No.: 20-8040 ORIGINAL

IN THE

SUPREME COURT OF THE

UNITED STATES

Michael N. Kelsey, J.D., Petitioner

vs.

The State of New York, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE NEW YORK SUPREME COURT,

APPELLATE DIVISION, THIRD DEPARTMENT

PETITION FOR WRIT OF CERTIORARI[1]

Michael N. Kelsey
Appellant-Plaintiff Pro Se

16A4286 Hudson Correctional
50 East Court Street
Hudson, NY 12534

[1] 28 USC 2403(b) may apply as statutes of the State have been drawn into question.

QUESTIONS PRESENTED FOR REVIEW

1: Are New York State's procedural rules insufficiently hospitable to a Petitioner's constitutional claims such as here where the Petitioner was deemed to be procedurally defaulted from raising claims on direct appeal due to the ineffectiveness of appellate counsel?

2. Does New York's procedural default rules embodied in CPL 440.10[2][c] & [3][a] violate the substantive due process rights of appellants (both on their face and as applied)?[2]

3. Is it a conflict of interest resulting in the loss of due process and/or judicial neutrality when the same trial judge who served as both witness of witnesses and a participant in the trial leading to conviction then serves as fact-finder and decision-maker in post-conviction procedures in evaluating the trial for error including those attributed to the judge or a product of his agency?

4. Is it a violation of the fundamental fairness represented by due process when a judge, fully aware that all pre- and mid-trial plea-offerings were for probation or conditional discharge, then sentenced the Petitioner to a seven-year prison term plus ten years of probation?

5. Is it a constitutional violation of due process and/or of equal protection that amounts to punishing a criminal defendant for his claim of innocence or the assertion of his trial rights for a judge when setting sentencing decisions to consider and/or base his sentencing decisions on the articulated trial inconveniences/burdens of crime victims?

6. Was the Petitioner subjected to cruel and unusual punishment when while still asserting his innocence he was sentenced to seven years in prison plus ten years probation after numerous cries – including from state agents in police and probation – to punish him for asserting his trial rights after rejecting pre- and mid-trial pleas that subjected him only to probation and/or conditional discharge if he would plead guilty? Is the imprisonment of sex offenders to prison terms or lengthy prison terms cruel or unusual punishment; or -- when considering the severe social stigma prevalent in our culture against sex offenses and their perpetrators -- is subjecting sex offender to plea-deals that require public admissions of guilt considered a cruel punishment in violation of the shaming practices that the Eighth Amendment and the first Congress sought to eradicate?

7. Did the State's imposition of a plea-bargaining system (i.e. the State's judicial and prosecutorial agent's pressured expectation that Petitioner participate in plea bargaining coupled with an alleged threats and a retaliatory sentence for asserting his trial rights) violate or subject the Petitioner to a reduction of the privileges and

[2] 28 USC 2403(b) may apply as statutes of the State have been drawn into question.

immunities – and specifically 5th and 6th Amendment trial rights – guaranteed him under the 14th Amendment?

8. Was probable cause thereby rebutted and negated such that both indictment and conviction should have been vacated when police agent and arresting officer both admit in their trial testimony to the use of fraud in the "control call" used to indict and convict petitioner, and when law enforcement withheld exculpatory BRADY materials from the Prosecutor?

9. Did the fraudulent nature of the control call conducted by the State police sufficiently counteract the one-party consent rule such that the control call amounted to an unreasonable search, operating without a warrant, in violation of the Petitioner's Fourth Amendment rights?

10. Does the relationship of the parties in a phone call amount to a co-tenancy relationship akin to that recognized in GEORGIA V. RANDOLPH, 547 US 103 (2006), such that it is unconstitutional for one party to a phone call to consent to a warrantless police interception/search over the refusal of other parties and cannot willfully conceal the police involvement in a concerted effort to circumvent the other party's likely objection as occurred in the warrantless 2014 police intercepted control call conducted on the Petitioner?

11. Does the Fifth or Fourteenth Amendments impose upon law enforcement a duty to provide MIRANDA rights and/or to terminate an undercover, non-custodial interrogation of a criminal suspect when such suspect articulates suicidal ideations and/or makes credible and obvious signs, symptoms or verbal indicators of mental instability such that continued questioning would violate fundamental standards of fairness, the suspect's volition, and/or the minimum level of reliability expected of police interrogations?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page: Michael N. Kelsey as Petitioner; New York State as Respondent. Service has been affected upon the New York State Attorney General.

LIST OF RELATED CASES

PEOPLE V. KELSEY. A prior petition seeking certiorari has been submitted to the U.S. Supreme Court with docket # 20-7308, filed on 22 February 2021 and fully submitted on 5 April 2021. Docket 20-7308 follows from a denial of the NYS Court of Appeals and Appellate Division denial of a petition seeking a Writ of Error Corum Nobis alleging ineffective appellate counsel as it corresponded to the filing of a direct appeal denied 3 July 2019. Both this action and the former one now before the U.S. Supreme Court deal with the same criminal appeal, the former alleging *inter alia* that appellate counsel was ineffective for not first filing a post-conviction motion pursuant to state Criminal Procedure Law 440.10 which would have allowed matter *dehors* the record to be considered by the State. The instant petition follows the trial court's rejection of the Petitioner's CPL 440.10 post-conviction motion based upon a ruling that Petitioner was procedurally defaulted from having his issues and grounds for vacatur of the conviction considered because appellate counsel did not first file a CPL 440.10 motion prior to the direct appeal.

PEOPLE V. KELSEY – St. Lawrence County Court, Indictment # 2015-123: An active motion seeks redaction, suppression and a protective order of Petitioner's pre-sentence investigation report in part due to claims of retaliatory sentencing (germane to Questions 3-6 herein). The motion can be found in Appendix D12.

PEOPLE V. LEWIN – State Habeas Corpus, Index #16417-20. This matter was filed with the NYS Supreme Court, Columbia County for which a Writ was issued and a hearing heard on 5 March 2021. A subsequent decision denied Petitioner consideration of his claims of unconstitutional statute and legal insufficiency. As with the State's denial of Petitioner's post-conviction motion, here too the State based its denial and dismissal upon a procedural default ruling that these matters should have been presented on direct appeal. As argued in Question #2 herein presented, the State's refusal to examine substantive claims violates Petitioner's substantive due process rights. Petitioner plans to appeal this ruling, but has yet to do so.

PEOPLE V. LEWIN – Federal Habeas Corpus, Index # 9:20-CV-01211-LEK: Filed in the District Court of the Northern Department of New York in September 2020, this case was dismissed without prejudice in December 2020 based upon a ruling that Petitioner had not yet exhausted his state remedies. This federal habeas case was resubmitted in late March 2021 following state exhaustion of remedies, with a new index number.

PEOPLE V. LEWIN – 2nd Circuit Court of Appeals, Index # 21-246: This case follows the above District Court's December 2020 dismissal of Petitioner's federal habeas corpus

petition arguing *inter alia* that under 28 USC 2254(b)(1) Petitioner's claim to inadequate state appellate procedures overrides any state exhaustion pre-requisites, such that dismissal was improper.

PEOPLE V. RUTLEDGE – NYS Supreme Court, Dutchess County, Index #: 2021-00007. This matter included in Appendix D1 was filed against the arresting officer alleges BRADY violations *inter alia.* It was dismissed in March 2021 for which a Notice of Appeal has been filed.

PEOPLE V. DUWE – NYS Supreme Court, Oneida County and Columbia County. This lawsuit alleging fraud against the police agent, relevant to Questions 7-10 presented herein can be found in Appendix D8. A state case law disallowing case transfer when a motion for summary judgment is pending has raised a jurisdictional issue to this case wherein a motion is scheduled to go before the Court in Oneida County in April 2021, while the Columbia County court dismissed the suit in March.

PEOPLE V. CATENA, NETHAWAY AND DIFIORE – NYS Supreme Court, Columbia County with Oneida County Index # CA2020-001577 has been stayed since August 2020.

TABLE OF AUTHORITIES

NEW YORK STATUTES

OTHER AUTHORITIES

TABLE OF CONTENTS

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(s) below:

OPINIONS BELOW

This petition for certiorari seeks the U.S. Supreme Court's review of the State of New York's denial of the Petitioner's post-conviction motion sought pursuant to state statute, Criminal Procedure Law 440.10. The Petitioner's motion is located in Appendix C10.

The motion opinion of the trial court that denied this motion is located in Appendix A6.

The highest court to review this denial was the New York State Supreme Court, Appellate Division, Third Department. Their refusal to grant leave is located in Appendix A9.

JURSIDICTION

The date on which the highest state court decided my case was 11 March 2021. A copy of the decision appears at Appendix A9.

The jurisdiction of this Court is invoked under 28 USC 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Amendment IV, Constitution of the United States;
Amendment V, Constitution of the United States;
Amendment VI, Constitution of the United States;
Amendment VIII, Constitution of the United States;
Amendment XIV, Constitution of the United States;
NY CPL 440.10[2][a] – see Appendix B5;
NY CPL 440.10[2][c] – see Appendix B5;
NY CPL 440.10[3][a] – see Appendix B5;
NY CPL 60.45 – see Appendix B6.

STATEMENT OF THE CASE

This petition seeking certiorari follows an earlier petition seeking same marked fully submitted on 5 April 2021, docket # 20-7308. That petition followed the state court's denial of the Petitioner's motion for a writ of error corum nobis alleging ineffective assistance of counsel largely for filing a direct appeal without first filing a post-conviction motion under CPL 440.10, and related appellate procedure matters.[1] This Petition follows the state court's procedural default ruling on the Petitioner's subsequent CPL 440.10 post-conviction motion submission. Accordingly, the two petitions seeking certiorari are intertwined, and it may benefit the Court to consider both simultaneously. The labeling of exhibits is the same for both petitions.

This appeal seeks the overturn of the Petitioner's 2016 sexual assault, forcible touch, and endangerment convictions that arose nine days before the Petitioner's likely win in a state legislative race. Petitioner's 2020 pro-se post-conviction motion, which was judged to be procedurally defaulted herein complained of, complained of 19 issues alleging that the conviction and subsequent deprivation of his liberty were unconstitutional. The procedural default ruling denied Petitioner of substantive review of

---

[1] In the previous Cert petition Petitioner argued that New York's bifurcated appellate process (direct appeal and post-conviction motion) was/is inhospitable to an appellant achieving a full, fair and adequate review of his constitutional claims. Here, the actual injury of such a system is demonstrated when the courts collude and conspire to weaponize the State's procedural rules to deny an appellant the opportunity of appeal. Pages 3-12 of Appendix A8 describe the State's bifurcated appellate system.

The inadequacy, unfairness and incompleteness of the New York State run-around appeal process – as argued in Petitioner's first Certiorari petition – is on full display in the present petition as illustrated by the circular reasoning deployed by State officials when the Appellate Court first rejects the Petitioner's Pro Se Reply Brief and application for Writ of Error corum nobis claiming Appellate Counsel was defective in not first filing a CPL 440.10 motion so as to place on the record the relevant issues by which the Court need consider. Then, when the Petitioner files the CPL 440.10 motion the State Court rejects the arguments therein raised on a claim of procedural default. When a State provides for an appeal process, that appeal must accord due process [SIMMONS V. REYNOLD, 898 F.2d 865 (2nd Cir. 1990)], such due process was denied here – both procedural and substantive.

his constitutional claims which as argued herein is a violation of his substantive due process rights (Question #2) and was the result of state laws and procedure that as applied were inhospitable to his federal rights (Question #1).

Question #3 raises a procedural conflict of interest claim. Questions 4-7 describe the hardships imposed upon the Petitioner by an unwanted and unsolicited, but government-imposed, expectation and insistence of a program of adjudication based upon plea-bargaining that Petitioner claims conflicts with his trial rights. Petitioner argues that he was retaliated against and punished for refusing the plea-deal scheme in assertion of his trial rights. Questions 8-11 present, condense, and repeat the motion's concerns that law enforcement overstepped its constitutional limits by violating the Petitioner's 4th and 5th Amendment rights in manufacturing the only evidence used to convict.

REASONS FOR GRANTING THE WRIT

I.

THE STATE'S REFUSAL TO GIVE SUBSTANTIVE CONSIDERATION TO PETITIONER'S POST-CONVICTION GROUNDS FOR RELIEF WAS INHOSPITABLE TO PETITIONER'S FEDERAL RIGHTS PARTICULARLY WHEN THE COURT IGNORED INEFFECTIVE ASSISANTANCE OF APPELLATE COUNSEL CLAIMS AS CAUSE FOR THE DEFAULT

Petitioner's CPL 440.10 motion was deemed by the Trial Judge to be in procedural default by a June 2020 decision based upon CPL 440.10[2][a],[c][2] and CPL 440.10[3][a].[3] As applied to the Petitioner, these state procedural default rules are unconstitutional in that (1) that the trial court's boilerplate dismissal failed to hospitably examine the substance of the Petitioner's claims (which if done so would have proven the

[2] "...the defendant's motion must be denied because the grounds or issues raised were previously determined on the merits upon appeal or could have been determined but for defendant's unjustifiable failure to raise such issues on appeal (CPL 440.10[2][a],[c]" See Appendix B5 for full text.

[3] "And to the extent defendant alleges facts not appearing on the record, they could with due diligence have readily been made to appear (CPL 440.10[3][a]." See Appendix B5 for full text.

court wrong),[4] and (2) both the trial court and more so the reviewing court, inhospitably summarily denied Petitioner consideration of his claims by blaming him for the faults of appellate counsel for failing to raise the issues on direct appeal.

Petitioner's Leave application denied by the State Appellate Division in March 2021 argued at length and with precision that the trial court erred when it rejected the claims made in his post-conviction motion under CPL 440.10[2][a], as the issues raised had not previously been raised on direct appeal (see Appendix C2, p. 8-15).

This same Leave Application challenged the trial court's dismissal of his post-conviction motion based upon CPL 440.10[2][c], listing 13 of the 19 arguments raised in the post-conviction motion as having insufficient facts perceivable in the trial record to have been properly considered on direct appeal (see Appendix C2, P.16-17). Petitioner's Leave application argued further that of the six issues raised where there were sufficient facts on the record there were also blanks in the record caused by the trial judge's "habitual practice of going off the record when controversy or matters of import need[ed] discussing."[5] N.B. the trial judge's practice for going off-record as a cause of the prejudice of sufficient facts not appearing in the record must be considered under the WAINWRIGHT V. SYKES, 433 US 72 (1977) methodology considered below as yet another reason why the State's procedural default ruling was made in error.

Of particular inhospitality – and of frustration – is that both 440.10[2][a] and [c] as applied assigns blame on the Petitioner for issues not presented on direct appeal ("but for defendant's unjustifiable failure to raise such issues upon appeal") or not appearing in the record ("they could have with due diligence have readily been made to appear"). Both instances presume too much, and assign *a priori* blame too much to the defendant to be reconciled with procedural due process. There are many reasons why evidence or facts might not have appeared in the record, including trial court rulings, prosecutorial objections, court practice of going off record, etc.[6] Procedural due process should have

---

[4] On this point, it is to be noted that the State Court was required under BRADLEY V. MEACHUM, 418 F.2d 338 to consider matters of federal law before considering state procedural rules. Procedural default is not independent of federal law, although the State seems to operate otherwise.

[5] The failure of the trial court to preserve a complete and full transcript of the trial by which a proper appeal could be pursued was presented to the U.S. Supreme Court as question for consideration in the Undersigned's petition seeking certiorari, #20-7308.

[6] See for instance the argument concerning the trial court's improper evidence preclusion detailed in Appendix D11.

required a judge to inquire into the reason why facts were not argued on appeal or did not appear on the record by scheduling a hearing. Evidence hearings may be required under due process to determine issues of fact in dispute. NUNES V. MUELLER, 2003 WL 22833789. Under HOFFMAN V. ARAVE 236 F.3d 523 (9th Cir. 2001), appellate courts should have provided a reasonable opportunity for Petitioner's claims to have been made.

Moreover, as paragraph 9 of page 18 of the Leave application details, the Judge "had in his possession at the time he made such a boldly erroneous statement both the Movant's pro se supplemental brief ... and the affidavit for a writ of corum nobis error." Both documents [here Appendixes C6 and C3 amply explain the cause of attorney ineffectiveness to explain any voids in the record. Adding insult to injury the appellate division had further explanation as to the cause of any voids as attorney error, yet opted not to reverse (see Appendix C2 pages 18-21). "Substantial compliance with the state procedural rule is enough to overcome procedural default. ALBUQUERQUE V. BARA, 628 F.2D 767 (2nd Cir. 1980).

It was beyond clear by Petitioner's Leave application (Appendix C2) that Petitioner had made good faith effort to comply with state rules. Petitioner took extraordinary efforts to remediate, cure and prevent any procedural default by filing a Pro Se Reply Brief before the Appellate Court decided his case in which he attempted to raise issues. At the same time his memorandums to Appellate Counsel (attached as an exhibit in the leave application) sought to have appellate counsel raise other issues at oral arguments (included herein as Appendix C7). Then Petitioner filed for a writ of error corum nobis wherein he requested permission to file a CPL 440.10 motion without threat of procedural default on account of appellate counsel's errors. Petitioner's good faith efforts demand that the procedural default be declared erroneously applied. See ASHBY V. WYRICK, 693 F.2D 789 (8TH Cir. 1982) (Petitioner twice tried to comply with 'arguably confusing' procedural rule); and DOUGLAS V. ALABAMA, 380 US 415 (1965) (objection which is ample and timely to bring the claim to the attention of the trial court and enable it to take appropriate corrective action is sufficient).

On top of the State courts errors above, such a procedural default finding ignores the federal presumption of correctness standard that ought to apply when a petitioner makes a claim of ineffective assistance of counsel. "When counsel's deficient

performance deprives a defendant of an appeal that he otherwise would have taken ... a reviewing court must 'presume prejudice' with no further showing from the defendant of the merits of his underlying claims." ROE V. FLORES-ORTEGA, 528 US 470 (2000).[7]

A larger issue herein applicable is that the state court's automatic assignment of blame to criminal defendants for voids in the trial record or failures to raise issues on appeal ignores the U.S. Supreme Court's cause-and-prejudice jurisprudence as announced in WAINWRIGHT V. SYKES and COLEMAN V. THOMPSON, 501 US 722 (1991) at least insofar as it concerns state procedural default and federal habeas corpus reviews (procedural default can be cured by a showing of "cause" for the defendant and "prejudice" attributable thereto). The references to pages 18-21 describe the ineffectiveness of appellate counsel was the cause for any procedural default.[8]

In like manner, the State courts were both unreasonable and inhospitable in their decision(s) to declare Petitioner's post-conviction motion claims in procedural default as per CPL 440.10[3][a]. To the extent the statute requires an issue to be raised prior to sentencing, there seems to be a conflict between the federal rule pronounced in ULSTER COUNTY V. ALLEN, 442 US 140, as an "exception to the State's contemporaneous objection policy that allows review of an unobjected error that affects constitutional right." Petitioner's Leave application specifically cited ALLEN and applied it to his case on page 32 (see Appendix C2).

Notwithstanding this conflict of laws, the greater issue that shows the State's egregious inhospitability in its procedural default decision is that CPL 440.10[3][a] specifically exempts ineffective assistance of counsel claims[9] – which amounted to well over a third of Petitioner's post-conviction motion complaints. Petitioner's Leave

---

[7] The State courts refusal to apply the federal presumption of correctness standard when Petitioner filed a 2019 Petition seeking a writ of error corum nobis alleging ineffective assistance of counsel was presented to the U.S. Supreme Court as question for consideration in the Undersigned's petition seeking certiorari, # 20-7308. Had the state court adhered to the federal standard when reviewing Petitioner's petition for a writ of error corum nobis the matter would have been properly addressed making this second instance where a state court ignored the federal presumption of correctness standard totally and egregiously unnecessary.

[8] The issues of ineffective appellate counsel and the hindrances caused by the State's bifurcated appellate procedures and rigidly, as well as haphazardly, enforcement limitations on what claims will be considered in what court as the cause of the procedural default comprised a major component of the undersigned's petition seeking certiorari as presented to the U.S. Supreme Court, docket # 20-7308.

[9] "...This paragraph does not apply to a motion based upon a deprivation of the right to counsel at the trial..."

application seeking appellate reversal of the procedural default advised the appellate court that CPL 440.10[3][a]'s exception for ineffective appellate counsel claims meant that the procedural default ruling should have been declared a legal nullity as it regards Arguments II, III, IV, V, VII, VIII, XIII, XIV, XV and XIX.[10] This is a sizeable amount

[10] We summarize each herein as ineffective counsel was a major part of why the conviction ought to have been vacated. The cumulative effect of counsel's failings is due to a belief argued in the post-conviction motion that Counsel did not prepare for trial as he was relying on his ability to broker a plea-deal, which Petitioner told counsel at his hiring and often afterwards that no plea deal would be accepted. This is important when considering the arguments presented herein in Section 7.

Trial Counsel failed to prepare, interview and call witnesses. Petitioner's CPL 440.10 motion (APPENDIX C10) devoted pages 124-135 to this topic, excluding additional sections on defense counsel's failure to call medical and expert witnesses.

Counsel failed to subject prosecutorial witnesses to meaningful adversarial testing. This argument was made often in the Petitioner's CPL 440.10 motion including pages 43-52 wherein counsel's failures to challenge the Petitioner's accusers, to probe their ulterior motives, to chronicle the evolving nature of their allegations, and failure to impeach them with meaningful yet available inconsistencies was detailed. This claim was also raised on page 20 of the Petitioner's 2020 Leave to the Appellate Court.

Defense Counsel failed to introduce known BRADY evidence. Exculpatory affidavits taken by law enforcement were kept from the defense by the prosecution (and police) until the eve of trial. These affidavits from three adult Boy Scouting leaders all claim that when the Petitioner's accusers first raised allegations that the claims did not include any type of touch or contact, and that claim only came two months later from the teen-ager's parents. Petitioner presented the issues of the prosecutor's BRADY violation, and defense counsel's negligence to introduce such evidence at trial in his CPL 440.10 motion pages 12-17, 20-27, and 148 para. 29). Petitioner's 2020 Leave application to the Appellate Court disputes such a determination on pages 20 and 32.

Defense Counsel failed to present medical testimony. Petitioner's mental health was an issue relating to statements made in a covertly-recorded control call initiated by police. Medical affidavits were produced for use at trial including medical testimony evaluating the Petitioner's speech and symptoms during the phone call, the effects and combinations of the medications on the Petitioner at the time of the call, and professional opinion as to the Petitioner's instability leading up to and during the call itself. While Petitioner was prescribed psychotropic medication for depression six weeks before the call, and then prescribed a different drug a week before for pure obsession disorder resulting in both withdrawal and side effects that made Petitioner question reality, and while Petitioner was admitted a psychiatric hospital immediately following arraignment defense counsel did not call any doctor to testify at trial. Numerous doctors were subpoenaed including one who drove five hours and was present in the courthouse ready to testify (his affidavit was made part of the CPL 440.10 motion), which the State refused to consider.

Defense Counsel unreasonably failed to report perjury. On the eve of trial when the Prosecution turned over ROSARIO discovery, the perjured testimony of a prosecutorial witness became evident. This is described in detail on pages 30-35 of Petitioner's CPL 440.10 motion.

Defense Counsel failed to propose and/or object to jury instructions. Argued in the Petitioner's CPL 440.10 Motion (pages 108-109) the failures of defense counsel to insist upon jury instructions regarding how the Jury were to consider the testimony relating to the Petitioner's alleged prior bad acts, as well as the Jury's consideration of mental health testimony resulted in prejudice to the Petitioner.

Defense Counsel failed to consult with his client at critical trial stages. Petitioner's CPL 440.10 describes in detail the many failings of trial counsel that most severely resulted in Trial Counsel resting the case without knowledge or consent of his client while the Petitioner was on the stand, even as the bulk of defense witnesses had not testified (some including a medical expert in the courthouse ready to be called) and without major components of the defense not yet admitted into evidence or argued. Pages 164-171 describes this tragic ending with affidavit-excerpts of defense witnesses.

Cumulatively, Defense Counsel undermined the overall proper functioning of the Trial. Much like the attorney in STRICKLAND V. WASHINGTON, 466 US 668 (1984) who did not prepare for trial and did

of argument complaining of constitutional deprivation that did not receive any State consideration for trial error. We note that in some respects the State court's procedural default ruling is not unlike the state court in MAPES V. COYLE, 171 F.3d 408 (6th Cir. 1989), where there too the state procedural rule unduly frustrated the enforcement of fundamental federal rights by withholding from the Petitioner "reasonable opportunities" to make claims. To this end, the state statute should be declared unconstitutional on its face not just as it was applied to the Petitioner.

For all of the forgoing reasons the State Court's procedural default ruling that dismissed the Petitioner's post-conviction motion should be vacated and the appropriate rulings issued to prevent state courts from subjecting future petitioner's from having their claims of fundamental rights-deprivations dismissed without consideration.

II.

STATE STATUTES THAT DENY CONSIDERATION OF DEPRIVATION OF LIBERTY CLAIMS SHOULD BE SUBJECTED TO STRICT SCRUTINY SO AS TO PROTECT THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE ACCUSED AND WRONGFULLY CONVICTED

New York's statutory restriction on reviewing post-conviction motions that contest criminal conviction merely for procedural default violate the convicted defendant's substantive due process rights. On their face, New York's procedural default rules unconstitutionally interfere with a criminal appellant's ability to raise and have considered issues that his deprivation of liberty violates federal law. A law that prevents an appellant from rehashing the same issue after its merits have been determined (such as CPL 440.10[2][a]) provides both procedural and substantive due process, but statutes that shut out previously unheard substantive claims merely on a theory of procedural default theory cannot be reconciled with the appellant's substantive due process rights to have any constitutional claim heard and considered.

---

not call essential witnesses to the stand, the parallels to the present case also resonate in the fact that, here too, Trial Counsel abandoned his client midway through the trial. Pages 137-138 the CPL 440.10 motion list a detailed summary of counsel's failing that undermined the overall proper functioning of the trial before embarking on an additional 36 pages of issue unfolding. Page 162 and 163 quote from the emails sent to Counsel on the eve of trial expressing fear that Counsel was not ready – as proved to be the case.

CPL 440.10(2)(c) and 440.10(3)(a) both deny appellate review to claims of unconstitutionality not previously considered based upon a theory of procedural default (the former on mandatory basis, the second at the discretion of the judge). This was demonstrated in the instant case where Petitioner was shut out from having numerous issues of constitutional dimension considered – which if true amounts to a fundamental deprivation of liberty. As argued below, a criminally convicted person's interest in a fair trial, due process and all the rights for which he/she is entitled by the Fourteenth Amendment extends to appellate procedures, for which the State lacks a compelling reason to justify any procedural default decision that precludes a fair consideration of each claim. Recall the State Court is already required under BRADLEY V. MEACHUM, to consider matters of federal law before considering state procedural rules, such in some sense federal courts already recognize a substantive due process right for a criminal appellant to have each constitutional claim considered by a state court – and yet in the Petitioner's situation this did not happen. Declaring the State's statutes constitutional incompatible is therefore necessary to prevent further abuses by the State.

"The Fourteenth Amendment guarantees more than fair process; it covers a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." HURD V. FREDENBURGH, 984 F.3D 1075 (2nd Cir. 2021). The Supreme Court has interpreted the guarantee of 'due process of law' in the Fifth and Fourteenth Amendments to include "a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them" [ZINERMON V. BURCH, 494 US 113 (1990)]. The U.S. Supreme Court has expounded a two-part test applicable to substantive due process cases (WASHINGTON V. GLUCKSBERG, 521 US 702 (1997). The first prong of the test seeks to determine if a fundamental right is at stake. The second prong applies a strict scrutiny standard to determine whether a compelling state interest exists to justify the action complained of. PEOPLE V. BELL, 3 Misc.3d 773 (Sup. Ct. Bronx Cty, 2003).

Incarceration following conviction involves a fundamental right. "Freedom from bodily restraint has always been at the core of liberty protected by the Due Process Clause from arbitrary government action, ... commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection" FOUCHA V.

LOUSIANA, 504 US 71. A deprivation of liberty occurs, and the protections of the Fourteenth Amendment's Due Process clause are triggered, by "the State's affirmative act of restraining [an] individual's freedom..." DESHANEY V. WINNEBAGO COUNTY DEPT. OF SOCIAL SERVICES, 489 US 189 (1989).

The right to appeal from a criminal conviction meets the definition of a fundamental right not just because New York State has passed legislation to provide for appellate review (a statutory right)[11], but because the right to appeal in the state is deeply rooted in the state's history, tradition and concept of ordered liberty. Proof and analysis of such, in the words of its founding generation on both sides of the Constitutional ratification debate, can be found in Appendix D6. Substantive due process "provides heightened protection against government interference" with certain fundamental rights and liberty interests namely those rights and interests that are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" (GLUCKSBERG).

Clearly, the Petitioner had a fundamental right to have the reasons alleged to be the cause of his wrongful imprisonment and conviction examined for their substantive value when he submitted his 2020 CPL 440.10 motion.

Strict scrutiny is the standard of review ordinarily applied to determine if a state action infringes upon a fundamental right. CAREY V. POPULATION SERVICES INTL, 431 US 678 (1977). Such action will only withstand strict scrutiny analysis if it is narrowly tailored to advance a compelling state interest. The state may not infringe upon such a "fundamental" liberty interest "unless the infringement is narrowly tailored to serve a compelling interest" RENO V. FLORES, 507 US 292 (1993).

The State Court's refusal to substantively consider the issues the Petitioner presented in his 2020 CPL.440.10 motion lacked a compelling reason. The state decision, PEOPLE V. COOKS, 67 NY.2D 100 (1986), advises that the reason for CPL 440.10[2][c] is to prevent the use of the motion as a substitute for appeal. CPL

[11] Although many state-created rights are not recognized under the substantive due process clause, state-created rights that trigger core constitutional interests are entitled to its protection. LOCAL 342, LONG ISLAND PUB. SER. EMPS. V. TOWN BD. OF TOWN OF HUNTINGTON, 31 F.3D 1191 (2nd Cir. 1994). ...It is the nature of the right, not just its origin, that matters. ... substantive due process protects rights that are so 'vital that neither liberty nor justice would exist if they were sacrificed'" HURD V. FREDENBURGH.

440.10[3][a] exists merely to discourage motion proliferation and dilatory tactics as also expressed in CPL 210.20[3] and 255.20[2]. None of these reasons are compelling enough reasons to deny a criminal appellant consideration of a claim that may prove that his federal rights were violated and that he is at present being deprived of liberty.

Accordingly, as argued, we assert that the state's procedural default rule is depriving convicted persons – and specifically the Petitioner – of the ability to present specific claims that his/her rights have been deprived for which the State's reason for denying the claim from being heard are outweighed by the magnitude and importance of the liberty interest. Therefore New York's CPL 440.10[2][c] and [3][a] rules must be evaluated on their face from the standpoint of an appellant's substantive due process rights, and by a strict scrutiny standard. Doing so will result in their subsequent nullification.

III.

IT IS BOTH A CONFLICT OF INTEREST AND A DENIAL OF DUE PROCESS FOR THE SAME JUDGE THAT PRESIDED AT TRIAL TO RULE ON POST-CONVICTION MOTIONS

The late Second Circuit Appellate Court judge Jerome Frank once wrote, "Democracy must, indeed, fail unless our courts try cases fairly and there can be no fair trial before judges lacking in impartiality" (Law and the Modern Mind, p.xix). We add neither can there be a fair appeal or post-conviction review when the judge lacks impartiality. In the instant case, we argue that the Petitioner was denied due process in having his trial and conviction reviewed for error when his CPL 440.10 motion was processed and decided before the same judge who presided at trial. In addition to being a clear conflict of interest, we argue that such an arrangement admits to structural defects in appellate procedure and can – and did – result in a miscarriage of justice.

State judiciary law requires judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (22 NYCRR 100.2(1) including performing "judicial duties without bias or prejudice" (22 NYCRR 100.3(b)(4). State and federal courts have placed further impositions on a judge to protect the rights of criminal defendants "as governor of the trial for the purpose of assuring its proper

conduct and of determining questions of law" (QUERCIA V. UNITED STATES, 289 US 466); including curbing and reprimanding the prosecutor when improper remarks are made (PEOPLE V. STEINHARDT, 9 NY.2d 267; PEOPLE V. MOTT, 94 Ad.2d 415; BERGER V. UNITED STATES, 295 US 78). "No matter what the evidence was against him, he had a right to have an impartial judge" TUMEY V. OHIO, 273 US 510. FRISCHLING V. SCHRANK, 260 NY.2d 537 argued that "the right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial." We argue that to the degree that there is a right to a fair appeal, that such right needs to include the expectation that that judge will also be free from bias.

"Dictates of reason and common sense, if not judicial policy, indicate that [the trial judge] had a conflict of interest in deciding upon the merits and exercising decision-making over the issues of this case," the Petitioner argued in his application for leave to contest his CPL 440.10-motion's rejection (Appendix C2) "when [the trial judge] was named as the cause so often in denying justice to the accused."[12] Approximately one-third of Petitioner's post-conviction motion complained of the trial judge as a cause of trial error by which his conviction should be vacated. These included:

- Denying a fair trial by his rulings on objections (p. 98-113)
- Inappropriate statements from the bench that caused jury taint (p.98-99, 101-106, 110-113, 156)
- Constraints on the opening statement (p.99)
- Exerting undue influence by conducting official business off-record (p. 100, 102, 165-171)
- Sabotaging the appellate record (p.100, 167)
- Attempting to coerce a mid-trial plea-deal (p.100, 114-118).
- Evidence preclusion (TWICE!: p.102, 91-97; 36-42; See also Appendix D11 for the Grievance filed with the State's Commission on Judicial Conduct)
- Failure to restrain prosecutorial misconduct (p.180, 182-195)
- Retaliatory and vindictive sentencing (p.100, 121-122)

[12] Pages 5 & 6 Appendix C2 of Petitioner's application for Leave provides some interesting background material suggestive of foul play that is not being raised in this petition for certiorari, but its mention is necessary to establish that when the Petitioner wrote his CPL 440.10 motion he was under the impression that it would be decided by a disinterested and impartial judge. Had he known it was to be submitted to the same judge who presided over the trial he may not have been so frank in his criticisms of the judge's acts and omissions in the trial. And yet, the fact that a Petitioner may have to consider toning his language or omitting facts so as not to offend a reviewing judge is argument enough of why the trial judge lacks impartiality wherein an appellate review can be said to conform with due process.

It is inconceivable how the Petitioner could have received an impartial and objective review of his post-conviction motion from someone who was named therein as part of the problem. The classic case for insisting on limits to government excess including the principle that judges self-discipline him/herself when faced with issues of possible bias, BERGER V. UNITED STATES, 255 US 22 includes the dicta that judges possess a "duty to 'proceed no further' in the case" upon the showing of an objectionable inclination or disposition of the judge for bias. Perhaps this dicta needs bolder teeth, perhaps due process requires that recusal in the face of conflict on interest be not optional, but court policy? Perhaps it needs extension to appeals?

When a judge falls short of his judicial duties, or seeks to steer it to guilty verdict or guilty plea – as here – the convicted defendant's post-conviction relief is sterile. It is an empty effort for an appellate to achieve justice when any effort to expose errors, omissions and mischief can be blocked, snuffed out, or otherwise glossed over by a judge with an interest in preventing his own errors or those he failed to correct to be covered up. Perhaps in the interest of court administration it is economically prudent (but not compelling) for the same trial judge to review post-conviction motions, but it is also a procedure ripe for abuse and at odds with due process.

The 21st Century began with various corporate scandals that required business law to tighten its rules of accountability via internal controls; it is not unreasonable for so-called courts of justice to also adhere to procedures and rules that promote and enforce impartiality by policing conflicts of interest and mandatory recusal for the sake of the appearance of impartiality, if not the ideal itself. The Petitioner raised this issue in his Leave application to New York's appellate division citing the state mode of operations procedural powers. It received no consideration. We raise it again now as the uncorrected conflict violated Petitioner's due process rights.

IV.[13]

PETITIONER WAS RETALIATED AGAINST WITH EXCESSIVE AND PUNITIVE PUNISHMENT FOR THE ASSERTION OF HIS TRIAL RIGHTS IN VIOLATION OF DUE PROCESS

[13] The facts and cited law contained within each section is intended to apply to all argued sections as the facts and case law overlap for which page lengths has led the Petitioner to avoid needless redundancy.

"Certainly the District Attorney's office, whose job it is to seek justice, would not make an offer in a case that they did not feel was just," spoke Petitioner's attorney at his 2016 sentencing, "The only difference between what has happened before trial and what they're asking for now is that the verdict has been rendered, and they go from a misdemeanor with a CD[14] to 11 years in state prison. That's not justice; that is revenge."

On paper both federal and state courts condemn the principle of retaliatory sentencing that punishes a criminal defendant with a prison sentence in gross disproportion to an offered plea intended as a bribe for him to forgo his trial rights and plead guilty. On the federal level these include: "The trial court must not penalize the defendant for exercising his constitutional right to plead not guilty and go to trial." UNITED STATES V. HARRIS, 635 F.2d 526. Numerous additional federal court opinion have also ruled that States may not penalize or punish a criminal defendant for relying on his legal rights including: CHAFFIN V. STYNCHCOMTE 412 US 32 (1973) and NORTH CAROLINA V. PEARCE, 395 US 711. At the appellate level in this jurisdiction the Second Circuit has ruled also in UNITED STATES EX RELE MCGRATH V. LAVALEE 319 F.2D 308 (2nd Cir. 1963). It is remarkable to this writer that all of these decisions were decided 50-60 years ago, meanwhile retaliatory sentencing continues.

At the State level New York Courts in years past have also offered corrective protection to criminal defendants punished at sentencing for choosing their constitutional rights as opposed to prosecutorial carrots waved before them that require a guilty plea. NY Court of Appeals Associate Justice Piggott also reached far into history in citing the 1978 state case CORBITT V. NEW JERSEY, 439 US 212 in his 2015 dissent to a state case that ruled differently when it came to harsh sentencing following the rejection of a prosecutorial plea deal and loss at trial. Justice Piggott cited New York State practice of yesteryear:

> "New York appellate courts have routinely reduced sentences in case in which the disparity between the plea offer and imposed sentence was great. For example in PEOPLE V. BROWN, 70 Ad.2d 505 (1st Dept. 1970) the Court reduced a sentence where there was a disparity between the plea offer of 3 1/3 to 10 years and imposed sentence of 8 to 24 years. The Court found

[14] Conditional Discharge: behave for six months and the charges are dismissed; the record sealed.

> the sentence 'create[d] the appearance that the defendant was being punished for proceeding to verdict, rather than receiving merely the sentence which his crime and record justified" (id.). In PEOPLE V. COSME, 203 Ad.2d 375, 610 NYS.2d 293 (2d Dept. 1994), the Court reduced a sentence to 15 years to life because of the disparity..."

Justice Piggott's dissent in PEOPLE V. MARTINEZ, 26 NY.3D 196 (2015) (Appendix B7) criticized his brethren justices for upholding a 10-20 year prison sentence on a defendant who had been offered a plea with only ten-months probation.

As reported in his post-conviction motion (Appendix C10), the judge who conducted sentencing was aware of the unsolicited plea offerings made to the Petitioner:

> "...last week early on we had engaged in some earlier negotiations about possibly resolving this with a plea to a felony and a misdemeanor. It was like an interim probation situation where we could resolve it with a plea to a felony and a misdemeanor, and then Mr. Kelsey would serve on year of interim probation, and if successful the felony would have been dismissed and he would have been sentenced on a misdemeanor, and the sentence would be a one-year conditional discharge, no – yeah, no probation, no sex offender registration, and he rejected that and you know, he maintains his innocence, he always has.
>
> "And then so as we got very close to trial it might have been Friday, Thursday or Friday, I think Thursday, the offer was increased significantly, and the offer at that point was two counts of endangering the welfare of a child as a misdemeanor with a conditional discharge, no sex offender registration, no jail, no probation, no felonies and two orders of protection, and Mr. Kelsey rejected that offer and again has maintained his innocence since the day I met him,
>
> "And then most recently we had just discussed ... a plea to the top count which he rejected out-of-hand, so I just want to put that on the record."
>
> "The Court: Very Good."

Noteworthy: none of the plea-offerings included any incarceration. This last plea offer was made at the Judge's insistence *after* the majority of Prosecution's case when – according to an 9 October 2016 letter attached to the Petitioner's pre-sentence investigation report – the Judge "pulled Kelsey into chambers to advise him to settle."

Among the reasons the U.S. Supreme Court should consider in the present matter is that current state practice, as in MARTINEZ, is now blatantly endorsing retaliatory sentencing. The new trend is to punish people for refusing to plead guilty despite

jurisprudence on the books from a half-century ago telling criminal defendants that their trial rights will be protected under the law. The High Court needs to speak, and speak clearly: Do trial rights matter any more? NY Associate Justice Piggott in his MARTINEZ dissent got it right, "An appearance of judicial vindictiveness arises when a trial judge is aware of an unsuccessful plea discussion and, after trial, the same judge sentences the defendant to a jail term that is significantly harsher than that offered in the plea."[15] We ask the Supreme Court to rule the same way. Justice, due process, and equitable punishment for a charged offense should disallow a judge from imposing a sentence that exceeds one offered in a pre- or mid-trial plea offer.

V.

PETITIONER WAS RETALIATED AGAINST WITH EXCESSIVE AND PUNITIVE PUNISHMENT AND DENIED EQUAL PROTECTION OF THE LAW WHEN THE COURT SOUGHT, AND BASED, PUNISHMENT AS COMPENSATION FOR TRIAL INCONVENIENCES OF "VICTIMS"

Like an onion the issue of retaliatory sentencing has many layers. What is significant here is not just that modern courts are tending to sentence upwards of a pre-verdict sentence offer, but that courts of today are basing its decisions in a verbalized desire to compensate victims for trial-related traumas, i.e. punishing convicted defendants for "forcing" the victims to testify at trial (see the majority opinion in PEOPLE V. MARTINEZ in Appendix B7). This was the same rationale used in the Petitioner's case when the trial judge ordered him to take a mid-trial guilty plea (with only ten months of probationary supervision) so as to "prevent the other boy from having to testify" (see Appendix C10, p.115).

The added significance is that the New York Legislature has not instituted such a policy shielding accusers from testifying, nor could such a law interfering with an accused person's trial rights survive judicial scrutiny. Nor has the State or Congress passed laws that convicted defendants should be penalized for the traumas of trial, also

[15] Perhaps it is also a conflict on interest for "the same judge" who presided over trial to also preside at sentencing. Such an internal control of separating the roles could avoid the abusive opportunity as well as the appearance of impropriety.

unlikely to survive constitutional scrutiny. And yet, judges in New York are observing such an unwritten rule [see for instance PEOPLE V. MILLER, 65 NY.2D 502 (1985)]. New York judges are inflicting harsh sentences in furtherance of such a personal philosophy ["Defendant's rejection of the plea offer also required the victim to testify about the sexual abuse at trial, a factor this Court has recognized as a legitimate basis for the imposition of a more severe sentence after trial than that which the defendant would have received upon a plea of guilty" MARTINEZ). Brazenly, New York judges are holding convicted defendants to an unconstitutional standard that punishes them for asserting their innocence, punishes them for seeking their rights under the Constitution – and then unduly punishing them for the procedural traumas, burdens and costs associated with the criminal justice process.

The majority's opinion in MARTINEZ, that the so-called victims' "*right*" not to have to testify is somehow equivalent to the reduced plea is a question of value – not one of law, or of contract. Judges are not qualified to measure or make value judgments. Nor is it a judge's role to set public policy by equating or valuing so-called victims' rights (which appear no where in the Constitution or in federal or state statute) with the trial rights of the accused which have cherished standing in the law and in the constitution. What the New York judges are brazenly doing – despite perhaps noble or meritorious intentions – is seeking to hold criminal defendants accountable for the rigors of the justice system in decisions that resemble if not amount to compassionate despotism, but despotism nonetheless. This, the Bill of Rights was adopted, to prevent – and disallow.

To punish defendants who proceed to trial runs afoul of equal protection at the expense of the accused person for whom the rights contained in the Fifth and Sixth Amendments were meant to protect. Again, the Supreme Court needs to speak on society's values when it comes to the rights of the accused. Not unlike the Petitioner, the aforementioned Martinez in the 2015 state Court of Appeals case was offered probation to plead guilty, and then punished with a lengthy prison term. In Martinez's case the NY Court of Appeals got away with endorsing Mr. Martinez' retaliation at sentencing by finding there that was no presumption of vindictiveness when a defendant's sentence exceeded the rejected plea offering. Here, we need not concern ourselves with "presumptions" of vindictiveness as in the present case the repeated calls for

vindictiveness and retaliation to punish the Petitioner for asserting his rights to trial – and appeal – were explicit in the record itself.

The pre-sentence report (prepared by the government's probation department by order of the Judge) opines for a "substantial term of imprisonment" including quoting the arresting officer who sought "maximum punishment."[16] The justification? "Reportedly, the defendant was offered a plea deal however" but as per the government issued report, "the defendant chose to take the matter to trial. "Investigator Rutledge stated, in his opinion, [the Petitioner] re-victimized the victims by doing so. He believes the defendant should be sentenced to a maximum term of imprisonment" (emphasis supplied). See Appendix D12. Note that the same PSI report rated the Petitioner as a "low risk for violence and recidivism," suggesting that its recommendation for a prison term was not grounded for any fear or danger to the community, but merely punishment for asserting constitutional rights. Prior to trial the Petitioner was released on a mere $2,500 bail, later reduced to $1,000.

Apparently the probationer and the state police officer did not know that what they were advising the judge to do was itself a violation of due process. "Due process requires that a defendant be freed of apprehension of such retaliatory mutation on the part of the sentencing judge. BLACKLEDGE V. PERRY, 417 US 21 (1974). Perhaps the Judge was unaware too that retaliatory sentencing violates federal law, as he announced at sentencing that his sentencing decision was based upon the "contents of the pre-sentence investigation report and the victim impact statements and the sentencing hearing.[17] The various victim impact statements attached to the Petitioner's pre-sentence report ask that the petitioner should be punished to the maximum term for "the immense expense of legal resources," due to "the cross-examination the accusers went through," and the trial expenses of having to take vacation time at work and hotel expenses.

One of the accusers in their sentencing speeches asked for the maximum punishment as his "having to testify at court" "put a huge stress on me." Maximum punishment was sought in the sentencing speeches to punish the Petitioner for "dragging

[16] Under State law the pre-sentence investigation report is a confidential document such that the Petitioner is not permitted to attach it as an appendix.

[17] Recall also that the Petitioner argued in his post-conviction motion that the Judge threatened him off-record mid-trial that if he did not accept the mid-trial plea that he would pay the consequences for it. See Appendix C10, p. 100, 121-122.

out the legal process ... and even now by trying to overturn the Court's decision." The other accuser referenced the rejected pleas in asking the Judge to sentence the Petitioner to the maximum prison term because "throughout his convicting process [the Petitioner] was given opportunities to resolve this easily, but he chose a difficult route each time." This accuser's speech also cited testimony elicited by the defense as grounds for punishing the Petitioner: "My friend," a defense witness, "went on the stand and called me a liar. The defense tried to humiliate [us] by calling us liars and questioning our reputation" at a time when "during the five days of school I missed for the trial when I had seven Regents to study for." Noteworthy is the fact that both accusers stated in videotaped interviews with the police on the day of the Petitioner's arrest that neither wanted the Petitioner to go to jail.[18] Again, the accuser's change in their punishment preference made to the court establish clearly and convincingly that the harsh prison sentence was imposed to punish the Petitioner for electing a trial, which is doing what the law allows, namely exercising his right to assert his innocence and generate a defense.

Petitioner does not lack empathy for the so-called victims and their families, but argues that it is sophist sleight-of-hand to blame and punish criminal defendants for the stresses of trial when the prosecutor has all the power in the world to drop charges and/or in the interests of justice (which may include concern for the trial trauma of the "victims") choose not to proceed (*nolle prosequi*). This too was argued in Petitioner's post-conviction motion (Appendix C10, pages 122-123) and also argued on appeal for Leave to the Court of Appeals[19]. Such an inversion of justice also begs for U.S. Supreme Court attention particularly after the New York courts demurred.

As with PEARCE, CHAFFIN, and BORDERKIRCHER V. HAYES, 434 US 357 this query asks if retaliatory motive in sentencing still violates the traditional concept of fairness embodied by due process, whether judicial consideration of the burdens of trial on crime victims into the sentencing decision violates due process, and whether such considerations denied the Petitioner his right to equal protection under the law.

---

[18] Post-conviction depositions in a civil action has also revealed that the parents of the teens have consistently coerced both teens to make these allegations to the police and subsequent proceedings.

[19] "If more harm is caused to 'victims' in processing offenses than in the offense itself, then perhaps legislators, law enforcement, prosecutors and judges need to reconsider the definition of crime, and where plea-bargaining fits within a constitutional justice model?"

VI.

PETITIONER WAS RETALIATED AGAINST WITH EXCESSIVE AND PUNITIVE PUNISHMENT FOR EXERCISING HIS TRIAL RIGHTS IN VIOLATION OF THE EIGHTH AMENDMENT

"The trial court must not penalize the defendant for exercising his constitutional right to plead not guilty and go to trial." UNITES STATES V. HARRIS, 633 F.2d 526 (6th Cir. 1980). Retaliatory sentencing is "impermissible." PEOPLE V. PATTERSON, 483 NYS.2d 55 (App div. 1984). Here, we ask if retaliating against a criminal defendant who rejected a plea and proceeded to trial with a heavy sentence can be considered excessive within the murky meaning of federal court jurisprudence?

Among the many possible examples that establish how widespread this issue is, in 1998, Mr. Scalf rejected a probation plea-offering, lost at trial, and was then sentenced to a year-and-a-half in prison in Ohio. STATE V. SCALF, 710 NE.2d 1206 (Ohio Ct. of App 1998). In 1999, Mr. McDonald rejected a three-year-four-month prison term, only to be sentenced to 30 years in prison in his Florida trial (MCDONALD V. STATE, 751 SO.2d 56). In the instant case in 2016 New York, the Petitioner is now in the fifth year of his seven year prison term to be followed by ten years of probationary supervision (i.e. subjected to all sorts of liberty-depriving terms and conditions like senseless curfews and restrictions on travel), collateral damages that this Court declines to consider as punishment like sex offender registration, restrictions on housing, loss of his law license, loss of the right to vote and hold public office, etc., and a myriad of intangible infringements upon the pursuit of happiness to include loss of reputation, loss of career, egregious attorney and court expenses, stigma, shame, etc. after refusing plea offers that mandated small terms of probation, a conditional discharge and scaling of his record (see *supra)*. Is such a sentence excessive?

That the practice of retaliatory sentencing is largely accepted punishment is accepted by both academia and the bench. "Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal and incontrovertible," wrote Massachusetts District Court Judge William Young. His 2001 decision was candid in BERTHOFF V. UNITED STATES, 140 F.Supp.2d 67 (D. Mass

2001). "Today, we punish people – punish them severely," Judge Young wrote, "simply for going to trial. It is the sheerest sophistry to pretend otherwise."

"Punishing the defendant for making the state prove its case (which of course entails calling the alleged victim as a witness) is a clear punishment for the defendant's exercising his constitutional right to trial," spoke Professor Richard Klein of Touro University in a Hofstra Law Review article, Due Process Denied: Judicial Coercion in the Plea Bargaining Process. "Such punishment is not only vindictive, it is also unconstitutional," Klein continued. Stanford University's George Fisher called the "harsher sentence" imposed upon defendants who "stand trial and lose" both a "penalty" and a "tax" to make the defendant pay for 'having burdened the court with a trial" (Plea Bargaining's Triumph: A History of Plea-Bargaining in America, p.179, 184).

Does such punishing disparity when the sentence exceeds – and exceeds by far – the prosecutorial plea offering meet the definition of cruel or unusual punishment? Is it excessive? When considering that "fives years of hard and painful labor including being chained from wrist to ankle for falsifying a single document" was considered excessive in the Supreme Court's interpretation of the Eighth Amendment in WEAMS V. UNITED STATES 217 US 349, we argue that Yes a seven-year prison sentence and lifelong shame and stigma as a sex offender in today's "cancel culture" after turning down a conditional discharge and/or probation with a mandated guilty plea is far more severe.

We argue also that when prosecutors sought to offer probation or conditional discharge pre-trial that anything short of probation and conditional discharge is grossly excessive. We argue that it is neither in the interests of public safety nor in the interests of justice – and certainly not in the interests of taxpayers which nobody considers anymore. We argue that such inquietude is a by-product of the egregious sentence ranges passed by legislatures to induce criminal defendants to accept pleas. Such state influence designed to coerce a defendant to plead guilty at the expense of giving up constitutional rights is argued in the next section as being coercively unconstitutional; here we are argue that the punishment that follows from retaliation from an unsuccessful state-sponsored attempt to bribe a person from asserting defense rights is cruelly and unusually excessive.

Excessive and harsh (that is cruel) sentencing as a byproduct of a system built upon a plea-bargained contract model of criminal adjudication is easy to see. In particular

consider the "unusual" imprisonment punishment practices imposed on sex offenders in the last half-century since plea-bargaining was formally accepted and given the U.S. Supreme Court's imprimatur. William Edwards and Christopher Hensley report that in 1980, 4/5 of convicted sex offenders received sentences of probation compared to 79 percent (just shy of 4/5) being sent to prison in 1996.[20] This complete reversal is also a 330 percent imprisonment increase for sex offenders at a time when the overall prison census increased by only 206 percent.[21] Such statistics suggests that, on the norm, that imprisoning sex offenses is unusual, if unusual is defined as historical.

To the degree that the U.S. Supreme Court's 21st Century excessive punishment jurisprudence has focused on classes of people rather than specific situations or sentences, the drastic change in the sentencing of sex offenders from a probation approach to an imprisonment model shouts for excessive punishment relief. It should not shock any conscience that the moral panic and social stigma attached to sex crimes psychologically acts as an inhibitor to many defendants accused of a sex crime from accepting a plea – even a reasonable one that would spare him/her imprisonment – when such plea requires a public admission of guilt. A false accusation on such a potentially life-ravaging topic demands an opportunity to answer, challenge and defend oneself such that to some plea-deals will never measure up, even when rejecting a plea may mean a long prison term due to sentencing ranges enacted chiefly to entice plea-settling instead of trials. For instance, MARTINEZ involved a man accused of sex offenses who not unlike the Petitioner likely exercised his trial rights to challenge the narrative and tell his version of the facts on such a stigmatized topic. It is likely that the stigma associated with the labels associated with such a charge influenced Mr. Martinez's decision not to accept probation but to fight the charges. Should the widespread social stigmatization of sex offenders prevalent in society exempt sex offenders from having to choose between admitting guilt between a lenient plea offer or facing a long prison term in retaliation for rejecting a plea and proceeding to trial as such a choice be deemed a subjection to a cruel and unusual punishment?

---

[20] See their 2001 article, "Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice System Process."

[21] Ibid.

A probationary plea, while from a prosecutor's perspective is perhaps benign, from a defendant's it is vastly incommensurate to the lifelong social stigma attached to a conviction, and tremendously disproportionate to the invidious discrimination for which such a guilty plea to a sex offense will subsequently subjected him/her. The Court's confluent 21st Century jurisprudence on excessive punishment that looked to the psyches of ill-formed minds as guide in determining when a sentence is excessive may seek to engulf alleged sex offenders as a class in whom the law should especially shield from retaliatory imprisonment following a rejection of a plea.

Unlike the 21st Century U.S. Supreme Court excessive punishment cases, and unlike RUMMEL V. ESTELLE, 445 US 263 and HARMELIN V. MICHIGHAN, 501 US 957, the instant case is not asking the Court to reverse a legislative policy. Rather what is under the microscope here is a judicial policy, and one firmly within the Court's purview. Is it good constitutional practice to punish persons who reject a non-prison plea, and are then sent to prison in what appears, is often, – and as demonstrated in this case – is the response to calls for punishment for asserting trial rights? Can judges mete out harsh punishments when he is aware that the minister of justice – the prosecutor – has already made a determination via a plea offer that the defendant does not need to be incapacitated in prison for justice to be served?

Lastly, an argument could be made that the surge in imprisonment seen in the last half century was a direct result or corollary of the U.S. Supreme Court's recognition of plea-bargaining as an accepted means of prosecuting defendants, and that States responded in kind by lengthening prison sentences to provide prosecutors with leverage. As an example, New York penal code was updated in 1969 with the express purpose of increasing plea bargaining opportunities (see Fisher's Plea Bargaining's Triumph, p.170 quoting Commission Chairman Richard Dennison). Perhaps the increased sentence ranges are in fact excessive when their precise purpose – as New York admits – was to promote plea-bargaining, at the expense of a defendant's trial rights?

VII.

THE STATE'S RELIANCE ON PLEA-BARGAINING AS ITS NORMAL MODE OF PROCEEDING THREATENED AND/OR DEPRIVED PETITIONER OF HIS TRIAL RIGHTS

AND SUBJECTED HIM TO RETALIATION IN CONFLICT AND OPPOSITION TO THE CONSTITUTION'S GUARANTEES

The Fourteenth Amendment prohibits States from violating the rights afforded citizens under the Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." These privileges include the trial rights afforded by the Fifth and Sixth Amendments including due process, public trial, jury, witness confrontation, process for obtaining witnesses in his favor, and the right of counsel. Such rights have been interpreted by the U.S. Supreme Court to include effective counsel and an impartial judge tasked with "safeguarding the rights of the accused."[22] The immunities guaranteed by the Constitution include the Eighth Amendment's prohibition on cruel and unusual punishments and the Fifth Amendment's right not to self-incriminate. The Petitioner argues that the State's over-reliance and insistence on plea-bargaining as a means of docket control, unduly subjected him to a deprivation and denial of the privileges and immunities afforded him by the Constitution – and as argued *supra* eventually led the State to punish him with an egregious sentence in vindictive retaliation for asserting his trial rights.

In pre-trial correspondence with the District Attorney and with documented records with the Petitioner's trial attorney (see pages 121-123 in Appendix C10) Petitioner made it abundantly clear that the Petitioner would be unwilling to entertain or engage in any plea-bargaining. Nevertheless, as the trial approached the District Attorney made repeated plea offers, culminating in a mid-trial plea arrangement that the Trial Judge orchestrated wherein Petitioner wrote in his post-conviction motion that he was bullied by the trial judge to take a plea under a threat of severe punishment if he did not (see pages 114-118). It is also argued that but for defense counsel's self-confidence that he could persuade the Petitioner into accepting a plea that defense counsel would have prepared for trial, for which his egregious lack of preparation cost the Petitioner any and all semblance to a fair trial.[23]

---

[22] GLASSER V. UNITED STATES, 315 US 60 [1942] (upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused").

[23] The Petitioner's CPL 440.10 motion (APPENDIX C10) argued in detail ineffective claims. See footnote 12 in Section I.

Petitioner's argument is that while plea-bargaining may be of benefit to the guilty, it is a disservice to the innocent, not to mention an unreasonable assault on an accused person's right for the State to compel a criminal defendant to plead guilty as a means of case-disposal. This is particularly a disservice for the innocent suspect who may reject a plea deal in hopes of having his name cleared who is now re-cast as a villain by the State when he elects not to accept a plea. Even benign plea offerings like a conditional discharge require a guilty plea that comes with a criminal record and long-lasting Internet stories that threaten the later pursuit of happiness. A system that relies upon plea-deals does so at the expense of trials where otherwise a defendant could confront and impeach his accusers, call witnesses, and present evidence, not to mention possibly be acquitted. The very notion that this Petitioner need spell out the benefits of trial in a brief to the U.S. Supreme Court suggests what an ill effect the system of plea-bargaining has had on the American justice system. Trial rights have value to the criminally-accused that the State should not be in the business of curtailing by insisting on a plea-deals.

Petitioner argued in his CPL 440.10 motion (Appendix C10) that he has been injured in the pursuit of justice by New York's criminal justice system's over-reliance on plea-bargaining as its main vehicle for processing criminal defendants. Such injuries include prosecutorial over-charging to gain leverage in plea-negotiations (p.119)[24], as well as the monetary over-charging of criminal defense attorneys in the prices they charge clients when advertising trial defense all the while only intending to negotiate a reduced plea (p.120). As illustrated extensively in Petitioner's paperwork the ineffective – rather defective – assistance of counsel at trial is believed to be directly related to an attorney who was neither skilled nor prepared to conduct a trial, who all the while believed criminal defense work nowadays amounted only to negotiating a reduced "deal."[25] Such neglect of trial preparation was in total disregard of his client's expressed intention, who at all times told him he would not accept any plea (see pre-trial email confirmation cited on p.123 of Appendix C10). The taint and smear of the prosecutorial

[24] Petitioner's claim that the Prosecutor over-charged him in part to obtain leverage in bargaining (as also to gain from the publicity his elected official status would garner for her by charging him with a legally insufficient felony) was raised in a State Habeas Corpus action that is not before this Court at this time. To the effect that the existence of prosecutorial over-charging has bearing on this argument Justices may review the State Habeas Claim documenting and claiming both unconstitutionality of the state statute and the legal insufficiency of the facts to sustain both indictment and conviction in Appendix D7.

[25] See footnote 12 in Section I.

charges were such that he would not settle for anything less than dismissal of the charges or acquittal (p.121).

Pages 114-118 of Petitioner's CPL 440.10 motion describe how the Trial Judge initiated a mid-trial plea (with a sentence of ten years probation) in an in-chamber discussion held off-record, and for which Petitioner's March 2020 Reply (Appendix C11) includes corroborating evidence of the judge's involvement. See also Petitioner's grievance filed with the State's Commission on Judicial Conduct in Appendix D10. As argued in the motion with a citation to the Second Circuit's decision in UNITED STATES V. WERKER, 535 F.2d 198 (2nd Cir. 1976): "In the defendant's eyes the judge who has attempted to get the defendant to plead guilty has determined that the defendant is indeed guilty and he will be 'an advocate for the resolution he has suggested to the defendant." WERKER affirms the federal law requirement of an impartial judge as enunciated in TUMEY V. OHIO, 273 US 510, UNITED STATES V. LOGAN, 998 F.2d 1025; ELKSNIS V. GILLIGAN, 256 F.SUPP 244 as elsewhere.

Petitioner's post-conviction motion argued that the Trial Judge's biases hindered his defense, affected his rulings on objections and evidence admission, and had a negative effect on the jury (see Section III *supra*). So also it was argued (in Section III) that the Judge's damaged ego when Petitioner "disobeyed" his mid-trial mandate that the Petitioner accept the plea-deal he organized influenced his procedural default decision.

A criminal trial should not be viewed as a transaction. In a transaction the buyer is free to walk away. Not so in a trial. To look at a legislative sentence as full price and a plea as a negotiated discount where give-and-take is bargained for lacks the freedom that the "free" market requires. A negotiated plea accepted is voluntary only insofar as Aristotle's Ethics considered a man who throws overboard cargo on his ship in a storm to prevent sinking does so voluntarily. He does so under duress. A defendant forced to take a plea is forced to take the guilty "goods" no matter what. Conversely guilt or conviction is not a given the way it is in a plea-deal, and therein lies the difference why a contract theory applied to a criminal proceeding is on its face incommensurate.

That a State dictates such a policy that is opposed to the rights guaranteed to the accused by federal law and wherein lawmakers manipulate sentence ranges to further its spread should cause scandal. That the State then pressures criminal defendants to

embrace such a policy, overcharges arrestees to increase their return, and then subjects the accused to punitive measures if he "disobeys" is likewise despotic. But, when bar and bench permits self-contaminate themselves such that the accused man or woman is denied an impartial judge and/or denied effective counsel there comes a time when a student of constitutional law must ask, as Chief Justice Marshall once asked, "Are we a nation of men [sic], or a nation of laws?"

VIII.

WHEN LAW ENFORCEMENT ADMITTED TO THE USE OF FRAUD IN THE MANUFACTURE OF MATERIAL EVIDENCE USED TO OBTAIN INDICTMENT AND CONVICTION, PROBABLE CAUSE WAS NEGATED SUCH THAT PETITIONER'S INDICTMENT AND CONVICTION MUST BE VACATED.

State law of New York requires that the probable cause necessary to obtain a criminal indictment "should be rebutted where the record failed to disclose evidence establishing that law enforcement misrepresented salient facts plaintiff's criminal proceeding including showing the existence of fraud, perjury and misrepresentation, police misconduct and suppression of evidence." SHOPLAND V. COUNTY ONONDAGA, 154 Ad.2d 1941. This rule repeats in COLON V. CITY OF NEW YORK, 60 NY.2d 82.

So too does NY Criminal Procedure Law 60.45(2)(b)(1) & (2) require the exclusion of statements made by a criminal suspect when the "public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him by means of any ... statement of fact, which ... statement creates a substantial risk that the defendant might falsely incriminate himself, or in violation of such rights as the defendant may derive from the constitution of this state or of the United States."

In the same year that the Petitioner was subjected to restraints on his liberty by post-arraignment sanctions, the Second Circuit ruled in RENTAS V. RUFFIN, 816 F.3D 214 (2ND Cir 2016) that the presumption of probable cause that normally attaches to Grand Jury indictments may be rebutted by wrongful acts by police including fraud, perjury or <u>suppression of evidence</u> (emphasis supplied).

On the federal level, the United States Supreme Court held in the New York State case, SPANO V. NEW YORK, 360 US 315 that "Police must obey the law while enforcing the law, that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.". Also, "When the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." FRANKS V. DELAWARE, 438 US 154 (1978). The U.S. Supreme Court expressed zero tolerance for use of deception such that its use amounted to a violation of "the fundamental conceptions of justice which lie at the base of our civil and political institutions ... if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court and jury." MOONEY V. HOLOHAN, 294 US 109.

Here, law enforcement planned and conducted a "control call" on the petitioner on 15 December 2014. This 26-minute clandestinely recorded phone call then became the prosecution's only non-testimonial evidence used to indict (June 2015) and convict (May 2016) the Petitioner. Both the arresting officer and police agent testified at Petitioner's trial to misrepresenting facts and making untruthful statements in the control call so that the Petitioner would rely upon the misrepresentation to make an admission, upon which he could then be arrested, the recorded phone call serving as the evidence against him. As argued in Petitioner's CPL 440.10 all the elements of fraud have been met (p. 173, para. 10). Accordingly "the record of the trial adequately established that the elements of Actual Fraud were acknowledged by the police agent by which the control call can be determined to have been unlawfully produced, thereby requiring its rejection" (p.180, para 25) and 'that the conviction and indictment be reversed" (p.181). As noted the State unreasonably refused to consider Petitioner's CPL 440.10 motion such that the substance of this claim has not been adjudicated.

Pages 172-181 and to a lesser degree pages 62-73 of Petitioner's CPL 440.10, as well as the KELSEY V. DUWE lawsuit (Appendix D8) motion, describe in detail the numerous misrepresentations and fraudulent statements that the police agent made and the Petitioner relied upon in the 2014 phone call that are grounds by which the Indictment and Conviction need by reversed. Of these the most material misrepresentation used to

indict and convict the Petitioner is listed on page 176 of the motion wherein after the Petitioner repeatedly denied touching "D," the police agent lied stating that he was observed by "J." After vehemently denying any touch [*"They – they – they said something happened with D. in the car. ... That I reached towards D. And I don't – I have no recollection of this. I don't remember this"* and *"I said No. I said No. I wouldn't have done that."]* After the police agent introduces the untrue statement that he was observed touching D, Petitioner then accepts "responsibility," stating [*"If J. says I did, then I must have. And – it scares me."*) (*I'll take responsibility, but I don't know. I don't know if I did.") ("Did I do it in my sleep? Possibly, But I don't – I mean, we were in close quarters ... Is it possible? Maybe. But I don't – I don't –"].* This "admission" led to the Petitioner's sole felony arrest on the night of 15 December 2014.

At trial the police agent was asked: "Did J. ever tell you that he saw what happened to D? / No. / Did you make that up? / Yes. / Any why did you do that? / So that he would admit what he did." Also on Page 17 the police agent was asked to confirm the deceit: "J. told me that he saw something with D. in the car. That wasn't true? / Correct. / These were all fabrications that were intended to elicit an admission from my client. Correct? / Yes. / 'J. told me that he saw you touch D.' Untrue? / Correct."

We argue that this is a serious misrepresentation that coaxed the Petitioner into accepting the police agent's version of what was alleged to have taken place not unlike the police tactics condemned in SPANO V. NEW YORK: "The police were not therefore trying to solve a crime, or even to absolve a suspect ... they were rather concerned primarily with securing a statement from a defendant on which they could convict him." Justice Douglas' concurrence in SPANO argued that such police tactics violate due process and the principle of fair trial, constitute police misconduct, and "will lead to a kangaroo court."

Not just legal precedent but scientific research supports the self-evident finding that leading questions and misrepresentation contaminate an interrogation. Gisli H. Gudjansson CBE, PhD, a world-recognized expert on false confessions argues that the interrogative suggestibility technique of police is used to manipulate pre-determined answers wherein "people come to accept messages communicated during formal questioning" as they attempt "to cope with uncertainty and interpersonal trust on the one

hand and expectations on the other" (see his study with N.K. Clark, *Suggestibility in Police Interrogations: A Social Psychological Model*, Social Behavior, 1, 83-104.[26]

Suggestion and confabulation of a suggested narrative repeated over and over again "devastates memory and plays havoc with recollections," was argued as early as 1908 by Hugo Munsterberg whose authoritative view has been recognized for over a century. He held that false confessions can occur in healthy individuals who are caught up in unusual circumstances for instance being arrested and charged with a crime. More recently clinicians D. Davis and R.A. Leo assert that factors brought on by emotional distress can lead to a failure in self-regulation that can cause even healthy suspects of good intelligence to succumb to pressures in police interviews. Davis and Leo claim that a lack of self-regulation include a temporary loss of the ability to control emotion, cognition and behavior.[27] Petitioner's post-conviction motion referenced an even older authority, namely Adam Smith, whose theories on false confessions are discussed on pages 88-90 in Appendix C10 in a passage arguing that it was ineffective assistance of counsel not to call available expert witnesses to stand to counter the control call once it was admitted into evidence.

A second form of police misconduct that should invalidate the indictment – if not also the conviction -- is the arresting officer collected three exculpatory investigation affidavits, considered within days of the Petitioner's arrest that he then failed to deliver to the Prosecutor for sixteen months including allowing the Grand Jury to convene and indict the Petitioner without the Prosecutor being aware of the existence such exculpatory documents. These investigation affidavits are significant because all three claim that D's original version of his allegation did not include any claim of being touched by the Petitioner. These affidavits, not shared with either the Grand Jury or the Trial Jury, include:

---

[26] In his book, The Psychology of False Confessions: Forty Years of Science and Practice, Emeritus Professor of Forensic Psychology at the Institute of Psychiatry, Psychology & Neuroscience at King's College, London Gisli Gudjansson discusses how modern American police interrogation is designed to lead a suspect from denial to admission by following the "Ofshe and Leo Decision-Making Model of Interrogation," described in the latter's 1997 article, The Decision to Confess Falsely: Rational Choice and Irrational Action, Denver Univ. Law Rev. 74, 979-1122: "The first step involves repeatedly accusing the suspect of the offence, vigorously refuting the denial, attacking their alibi and memory, and presenting them with 'supposedly incontrovertible evidence of guilt' (p.990), which may be real or fabricated."

[27] See Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess, *Psychology, Public Policy and Law* 18, 673-704.

- "I asked them repeatedly if they were touched or if there were was any skin to skin contact. Their answer was no."
- "Marsella said that he had asked the boys specifically if Mike Kelsey had touched them inappropriately and they said 'no.'"
- "I repeatedly asked Marsella if the boys made any allegations that they were touched inappropriately, and he repeatedly told me No."
- "There was no accusations of inappropriate touching."
- "At the time everybody was under the impression that... [D.] were not touched."
- "Chris told me that he asked both guys more than once if Mike had touched them or if there was physical contact. They both replied No."
- "At the time I was under the impression that [D.] was not actually touched at all.

The police officer's failure to turn this exculpatory evidence over to the Prosecutor is police misconduct within the meaning of SHOPLAND V. COUNTY ONONDAGA, and a violation of Petitioner's federal rights within the meaning of NY Criminal Procedure Law 60.45(2)(b)(2). The failure of police to furnish exculpatory information to the prosecutor is a constitutional violation. NEWSOME V. MCCABE, 256 F.3d 748.

The U.S. Supreme Court held in KYLES V. WHITLEY 514 US 419 (1995) that police failure to provide material to prosecutor violates Brady: "Any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for a prosecutor." KYLES is the leading case charging the government, i.e. the prosecutor, to set aside any conviction when exculpatory information was withheld by the police even when the prosecutor was unaware. "The individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's behalf in the case, including the police." WALKER V. CITY OF N.Y., 974 F.2d 292 (2d Cir. 1992) ("The police satisfy their obligations under BRADY when they turn exculpatory evidence over to the prosecutors." This holding has been upheld in ELKINS V. SUMMIT COUNTY, OHIO, 615 F.3d 671 (2010); MOLDOWAN V. CITY OF WARREN 578 F.3d 388 (6th Cir. 2009). POVENTUD V. CITY OF NEW YORK, 750 F.3d 121 (2nd Cir. 2014) and KEUHL V. BURRIS, 173 F.3d 646 (8th Cir. 1999).

The probable-cause nullification is a consequence of the police's BRADY violation. The Respondent's failure to disclose the material and impeachment evidence to the prosecutor destroyed any probable cause that may have existed at the time of arrest in accord with HUDSON V. COUNTY OF DUTCHESS 2015 WL 7288657 (COSTELLO V. MILANO 20 F.SUPP 3d 406). See also PYLE V. KANSAS, 317 US 213 (1942); UNITED STATES V. VALENZUELA-BERNAL, 458 US 858 (1982); and BELLAMY V. CITY OF NEW YORK, 914 F.3d 727 (2nd Cir. 2019).

Like the deceit of the police agent in the phone call, the failure of the police officer to turn over the exculpatory affidavits is equally material when reviewing a claim of police misconduct and its impact on a person's right to due process. "Whether the alleged judicial deception was brought about by material false statements or material omissions is of no consequence" LISTON V. COUNTY OF RIVERSIDE, 120 F.3D 965 (9TH Cir. 1997). Accordingly both indictment and conviction should have been vacated by the reviewing court, but for which due to the State's reliance on its procedural default rules the Court refused to consider.

IX.

THE PRESENCE OF FRAUD NEGATES USE OF THE ONE-PARTY CONSENT RULE SUCH THAT THE CONTROL CALL RECORDING USED TO INDICT/CONVICT PETITIONER AMOUNTED TO A WARRANTLESS SEARCH IN VIOLATION OF THE FOURTH AMENDMENT

The recording of oral statements by police has long been recognized as falling under Fourth Amendment protections. SILVERMAN V. UNITED STATES, 365 US 505; KATZ V. UNITED STATES, 389 US 347 (1967). Despite the Fourth Amendment's prohibition on unreasonable searches in the absence of probable cause and in the absence of a search warrant, both New York State and federal law have historically permitted warrantless searches to proceed in recording oral statements when one party gives consent. When it concerns government agents listening or recording a phone call both state and federal government have recognized that only one party to the conversation can give their consent without the awareness or consent of the other party. See PEOPLE V. JACKSON, 125 AD.3D 1002; UNITED STATES V. WHITE, 401 US 745. A search

warrant is unnecessary when police have obtained one-party consent. PEOPLE V. PHILLIPS, 55 AD.2D 661; PEOPLE V. ROSS, 118 AD.3D 1321.

Despite the One-Party-Consent exception, the use of fraud or other malicious purpose by the consent-giver has been recognized to create a conflict of interest serving to void out the one-party's consent. "One-party consent," wrote PEOPLE V. HOPKINS, 93 Misc.2d 501 (1978) "is prohibited when the party acts in any way with intent to injure the other party to the conversation in any way. For example, publicly embarrassing him."

Here, as testified at trial in the absence of a search warrant the NYS police received one-party consent of the police agent to intercept and record the phone call she made with the Petitioner that led to his arrest, indictment and conviction. Also at trial, as described in detail in the CPL 440.10 motion and documented above, the police agent used fraud and misrepresentation so as to injure the Petitioner in hopes that he would rely upon the misrepresentation to create probable cause to justify his arrest and conviction. So also was it argued that not only the police agent's words, but the call itself was a ruse entirely designed to fool the petitioner to lead to his arrest and conviction. These all suggest injuries far beyond just public embarrassment such that under HOPKINS the one-party consent was negated. Since one-party consent was nullified, the police were required under the Fourth Amendment to obtain a search warrant prior to placing, listening in on, and recording the call with the Petitioner which they did not do. It is also worth noting the Second Circuit's opinion in UNITED STATES V. ARCHER, 486 F.2d 670 (1973): "Governmental 'investigations' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction."

A search warrant will only issue upon proof of probable cause, which here the police did not have. The one-party-consent rule – also coupled with the fraudulent misrepresentations – served to circumvent the Fourth Amendment Rule in hopes that probable cause could be achieved merely by consent – that is a waiver of the Fourth Amendment's clear warrant requirement. Accordingly, here as elsewhere, the Constitution's unequivocal mandate that government searches not proceed in the absence of probable cause is being circumvented by the one-party consent rule. The rule is being abused to create probable cause where none previously existed.

It is not enough for police to claim that the control call was an undercover operation. In her well-presented Stanford Law Review article, Breaking the Law to Enforce It: Undercover Police Participation in a Crime, (62 STNLR 155) Elizabeth R. Joh argues that to relieve the police of criminal responsibility when undercover operations veer from lawful practice, that in every American jurisdiction, they must have prior public authority. The police conduct must be authorized. LILY V. WEST VIRGINIA, 29 f.2D 61 (4TH Cir. 1928); WALKER V. COMMONWEALTH, 127 S.W.3D 596 (KY 2004); PEOPLE V. ROBERTS, 601 P.2D 654 (Colo. Ct. App. 2000). It is not rocket science to realize that prior public authorization to perform a police search is another way of describing a search warrant. In fact New York's high court, the Court of Appeals, tells us just that, the warrant requirement "is designed to interpose the detached and independent judgment of a neutral magistrate" (PEOPLE V. HANLON, 36 NY.2d 549). The control call placed on the Petitioner in December 2014 related to conduct alleged to have taken place four months prior. There was no necessity[28] for the police to have skirted the Fourth Amendment's search warrant requirement – other than that they knew the allegations lacked probable cause that an effort to receive the warrant would have failed. Where the police have sufficient time to obtain a search warrant a warrantless search will be found unlawful (PEOPLE V. SPINELLI, 35 NY.2d 77).

Accordingly, law enforcement's failures to first obtain a search warrant before placing the control call to the Petitioner when combined with the police agent's use of fraud and misrepresentation resulting in injury to the petitioner negated the one-party consent rule such that the interception, recording, and use of the December 2014 call with the petitioner amounted to an unreasonable search that was prohibited by the Fourth Amendment. The conviction and indictment that were built upon need be vacated.

X.

THE ONE-PARTY CONSENT RULE RELIED UPON BY LAW ENFORCEMENT TO MANUFACTURE EVIDENCE AGAINST THE PETITIONER CAN NO LONGER LEGITIMATELY BE RECONCILED WITH CONSTITUTIONAL JURISPRUDENCE

[28] Joh also argues that a claim of public authority defense to justify warrantless undercover operations also requires that the means used by police were "necessary." This too is found wanting here.

As detailed above, New York State police circumvented the Constitution's clear warrant requirement to manufacture evidence against the Petitioner in the absence of probable cause. They did so in reliance upon the One-Party-Consent Rule promulgated in PEOPLE V. JACKSON; UNITED STATES V. WHITE; PEOPLE V. PHILLIPS; and PEOPLE V. ROSS, 118 AD.3D 1321. As argued above, the one-party-consent rule leads to constitutional abuses by police officers in that it waters down the warrant requirement of the Fourth Amendment and allows police probes to overreach and advance without judicial or legislative authorizations to the harm of civil liberties. Here, we argue that the U. S. Supreme Court's holding in GEORGIA V. RANDOLPH, 547 US 103 (2006), when applied to phone calls, renders the One-Party-Consent Rule unconstitutional.

In GEORIGA V. RANDOPLH the Supreme Court recognized that a government search cannot proceed on a dwelling over the objection of a tenant even in despite another tenant's consent. "A warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified," Justice Souter's majority opinion held, "as reasonable as to him on the basis of consent given to the police by another resident." We argue that not unlike a shared physical space, that persons engaged in the phone call need be recognized by the law as co-tenants and therefore a warrantless police search (or interception) may not proceed over the refusal of one party to the call.

Such a holding's effect on reversing the One-Party-Consent Rule can be discerned when applying GEORGIA V. RANDOLPH's second holding, namely that when the consenting co-tenant actively conceals a search from the other co-tenant so as to prevent the co-tenant's objection that the search is unreasonable in violation of the Fourth Amendment's prohibition ("the potential objector, nearby but not invited to take part in the threshold colloquy, loses out ... *so long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection*" emphasis supplied). Here, the police agent who provided her consent to the police to listen in on and record her phone call with the Petitioner did so without providing him notice of her consent to the police, to the fact that the police were listening in, that she was calling from the police barracks, or that the police had prepared her for the call, told her what to ask, and was continuing to advise her as the call took place.

Under such facts we argue that the police agent's failures to inform the Petitioner amounted to active concealment to prevent the Petitioner from objecting to the police search. In addition to amounting to fraudulent concealment of material facts, a tort under New York law (WISCOVITCH ASSOCIATES LTD. V. PHILIP MORRIS COMPANIES, 193 Ad.2d 542), under the legal theory articulated in GEORGIA V. RANDOLPH the police agent's concealment amounted to a Fourth Amendment violation under federal law. It follows that the one-party-consent rule and the 2014 control call placed upon the Petitioner in reliance upon the rule should be declared unconstitutional.

XI

VERBAL OR OTHER OBSERVABLE SYMPTOMS THAT A CRIMINAL SUSPECT IS MENTALLY UNSTABLE IMPOSES A HEIGHTENED DUTY ON LAW ENFORCEMENT AND JUDICIAL OFFICERS TO AVOID COMPELLING THE SUSPECT FROM SERVING AS A WITNESS AGAINST THEMSELVES

The Fifth Amendment protects persons from being "compelled in any criminal case" from being "a witness against himself." Both, it and the 14th Amendment also entitle persons to fair dealings via due process prior to being deprived of liberty. Respect for a person's Fifth Amendment rights has traditionally placed some restraints on law enforcement and judicial actors in limiting how far they can go to obtain or enter into evidence a suspect's statements without undue influence or compulsion. In SPANO V. NEW YORK, 360 US 315 (1959), the Supreme Court acknowledged that "law enforcement have become increasingly aware of the burden which they share, along without courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime (emphasis supplied)." We argue that such a burden includes ending an interrogation with a criminal suspect – not just excluding such testimony from prosecution proceedings – when the suspect shows or articulates psychosis or mental instability that could lead to a false confession.[29]

Here, there is evidence to believe that the police knew prior to placing an undercover "control call" that the Petitioner was on psychotropic medication and in the

[29] In the United Kingdom, for instance, The Police Codes of Practice includes a "fitness to be interviewed" requirement/safeguard to prevent against false confessions wherein a suspect's psychological or mental health vulnerabilities are exploited or particularly susceptible to coercive police tactics.

care of doctor after experiencing a nervous breakdown on account of these accusations. However we need only focus on the verbal content of the phone call itself to argue that police had sufficient notice and were properly apprised that the Petitioner was in a vulnerable mental state. We argue that the fundamental fairness requirement of (due process and substantive as well should have mandated that law enforcement end the call to have met the government's burden in deference to Petitioner's constitutional rights. [30]

Throughout the 26-minute phone call, Petitioner (unaware that he is talking to an undercover police agent, and unaware that police are listening in and recording the call) volunteers that he is mentally unstable at the time. As the police agent was a person known to him who was aware of his recent depression and who had offered to help counsel him the phone conversation included numerous indicators that the Petitioner was vulnerable to manipulation, many within the call's first few exchanges:

- "I'm having some mental heath issues right now" (4th statement on the call).
- "I'm doing things that aren't like me" (5th statement)
- "Mental health runs in my family. And I've been noticing symptoms" (9th statement)
- "I went to see a counselor. I have a doctor. I have a diagnosis"(16th statement)
- "My mom has schizophrenia. ... And she sees things that aren't real when she's unmedicated. ... and now I've been developing symptoms." (16th statement).
- "I'm very suicidal." (16th statement).
- "I'm taking medication now and they think its going to help me" (19th statement)

In the same call, Petitioner identified and defined a medical disorder that he was being treated for at the time which is known as the "doubting disease." This combined with the doubt expressed in the "admission" should have clued the police into the unreliability of both the Petitioner's statement and his mindset at the time as not being able to distinguish between what was real from what was not:

> "They're diagnosing me with pure obsession disorder, which is, there's obsessions which come to me that are not reality based, and they're not – not who I am, and the mind flags them in your mind as important, because they're not – they're not real, and they're not – they go against your whole character and your definition."

[30] The Sixth Circuit held in PETERSON V. HEYMES, 931 F.3D 546 (2019) that police may be sued when feeding information to a suspect when they knew he was suicidal, depressed, and emotionally unstable.

Petitioner listed some of these irrational thoughts in his 22nd statement) before continuing:

> "These things are not – they're – they're --- it's not who I am, And I'm losing my mind. And two weeks ago I – I – I found this – they think its pure obsession disorder. And I talked to my therapist ... I went to the doctor, and he gave me medication, and I'm on my second week of it, and I'm not supposed to see results for, like, at least four weeks. And its causing my suicidal tendencies...."

Petitioner uses the word "delusion' three times (12th, 20th, and 21st statement), all when discussing the allegations attributed to him with the police agent, which in the 12th statement he defines as "not true, not real."[31]

Despite the plethora of indications that the Petitioner was beyond vulnerable to coercive tactics the state police did not terminate the call, but continued. This is not like CONNELLY V. COLORADO, 479 US 157 (1986) where on his own initiative a man suffering a schizophrenic episode approached a police officer and confessed to a crime.[32] Instead, here– despite ample evidence that the Petitioner was vulnerable to psychological coercion – the police set a trap for the petitioner, and continued to interrogate him including using fraud, feigned sympathy and other interrogation techniques condemned as elsewhere in SPANO V. NEW YORK.

Chief Justice Rehnquist's majority opinion in CONNELLY did however observe, with a nod to SPANO, "that as interrogators have turned to more subtle forms of

---

[31] Additional background material on the Petitioner's mental state at the time of the call, his subsequent hospitalizations and the trial court's refusal to let him testify on these can be found in his CPL 440.10 motion on pages 64-72, 75-77, 82-87 and 108-113.

[32] As per Hugo Munsterberg's 1908 book, On the Witness Stand, there are three distinct types of false confessions. Connelly seems to fit into the first category, namely the *voluntary confession* ("The self-sacrificing desire to exculpate others"). The second type, the *coerced-complaint confession* ("The untrue confessions from hope or fear through promises and threats") is the type mostly considered in judicial opinions where through the detection of threats or promises courts tend to negate the voluntariness standard as to exclude admissibility. Munsterberg's third type of false confession is the type that warranted condemnation from the Court in SPANO, but for which subsequent courts tend not to pay much heed – thus demonstrating a national need in the area of police misconduct for a coherent jurisprudence and renewed emphasis for law enforcement to tread lightly. This is the *coerced-internalized confession* "wherein the confession is given with real conviction under pressure of emotional excitement or under the spell of overpowering circumstances." See Munsterberg, p.144-147.

This trifold classification of false confessions, with slight variation, is shared by Saul Kassin of John Jay College of Criminal Justice. He describes internalized false confessions as a transition from an initial denial to a state of confusion, self-doubt and acceptance brought upon by police interrogation tactics. See S.M. Kassin & L.S. Wrightsman (Eds.) The Psychology of Evidence and Trial Procedures, London: Sage, 1985.

psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus."[33] Rehnquist's CONNELLY holding argued that the test for unconstitutionality required not just a mental condition but police coercion.[34] Here, we argue that psychological abuse (like fraud) is coercion. We argue that police had a heightened duty under both the due process clause and the prohibition against self-incrimination (see HALL V. CITY, 697 F.3D 1059, 2nd Cir. 2012) that once there was clear and convincing evidence of the Petitioner's diminished mental condition that the continued questioning / recording / listening etc. constituted an unconstitutional deprivation of Petitioner's rights under the Constitution.

Statements produced by psychological coercion are not admissible in New York State. "Psychological coercion may be any method or technique which is intended to, or may play directly or indirectly upon the defendant, so as to instill in him a sense of fear, foreboding, insecurity or other feelings which will induce, motivate or compel him to waive his rights and respond to questions by law enforcement," the state court defined in PEOPLE V. TARSIA, 67 Ad.2d 210, "Psychological coercions, while difficult to assess, is a direct threat brought to bear by a sophisticated type of pressure." On the federal level, the Court frowned upon the police's exploitation of a man's mental weakness upon learning of a man had mental health problems in BLACKBURN V. ALABAMA, 361 US 199 (1960).

Unlike the cited cases the issue presented to this Court is not whether the "confession" ought to have been excluded, nor judged as involuntary (nor can that issue be effectively asked herein due to ineffective assistance of counsel). Rather the germane issue here is whether the due process clause and the Fifth Amendment's wording that "No person shall be compelled in any criminal case to be a witness against himself" places a burden – rather a limit – on law enforcement to cease action when an

[33] The CONNELLY decision was decided in 1986. In 1994 a study of 137 police interrogations observed in three North American police stations revealed that interrogation tactics used included confronting suspects with false evidence of guilt (30 percent), and undermining a suspect's confidence in denial and guilt (43 percent) among other forms of questionable ethical forms of manipulation. Out of the 137 sample cases 64 percent made incriminating statements. Leo, R.A., Police Interrogations in America: A Study of Violence, Civility and Social Change. PhD Thesis, Univ. of California at Berkley.

[34] ("But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness'")

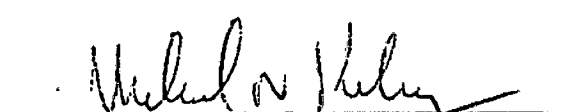
interrogation nears or equates to compulsion – and whether reasonable suspicion of a criminal suspect's diminished mental condition or state is sufficient warning that questioning must cease. An affirmative answer would require law enforcement to cease interrogation and not proceed. An affirmative answer treats the Fifth Amendment as a prohibition on government actors from compelling a person to serve as a witness against himself/herself, not just whether to later exclude unlawful conduct's use.

It is argued that a person undergoing psychosis or serious mental illness, or undergoing a nervous breakdown and under the care of a doctor as here, is not sufficiently in the full-frame of mind to make voluntary statements or detect and ward off police predators, particularly when they operate stealthily with intent to harm [see UNITED STATES V. BETTES, 229 F.Supp.2d 1103 (D.Or. 2002)]. Provided notice of such a condition – as here – the burden ought to shift to law enforcement to cease the interrogation for fear of coercive compulsion.

"The Supreme Court has recognized exceptions to the general rule that a suspect must invoke his right to silence," wrote the Southern District Court of New York in UNITED STATES V. AUSTIN, 2020 WL 6155366 "under these circumstances the onus shifts to the Government. It must inform the defendant of his right to silence and obtain his knowing and voluntary waiver of that right, otherwise the privilege against self-incrimination is said to be self-executing and the use of the suspect's statements in the prosecution's case in-chief is barred."

We argue that abuses can be prevented by clearly defining that interfacing with a person with a known mental condition fits into one these exceptions. Additionally merely providing Miranda Warnings and then proceeding with the interrogation may not be enough when law enforcement interfaces with a person of a compromised mental state. Due to the disability he or she may not even be able to process, let alone waive, those rights clearly spoken. The only logical path, to preserve the just adherence to the Fifth Amendment's purposes of non-compulsion and due process, is that the only appropriate action when law enforcement encounters a person struggling with mental issues is that no interrogation may proceed.

Dated: 2 April 2021
Hudson, NY



Michael N. Kelsey, Appellant-Plaintiff Pro Se

PRINTING SPECIFICATION STATEMENT

Pursuant to 22 NYCRR 1250.8(j)

The foregoing brief was prepared on a computer. By information and belief it has been typed as indicated:

Name of Typeface: Times New Roman

Point size: 12

Line Spacing: Double

The total number of words of Argument: 13.320

Dated: 2 April2021
Hudson, NY

Michael N. Kelsey
Appellant-Plaintiff Pro Se

16A4286 Hudson Correctional
50 East Court Street
Hudson, NY 12534

TABLE OF CONTENTS TO APPENDIX

N.B. The appendix index follows the same numbering of the prior Certiorari Petition; Only exhibits and documents relevant to this petition have been included.