Doctrine of Laches did Not apply to nor Control Petitioner's request for Coram Nobis or Collateral relief or Dictate the Outcome of Petitioner's Motion

In response to petitioner's coram nobis motion, the D.A argued that his motion "should also be rejected on the ground of laches [(case omit.)]."App.H,p.3. Based upon this argument by the D.A and the summary denial of coram nobis relief at the intermediate appellate level, it can only be reasoned that the court either considered or actually relied upon the Doctrine of Laches in denying petitioner relief.

Accordingly, in petitioner's leave application to the Court of Appeals, petitioner argued that the doctrine of laches did not apply to his motion for writ of error, coram nobis for three (3) reasons:

a)" 'The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party'(Beiter,67 A.D.3d at 1416),"Santillo v. Santillo,155 AD3d 1688,1689(4th dept.2017), and the D.A did not even attempt to, and actually did not, assert or claim any prejudice to themselves.App.G,p.3;

b)that "it is well established that laches is an equitable defense and 'is inapplicable to actions at law'(cit.omit.)" Ranney v. Tonawanda City School District,160 AD3d 1461(4th dept.2018); Leopard Marine & Trading,Ltd. v. Easy Street Ltd.,896 F.3d 174(2d Cir.2018).App.G,p.3;

c)"The doctrine of laches has no application when plaintiffs allege a continuing wrong (Capruso v. Village of Kings point,23 N.Y.3d 631,642)." Seaview at Arnagansett,Ltd. v. Trustees of Freeholder and Commonality of Town of East Hampton,142 A.D.3d 1066,1069(2nd dept.2016); In re Brizinova,588 B.R. 311(E.D.N.Y 2018),- and petitioner asserted and established not only a continuing wrong but that he was also currently suffering directly under the continuing wrong as a result of the 2011 judgment which was the 2011 judgment itself along with its lifelong civil and constitutional cosequences, as well as his currently-being-served 2015 judgment in which he was deemed a predicate felon and given an enhanced sentence as a result of the 2011 conviction, and the 2015 plea was premised and contingent upon acknowledging and accepting being a predicate felon -- mistakenly -- despite the 2011 offense being a misdemeanor at most (and legally impossible to commit in New York).App.G,p.4.

As a matter of importance to the nation, any application of the Doctrine of Laches to coram nobis by any/all lower courts and States -- New York State here -- would be, and is, in direct conflict with this court's ruling that "[t]he writ of coram nobis was available at common law to correct errors of fact [,and] that [i]t was allowed **without limitation of time** for facts that affect the 'validity and regularity' of the judgment..." in **U.S. v. Morgan**,346 U.S. 502,507(1954) with the rationale being that "[o]therwise a wrong may stand uncorrected which the available remedy would right, **id.**,at 512, and "Although [a] term has been served, the results of the conviction may persist.Subsequent convictions may carry heavier penalties, civil rights may be affected.As the power to remedy an invalid conviction exists...respondent is entitled to an opportunity to attempt to show that [the] conviction was invalid."**id.**,at 512-513.

Furthermore, since "laches is an equitable defense and 'is inapplicable to actions at law'(cit.omit.)," **Leopard Marine & Trading,Ltd. v. Easy Street Ltd.**,896 F.3d 174(2d Cir.2018), this Court should resolve whether laches could ever be applicable to a coram nobis action pertaining to a criminal case with fundamental issues on opposition by the government if there is "No statute of limitations [that] governs the filing of a coram nobis petition."**kovacs**,**supra**.

With respect to petitioner, the government did not assert or maintain their burden of establishing a delay or a showing of prejudice to themselves. Any delay in Petitioner's submission of his coram nobis motion is to be imputed to the State but, in any event, there was no delay on petitioner's behalf since he filed his coram nobis motion on March 24,2019, with due diligence, four (4) months and about one (1) week after receiving the papers revealing the fundamental and constitutional issues therein and the discovery of such. And the D.A did not even attempt to, let alone actually, assert any prejudice to themselves as a result of petitioner's submitting when he did. Thus, neither legal aspect applied, and the State contravened its own legal principals and holdings on the matter simply in order to summarily deny the

motion. In fact, the State evidently ignored the injustices and "continuing wrongs" asserted and established by petitioner that would render the doctrine of laches legally inapplicable even if it ever was or could have applied simply in order to summarily deny coram nobis relief.

F. Every Single one of Petitioner's Civil and Constitutional Rights that are Guaranteed to Defendants in Criminal Matters was Violated prior to, during and after Judgment

Petitioner was first arrested without probable cause or warrant in his home, to which was also searched without warrant , in direct violation of the 4th Amendment to the U.S. Constitution and New York State equivalent.App.G,p.15-16. Also see App.T,part B,point 1. Upon and following his illegal arrest, petitioner was charged with at least three (3) charges or crimes that he couldn't have committed under New York Law as previously noted in Part A herein. Thereafter, petitioner was haled into court, while being judged by a judge/court, without jurisdiction or authority and prosecuted on a jurisdictionally defective accusatory instrument that also didn't even fully or fairly apprise him of the crime he was being accused of, and was prosecuted by an over-zealous prosecutor using malicious and illegal tactics to strike a foul blow in order to secure a conviction against him for an offense that he not only did not commit under New York State Law, but was a legal impossibility in New York State. All the while, petitioner was assigned and represented by an attorney who not only failed to protect his rights and freedom but assisted the prosecutor in securing petitioner's illegal conviction to the uncommitted and impossible offense petitioner stands convicted of and orchestrated a sentence at least 3 years beyond the maximum authorized for the only offense petitioner could have committed in New York,a misdemeanor. adding insult to injury, after this malicious prosecution, petitioner is never informed of a right to appeal or appeal abilities, procedures or time limits by neither counsel nor the sentencing court, and counsel never filed a notice of appeal--blatant violations of Petitioner's rights under the

5th,6th,8th and 14 amendments to the U.S. Constitution and New York Constitution's equivalents and civil rights.

Upon discovering that above, petitioner sought relief as delineated earlier in this petition but his motions were rubber-stamped by the State of New York at every level. A rubber-stamping after a railroading. With respect to the aforementioned motion to vacate and set aside sentence under N.Y.C.P.L 440.10/.20, dated September 9,2018, at page 21 herein, in denying it the sentencing court did nothing more than insult petitioner's intelligence and chastise his pleadings in the Decision and Order, stating "to the extent [petitioner's] papers are at all intelligible,"App.P,p.2; that petitioner made "self-serving, factually unsupported statements, rank conjecture and his tenuous and often misguided understanding of the principals of law.[Petitioner] alleged - without support - generalized, sweeping claims of deprivation of Constitutional protections and procedural errors and has regurgitated erroneous legal conclusions," id.,at 6, despite the record and laws of the State establishing otherwise, and just as with petitioner's sentencing did not inform him of any right or procedure to appeal by way of seeking leave to appeal to the appellate court which led petitioner to file a reargument/renewal/reconsideration motion, dated March 18,2019, upon which the sentencing court did the same thing above along with making the same beratements and insults as it initially did in addition to stating "[petitioner's] papers exemplify the old adage warning against the inherent dangers stemming from a little bit of knowledge," App.Q,p.3, and the sentencing court, as well as its law clerk (a retired,fellow monroe county court judge and ex-coworker) intentionally failed to advise petitioner that there -- purportedly and according to them -- was no mechanism for a CPL 440 reconsideration/renewal/reargument motion and waited at least 60 days to render a decision in order to run the clock on the 30 deadline for seeking leave to appeal on the initial submission, something the court failed to advise petitioner of despite such advisement being its duty.

This is inconsistent with the requirement that pro se

litigants' "submission[s] must be held ' to less stringent standards than formal pleadings drafted by lawyers,' and [that] the court[s] must construe submissions 'liberally and interpret them to raise the strongest arguments they suggest,'" **Paredes-Cisnero v. U.S.,869 F.Supp.2d 402,404 (S.D.N.Y 2012), and wholly improper.**

With respect to the coram nobis motion at issue , despite this Court's ruling that "a defendant need not identify potentially meritorious issues that would be raised on appeal; the defendant need only demonstrate that, as a result of counsel's deficient performance, appellate rights were extinguished," **Roe v. Flores-Ortega,528 U.S. 470,477(2000)**, petitioner elected to do so anyway. See **App.G at 10-16**. none of these issues were addressed in law or fact nor considered by the State Courts, and although the New York State Court of Appeals does not review questions of fact, only of law, it may determine whether the facts, as the lower court found them, are sufficient to support that court's legal conclusions (**people v. Stoesser,53 NY2d 648[1981]**) and determining the standard against which the facts are to be measured is a question of law (**People v. Edwards,69 NY2d 814,815-816**), a state court's determination of facts is unreasonable if no finding was made and the court "should have made a finding of fact but neglected to do so."**Taylor v. Maddox,336 F.3d 992,1000-01(9th Cir.2004); Mask v. McGinnis,233 F.3d 132,140(2d Cir.2000).**

Since the D.A argued that petitioner waited more than 6 years to bring his motion and argued that petitioner's motion "should also be rejected on the ground of laches (cit.omit.),"**App.H,p.3**, it can only be presumed that the State courts' summary denials of petitioner's coram nobis motion without opinion was based, at least in part, upon this position by the D.A. However, the State Courts should have first made and were required to make a finding of facts on (1) whether the D.A's office and Court Clerks sent purported "notifi[cations]" and decisions to the wrong prison and, therefore, petitioner did not receive them, and (2) whether, even if petitioner would have received either he would have been

able to know or interpret what a "notice of appeal" was or what to do if one was not filed by his attorney, let alone know that he should or actually had to do something by law, considering that both his counsel and the sentencing court failed to inform him of the right to appeal or appeal abilities, procedures or time limits. These must be established to determine whether **Bygrave, Valente, Peguero** and **Reid** factors applied or controlled separate and apart from the burden the State had and failed in establishing that petitioner had independent knowledge of the right to appeal at the time of sentencing or anytime after and was not prejudiced. Part B of this petitioner establishes that the evidence was not legally sufficient to support petitioner's conviction, but as this section establishes, petitioner cannot and never could appeal.

Since these arguments were unaddressed along with the issues pertaining directly to and within the coram nobis motion, petitioner (1) was not afforded a full and fair opportunity to litigate any of them (see,e.g., **U.S. ex rel. Bostick Peters,3 F.3d 1023 [7th Cir.1993]; Agee v. White,809 F.2d 1487 [11th Cir.1987]**), and (2) his coram nobis motion was not resolved in a way reasonably related to the merit of that motion. compare **Smith v. Robbins,528 U.S. 259,277(2000).**

G. The State of New York has No Power or Authority to Enforce the Judgment

Considering that the offense petitioner stands convicted of was a legal impossibility in New York and that "[a] conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment," **Montgomery v. Louisiana,136 S.Ct. 718,731(2016);** that petitioner is actually innocent; that,if anything, petitioner committed at most a misdemeanor rather than a felony; that the court of conviction never had jurisdiction over the matter; that the accusatory instrument was jurisdictionally and constitutionally defective; and that every single one of petitioner's substantive, procedural, civil and constitutional rights were violated while

the rule of law and the substantive and procedural rules that the sentencing court was bound to follow and afford petitioner was violated as seen throughout this petition, the 2011 judgment is unlawful, unjust, unconstitutional, void and unenforceable, and the State of New York -- and every court within it -- has no power or authority to enforce it under the principals and precedent held by this court in **Montgomery v. Louisiana**,136 S.Ct. 718,729-731(2016), citing Schriro,524 U.S.,at 353,124 S.Ct. 2519; **United States v. United States Coin & Currency**,401 U.S. 715,724,(cit.omit.); and Siebold,100 U.S. at 376.

H. **Petitioner Has No Other Form of Recourse or Relief Available to Him**

This Court has determined that defendants are "entitled to an opportunity to show, by [way] of motion in the nature of writ of error coram nobis that conviction and sentence...should be set aside on grounds that [their] constitutional right to counsel had been violated," **U.S. v. Morgan**,346 U.S. 502,512-513(1954). To support a petition for a writ of error coram nobis, the petitioner must show that he continues to suffer a significant collateral consequence from the criminal judgment being challenged and that issuance of the writ will eliminate this consequence.**Williams v. U.S.**,858 F.3d 708,715. A coram nobis petition is a collateral proceeding through which a court may correct fundamental errors in a prior final judgment. **U.S. v. Hernandez**,283 F.Supp.3d 144,149. The New York State Court of Appeals acknowledged "that the writ [of coram nobis] continues to be available to alleviate a constitutional wrong when a defendant has no other procedural recourse."**people v. Syville**,15 Ny3d 391 at 400, citing **People v. Bachert**,69 NY2d 593,(cit.omit.)(1987).

Notably, petitioner brought his coram nobis motion under these principals and high-court holdings, not solely within the context or confines of ineffective assistance of counsel.**App.G,p.1-2,8-9.**

the State of New York, and all issues herein resulting in

petitioner's need to seek coram nobis relief that must be imputed to it, has given petitioner no other form of recourse or relief available to him except for coram nobis and the inclusive relief he has sought.

the dual deficiencies of the court and counsel resulted in prejudice and the loss of an appellate proceeding altogether; no appeal lies or is available.

Despite this Court's determination that "[i]n behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief" in Morgan,id.,at 504 Charles Siragusa, a Justice of the United States District Court for the Western District of New York, commented that "[petitioner] could attempt to collaterally attack [the 2011] conviction in a ...habeas corpus action, but such an attempt would almost certainly be time-barred."**App.R,p.2 footnote**. Thus habeas corpus relief does not ly and is unavavailable, but "A writ of error coram nobis is...typically available only when habeas relief is unwarranted because the petitioner is no longer in custody." **Kovac,supra,at 49**.

Currently pending in New York State Governor Cuomo's Office is a petition for a pardon on the 2011 judgment at issue.**App.S.** Pardons, however, are rare and unlikely as well as requests for such rarely successful. It is believed that Petitioner's request for a pardon will be denied.

Coram Nobis was the proper and appropriate relief because petitioner's fundamental and constitutional rights were violated, it was the only form of relief that could correct or relieve the collateral consequences, and he has no other form of recourse available to him -- other than this petition. Thus, this Petition should be granted.

I. Petitioner has Suffered, is Currently Suffering, and Will Continue to Suffer Life-Long Consequences as a Result of the 2011 Judgment

One of the rationales behind this court's ruling that "[t]he writ of coram nobis was available at common law to correct errors of fact," and that "[i]t was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment..." in **U.S. v. Morgan,supra, at 507**, and that " continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice," **id., at 511**, and that "Although the term has been served, the results of a conviction may persist.Subsequent convictions may carry heavier penalties, civil rights may be affected."**id at 512-513.** "Of course the record of a conviction for a serious crime is often a lifelong handicap.There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced therby. The stain on his reputation may at any time threaten his social standing of affect his job opportunities, for example." (dissenting justices) **at 519.**

As petitioner stated in his coram nobis motion, he is (1) suffering the always-resultant, lifelong consequences that accompany a felony conviction on one's record, notwithstanding that injury of serving wrongful prison time unlawfully and excessively, as a result of the 2011 judgment, and (2) that the 2011 conviction was used as the basis to impose a predicate felon status upon him in his currently-being-served 2015 judgment and to enhance his sentence.**App.G,p.8-9; App.J,p.4; App.K,p.12-13.** In fact, the 2015 plea was premised and contingent upon (mistakenly, unintelligently and involuntarily) accepting and acknowledging being a predicate felon (see **People v. Kates,162 AD3d 1627 at 1632 [4th dept.2018]**), and Petitioner's defense counsel admitted to the court that he was "unaware of any" constitutional challenges to the 2011 judgment at issue and as evidenced herein. See **App.S,p.4,lines 3-6.** Petitioner was tricked.

Furthermore, at sentencing petitioner refused to sign a surprise document regarding being a predicate felon and, when he did, counsel requested to approach the bench,**id.,at 2,line 1**, whereupon the judge agreed and a bench conference was held.**id at lines 2-4.** Immediately thereafter, counsel requested a recess, which was granted.**id at lines 5-7.** During the recess, counsel informed petitioner that the bench conference consisted of counsel telling the judge about petitioner's refusal to sign the surprise predicate felon paper and the judge telling counsel that he would enhance petitioner's sentence if he continued to refuse to sign the document. This was an impermissible threat from

the court against petitioner. see **People v. Green,140 AD3d 1660 (4th dept.2016)** This constitutes coercion as well. petitioner raised this issue on direct appeal, but the fourth department considered the threat harmless error. see **Kates(supra)**. Even if such a ruling was not erroneous back then, however, it certainly is and can only be harmful now considering that the dynamic of the issue has changed since back then because petitioner discovered that he was in fact not a predicate felon four (4) months **after** the affirmance of his conviction by the fourth department when the D.A voluntarily provided him with the 2011 judgment's indictment and plea and sentencing minutes, which evidenced and revealed that of which this petition is based.

This Court should act to eliminate the consequences and correct the fundamental errors of this matter,"otherwise a wrong may stand uncorrected which the available remedy would right," and petitioner continues to suffer significant collateral and direct consequences as a result of this unjust 2011 judgment, which petitioner was required to, and did, establish in order to be entitled to relief.

J. Petitioner's Case is "Rare" and "Extraordinary"

Petitioner's case is both "rare" and "extraordinary." This very Court has, at least in dicta, determined that "extraordinary" constitutes "where a constitutional violation has **probably** resulted in the conviction of one who is actually innocent" in **Murray v. Carrier,477 U.S. 478,496(1986)**. "At the same time, though, the **Schlup** standard does not require absolute certainty about the petitioner's guilt or innocence." **House v. Bell,547 U.S. 518,538(2006)**. For one, petitioner is actually innocent.Second, petitioner stands convicted of an offense that was unconstitutionally obtained and legally impossible to commit in the State of New York. Third, every single one of the applicable civil and constitutional rights he was guaranteed and entitled to was violated. Fourth, petitioner has suffered, is currently suffering direct consequences as a result of the conviction, and will continue to suffer collateral consequences and the loss of civil and constitutional rights, such as second amendment, job opportunity and voting loss and international travel restrictions, for the rest of his life. This petition and its content evidence the "rare" and "extraordinary" nature of this case, but it is certainly "rare" not only that all of the issues herein would occur in a single case but that both a sentencing court and a defense attorney would fail to inform a defendant of the right to appeal on top of counsel's failure to file a notice of appeal, and

"extraordinary" that all courts at every level of the state would ignore these collective issues and refuse to grant the relief this court has deemed warranted and, in fact, has mandated.

K. Cause and Prejudice apply, and there is No Procedural Bar or Default Adequate to Support the Judgment

1. In **Engle v. Isaac**,456 U.S. 107,135(1982) this Court ruled that the cause and prejudice standard will be met in those cases where review of a State prisoner's claim is necessary to correct "a fundamental miscarriage of justice." Further,this Court "explained clearly that 'cause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him..." in **Coleman v. Thompson**,501 U.S. 722,753 (**citing Carrier at** 488). "As a general rule, claims forfeited under State law may support federal habeas relief only if the prisoner demonstrates cause for for the default and prejudice from the asserted error." **House,id., at** 537(cases omit.). Petitioner, at least at this point in time, has not and is not seeking "federal habeas relief" since Judge Siragusa has indicated that it "would almost certainly be time-barred," **App.R,p.2 footnote**, but with respect to the issues of this petition here the "cause" and "something external to the petitioner... that cannot fairly be attributed to him" was petitioner's knowledge, or lack thereof, of the right to appeal as well as to any appeal abilities, procedures or time limits since both the sentencing court and assigned public counsel completely failed to inform him of such, which must be "imputed to the state." cf. **Evitts v. Lucey**,469 U.S. 387,396(1985).

The prejudice is evident; petitioner was unaware of any right to appeal or precedures or time limits, he could not protect his right to appeal or initiate one pro se because he was never so informed, and he lost an appellate proceeding and appeal merits consideration altogether not only due to counsel's deficient performance in failing to file a notice of appeal but because he was not informed of the right or procedure to do so by himself. None of this can be "attributable" to petitioner. But even if cause and prejudice did not apply, however, the fundamental miscarriage of justice exception would. In any event, this Court has determined that "[a]ttorney error that constitutes ineffective assistance of counsel is 'cause,' however." **Coleman v. Thompson**,501 U.S. 722,754(1991).

Although this Court explained:"Given that past precedents call for a

presumption of prejudice whenever 'the accused is denied counsel at a critical stage,' it makes even greater sense to presume prejudice when counsel's deficiency forfeits an 'appellate proceeding altogether'(citing Flores-Ortega at 483)" as recently as in **Garza v. Idaho,--S.Ct.--(WL 2019 938523),part 3 at** 6, and there is prejudice when the sentencing court fails to inform a defendant of the right to appeal unless they "had independent knowledge of the right" in **Peguero,supra,** despite the fact that it would be inconsistent with both **Garza** and **Peguero** to determine that when both counsel and the sentencing court fail to inform and counsel fails to file a notice of appeal that there is no prejudice, this Court has not determined whether prjudice is presumed for this particular dual deficiency situation or what the relief is to be at law and constitution. This Court should do so and determine whether the aforementioned exemptions applicable to federal habeas relief extend to coram nobis and petitioner's case.

2."This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." **Coleman,supra,at** 729

But petitioner's case was rubber-stamped and nothing was decided is his case;his claims of coram nobis motion was summarily denied without opinion and the issues within it were not fully addressed on their merits and therefore the factul predicates do not exist and, to that extent -- while presuming -- that the doctrine of laches was relied upon, the doctrine of laches is federal and, as previously noted, was inapplicable to petitioner's motion and the relief he sought.

The independent and adequate-state ground "doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement," **Coleman,supra,at** 729,730, but in petitioner's case here any failure to meet the time for filing an appeal or its notice was due (1) to both the sentencing court and assigned public counsel's dual-deficiencies in failing to inform petitioner of the right to appeal or appeal abilities, procedures, or time limits, which must be imputed to the state, and (2) counsel's failure to file a notice of appeal, which petitioner cannot be faulted for. The state's failure and refusal to afford relief to petitioner that this court has deemed mandatory

-- and as a result of the State's own failures at that -- violated petitioner's right to equal protection, due process, appeal merits consideration, rectification and correction, a full and fair opportunity to litigate, and the protections against cruel and unusual punishment.

Lastly, since the offense petitioner stands convicted of was legally impossible to commit in New York State, and this Court has declared that "[a] conviction under an unconstitutional law is not just erroneous, but is illegal and void..." in **Montgomery v. Louisiana,supra, at** 731, there is nothing at all upon which may be adequate to support the judgment.

L. Equitable Tolling Applies

In **Holland v. Florida,**130 S.Ct. 2549(2010), this Court addressed the circumstances in which a federal habeas petitioner could invoke the doctrine of "equitable tolling." **Holland** held that "a [habeas] petitioner is entitled to equitable tolling only if he shows (1) that he had been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." **id. at** 2562 (internal quotation marks omitted). Also, compare **Kovacs v.** U.S.,744 F.3d 44,49(2d Cir.2014)(A petitioner seeking coram nobis relief "must demonstrate that 1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief...")

This standard applies to petitioner. Since discovering the issues presented herein, petitioner has diligently been pursuing his rights by (a) filing his CPL 440.10/.20 motion dated September 9,2018, (b) filing his CPL 440.10/.20 motion reargument/renewal/reconsideration motion dated March 18,2019, (c) filing his application in the appellate court seeking leave to appeal from the denial of these two motions, dated June 25,2019, (d) having already prepared an application seeking leave to appeal from the anticipated denial of the appellate court leave application for the Court of Appeals, yet to be submitted, and (e) filing his coram nobis motion with all of the reliefs requested in the appellate court and a leave application in the Court of Appeals seeking permission to appeal from its denial, both of which are the subject of this petition.

The extraordinary circumstances that stood in petitioner's way of timely filing an appeal were the dual deficiencies of the sentencing court and

assigned public counsel both failing to inform petitioner of the right to appeal or to any appeal abilities, procedures or time limits, and counsel's failure to file a notice of appeal.

Petitioner sought permission to file a late notice of appeal or receive permission to file a late appeal through each of these motions but each state court has stood in his way by summarily denying relief without cause, reason or opinion.

Petitioner simply seeks (1) the relief he is entitled; (2) an opportunity to appeal; and (3) a full and fair opportunity to litigate.

M. Void for Vagueness and Burden-Shifting

Either New York's home or place of business exception for CPW offenses applies anytime possession of a loaded firearm occurs in the home or place of business or New York's PL 265.03, subdivision 1(b) and 3, are void for vagueness.

New York's Penal law § 265.03 states:

A person is guilty of criminal possession of a weapon in the 2nd degree when:

1. With intent to use the same unlawfully against another, such person:

a) possesses a machine-gun;or

b) possesses a loaded firearm;or

c) possesses a disguised gun;or

2.(Omitted as inapplicable)

3. Such person possesses **any loaded firearm**. Such possession shall not, except as provided in subdivision 1 and 7 of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business.

"The void-for-vagueness doctrine addresses concerns regarding (1) fair notice and (2) arbitrary and discriminatory prosecution.(Cit omit). To avoid a vagueness challenge, a statute must define a criminal offense in a manner that ordinary people must understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement..." **U.S. v. Ulbricht,31 F.Supp.3d 540 at 567.** Possession of a loaded firearm outside of the home or place of business is an element of CPW 2nd, **Rodriguez(supra)**, and although it would appear at first blush that both PL 265.03(1)(b) and (3) give fair notice to ordinary people that unlicensed possession of a loaded firearm is a criminal offense, only subdivision 3 gives fair notice that the offense constitutes only a misdemeanor when such possession takes place in

the home or place of business by a person with no previous convictions whereas subdivision 1(b) does not. This alone encourages arbitrary and discriminatory enforcement of subdivision 1(b) and prosecutorial cherry picking between the two subdivisions in pursuit of a felony conviction. Petitioner's case is a perfect example of this; if a defendant possessed a loaded firearm within their home and had no previous convictions, they violated PL 265.03(3) and are entitled to the defenses within it, but when the prosecutor is aware of these two facts and that those facts constitute only a misdemeanor at law under the exceptions the prosecution can assert or contend that because it was loaded he or she intended to use it unlawfully against another and resort to subdivision 1(b) in order to secure a felony conviction. This allows prosecutors to secure a felony conviction 10 times out of 10, and 10 times out of 10 evade and circumvent the home or place of business exceptions as long as they charge a defendant with both charges based upon possessing a loaded firearm -- subdivisions 1(b) and 3 -- as in petitioner's case, or only 1(b). What's more is that, in pursuing the felony CPW offense under subdivision 1(b), the prosecutor is then always in a position to guarantee securing the conviction by solely applying the PL 265.15(4) presumption, as in petitioner's case, in order to prove the "intent to use...unlawfully" element despite this court ruling such as impermissible (see **Allen**,supra;**Curcio**,supra) and despite the possession occurring in the home, thus circumventing Legislature's intent and enactment of the exceptions, then get away with the unconstitutional tactic under the guise of prosecutorial discretion when it's actually arbitrary and discriminatory enforcement of one subdivision over the other solely to achieve a felony, rather than a misdemeanor, conviction at the detriment of the accused and malicious benefit of the prosecutor. But this prosecutes and punishes citizens for felonies when all they actually committed was a misdemeanor. If that's the case, then there is no purpose whatsoever for subdivision 3 to exist at all nor its exceptions, but this was certainly not the intent of legislature.

Either PL 265.03(1)(b) is proscribed for when possession of a

loaded firearm occurs outside of the home or place of business exceptions and PL 265.03(3) is proscribed for possession of a loaded firearm within the home or place of business with the circumstances of the latter overriding and taking precedent over the former -- as "possesses any loaded firearm" in subdivision (3) encompasses "possesses a [single] loaded firearm" in subdivision 1(b) -- and the exceptions within applying (and were to be afforded petitioner in this case) or PL 265.03(1)(b) and/or (3) are void for vagueness. In any event, Petitioner's being charged with both was duplicitous.

Furthermore, since possession of a loaded firearm outside of the home or place of business is an element of CPW 2nd, **Rodriguez** (supra), the People were required to prove that Petitioner's purported possession occurred outside of his home but failed when the D.A conceded that possession was within his home.**App.N,P.8,at line 24- p.9,line 8**.

Because of this (a) no trier of fact would have determined that the material element of possession of a loaded firearm outside of the home occurred,(b) without establishing the predicate fact of possession of a loaded firearm outside of the home no trier of fact would have been entitled to infer that petitioner intended to use the weapon unlawfully, however,(c) applying PL 265.15(4) in petitioner's case would have impermissibly allowed the trier of fact to infer that he intended to use the weapon he possessed in his home unlawfully against another as if the People actually proved the element of possession of a loaded firearm outside of the home when they actually failed to prove that element, and shifted the burden of proof to appellant in that PL 265.15(4) would not merely allow but instead require the trier of fact to accept that presumed fact despite the People's failure in metting their burden of proof, which leads to (d), since the predicate facts were not established or proven the Pl 265.15(4) presumption could not be applied since possession of "any loaded firearm" is not a felony when possession occurs in the home of and by one who has no previous conviction, **White,supra, at 120-121**, and raises the misdemeanor offense right back up to a felony. That said, this

would also shift the burden to petitioner to prove that (1) he did possess a loaded firearm in his home;(2) did not possess a loaded firearm outside of his home;(3) did possess a loaded firearm within his home for family, home and self-defense; and (4) did not intend to take the loaded firearm outside of his home to use it unlawfully against another -- burdens of the People, no petitioner.

Lastly, in **App.Q,p.3,second paragraph**, the sentencing court stated: "...the exception [petitioner] asserts does not apply to the particular provision of the Penal Law under which [he] stands convicted (compare Penal Law § 265.03[1][b] with Penal Law § 265.03[3])." But PL 265.03 is the Statute, "1(b)" and "(3)" are simply subdivisions of that (same) statute. Accordingly, it only matters that the exceptions are contained within the statute, not a subdivision of the statute. The court in **People v. Hogabone,278** Ad2d 525,525-526(3rd dept.2000) put clear emphasis on this. This is especially so here in petitioner's case since the elements of PL 265.03(3) and 1(b) are the same minus "intent," but the intent is solely derived from the weapon being "loaded" and PL 265.15(4), which has already been addressed and seen to be constitutionally inapplicble.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully Submitted,

Alexander Yates

Date: October 26, 2019