No. 22-5644

IN THE

SUPREME COURT OF THE UNITED STATES

Kevin Griffin –PETITIONER

VS.

Thomas P. DiNapoli, et al. –RESPONDENT (S)

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR PETITIONER

Kevin Griffin
P.O. Box 2001
Dannemora, NY 12929

ORIGINAL

QUESTION(S) PRESENTED

1. Was petitioner's appeal erroneously dismissed even though newly discovered evidence supports petitioner's disability claims. *U.S. Const.* Amend. XIV?

2 Was petitioner erroneously denied the appointment of counsel as an *in forma pauperis* person, *U.S. Const.* Amends. VI & XIV?

3. Did petitioner possess an entitlement to relief?

4. Was petitioner's equal protection rights violated in violation of the U.S. Const. Amend. 14; N.Y.S. Const. Art. I §11; Art. V §7?

The answer to these questions should be in the affirmative.

LIST OF PARTIES

The caption of the case contains the names of the parties to the proceedings in the courts below and in this Court.

The Petitioner below is Kevin M. Griffin.

The Respondents are Thomas P. DiNapoli. et al. in his official capacity as the N.Y.S. Comptroller.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

U.S. SUPREME COURT PAGE

CIRCUIT COURTS

DISTRICT COURTS

STATE COURTS

STATUTES AND RULES PAGE

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

Federal Courts

The opinion of the United States Court of Appeals appears at Appendix–A to the petition and is reported at 2022WL1738059.

The opinion of the United States District Court appears at Appendix–B to the petition and is reported at 2021WL5370057.

The Report-Recommendation and Order of the United States District Court appears at Appendix–C to the petition and is reported at 2021WL1223819.

State Courts

The opinion of the highest state court appears at Appendix–D to the petition and is reported at 35 N.Y.3d 932.

The opinion of the New York State Appellate Division, Third Department appears at Appendix–E to the petition and is unreported.

The opinion of the New York State Appellate Division, Third Department appears at Appendix–F to the petition and is reported at 117 A.D.3d 1355 (3d Dept. 2014).

JURISDICTION

Federal Courts:

The judgment of the Second Circuit was entered on May 11, 2022 (Appendix -A).

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

State Courts:

The judgment of the highest state court was entered on March 31, 2020 (Appendix-D).

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

... to have the Assistance of Counsel ....

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

No State shall ... deprive any person of life [or] liberty ... without due process of law ... nor deny any person within its jurisdiction the equal protection of the laws.

42 *U.S.C.* §1983 states:

Every person who, under color of any statute, ordinance, regulation, ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article I §6 of the New York State Constitution provides in part:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.

Article I §11 of the New York State Constitution provides in part:

No person shall be denied equal protection of the laws of this state or any subdivision thereof. No person shall ... be subjected to any discrimination in his or her civil rights by ... the state or any agency or subdivision of the state.

Article V §7 of the New York State Constitution provides in part:

(a) ... membership in any pension or retirement system of the state ... shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

STATEMENT OF THE CASE

10. On July 1, 1988 petitioner was hired by the Town of Crawford Police Department as a Police Officer. Petitioner was a member of the New York State Retirement System.

11. On July 19, 2001 petitioner while on duty as a police officer was involved in a motor vehicle accident when the vehicles brakes failed. Petitioner sustained neck and back injuries.

12. On September 24, 2003 Town of Crawford Chief Daniel McCann filed for Tier 1 & 2 Accident Disability Benefits and Police and Fire Retirement Disability Incurred in the Performance of Duty Benefits (*Retirement and Social Security Laws* (hereinafter *R.S.S.L.*) 363 & 363c) as petitioner is unable to perform the duties of a police officer.

13. On May 18, 2004 Ms. Kathleen A. Nowak Director of Disability Processing erroneously denied both applications based only on the applications (Appendix-G) and without fifty-six pages of petitioner's medical reports (Appendix-H).

14. On November 16, 2011 seven years after Ms. Mullin's request for an adjournment the Retirement System scheduled a hearing via telephone conference before the Honorable Jack Economou. (Appendix -I).

15. On January 25, 2012 the Hon. Economou erroneously denied petitioner's request for Accident Disability Retirement Benefits and Police and Fire Retirement Disability Retirement Benefits Incurred in the Performance of Duty since petitioner was not permanently disabled. (Appendix -J).

16. On May 29, 2014 the Hon. McCarthy, Appellate Division, Third Department, filed a Memorandum and Judgment adjudging that the determination is confirmed (that petitioner was not permanently disabled), without coFE).

20. In June 2019, petitioner received his personnel file which contained the letter from Mr. Gnacik dated April 14, 2003, which did not state that petitioner needed to be permanently disabled which is contrary to the respondents denials (Appendix-K).

21. On September 30, 2019 petitioner filed an Article 78 Petition in the Appellate Division, Third Department regarding this newly discovered evidence which was denied on November 22, 2019, the Court of Appeals denied petitioner's motion on March 31, 2020.

22. On March 5, 2021, petitioner filed a 1983 claim in the Northern District of New York which was denied on November 18, 2021.

On February 28, 2022 plaintiff filed his §1983 appeal in the Second Circuit which was denied on May 11, 2022 (2022WL1738059). On June 23, 2022 petitioner received the Second Circuits certified copy.

This Court now has the opportunity and authority to grant petitioner's Accident Disability Retirement Benefits.

REASONS FOR GRANTING THE PETITION

POINT ONE

THE SECOND CIRCUIT ERRED IN DISMISSING PETITIONER'S COMPLAINT REGARDING NEWLY DISCOVERED EVIDENCE IN VIOLATION OF THE DUE PROCESS RIGHTS *U.S. CONST* AMEND 14

1. On June 24, 2022 this Court overturned the *Roe v. Wade*, 410 U.S. 113 (1973); *see also, Dobbs v. Jackson Women's Health Organ., et al.*, 2022WL2276808 (6/24/22) decision as being unconstitutional under the Fourteenth Amendment's Due Process Clause as it effected numerous people.

2. In the case at bar which is similar to *Roe v. Wade* regarding a constitutional violation that effects similarly situated individuals. The New York State *Retirement and Social Security Laws* §§ 363 & 363-c do not require petitioner to be permanently disabled (Appendix-L&M). The respondents and the Courts stated that petitioner was not permanently disabled therefore petitioner's claims were erroneously and prejudicially denied.

3. This is a Due Process Equal Protection claim that effects numerous individuals applying for disability benefits. This Court should treat this claim in the same manner as the *Roe v. Wade, supra* decision as being unconstitutional.

4. When the respondents and state courts fail to follow the laws of the state, that is a violation of the Fourteenth Amendment's due process clause (*Equal* Protection Rights). State Courts cannot assume, alter or presume what the legislature intended when it comes to the state's statutes. If the Legislature did not state a particular element of the law, the state cannot create its own element as was done in the case at bar. As a general rule, unambiguous language of a statute is alone determinative. *Theroux v. Reilly*, 1 N.Y.3d 232 (2003). A court does not get to delete inconvenient language and insert convenient language to yield the court's preferred

meaning. *Borden v. U.S.*, 141 S.Ct. 1817 (2021). The N.Y.S. *RSSL* 363 & 363-c do not require petitioner to be permanently disabled, yet the state Courts and respondents stated petitioner was not permanently disabled which is a violation of petitioner's due process rights just like in *Dobb's supra*. Both the U.S. and N.Y.S. Constitutions equal protection rights were violated.

5. To satisfy the constitutional requirements of due process, a statute must be sufficiently defined to give reasonable notice of the nature of what is prohibited and what is required of him. The respondents and Courts ignored the requirements of *RSSL* 363 & 363-c. (Appendix-L&M).

6. Petitioner has met both the essential elements of a §1983 claim. First, petitioner has shown the conduct challenged was "committed by a person acting under color of state law." *Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010). Secondly, petitioner has established that "the conduct complained of did deprive petitioner of rights, privileges or immunities secured by the Constitution or laws of the United States." *Snider v. Dylag*, 188 F.3d 51, 53 (2d Cir. 1999). Petitioner was deprived of his equal protection of the due process clause of the fourteenth amendment and the state constitution and laws. *U.S. Const.* Amend. 14; *N.Y.S. Const.* Art. I §11; Art. V §7; *RSSL* 363 & 363-c; *Bell v. Nassau Interim Finance Authority*, 2019 WL 4917892 (E.D.N.Y. 2019).

7. A judgment was made regarding the respondents erroneous and prejudicial denials of *Retirement and Social Security Law* (hereinafter "*RSSL*") 363 by requiring petitioner to be permanently disabled which was contrary to the N.Y.S. Statutes *RSSL* 363 & 363-c; the respondents own regulations (Appendix-K) and the Social Security Administration pursuant to 42 *U.S.C.* 423(d)(1)(A). These actions by the respondents denied petitioner of his equal protection rights pursuant to the *U.S. Const.* Amend. 14; *N.Y.S. Const.* Art. I §11.

I. Petitioner's Newly Discovered Evidence

8. To satisfy the constitutional requirements of due process, a statute must be sufficiently defined to give reasonable notice of the nature of what is prohibited and what is required of him *Lanzetta v. N.J.*, 306 U.S. 451 (1939); *People v. Byron*, 17 N.Y.2d 64 (1966);

9. Courts will not address new arguments or evidence that the moving party could have raised before the decision issued. *Banister v. Davis*, 140 S.Ct. 1698 (2020); see also, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485-486 (2008). In the case at bar, this Court can address the newly discovered evidence as petitioner was not made aware of and could not have raised the evidence in the initial Court proceedings since it was not discovered until June 2019.

10. Motions for new trials on the ground of newly discovered evidence have been more liberally treated. *U.S. v. Johnson*, 327 U.S. 106 (1946);

11. Where newly discovered evidence is in writing or is a matter of record, bill of review may be granted, notwithstanding that facts to which evidence relates may have been in issue before. *Southard v. Russell*, 57 U.S. 547 (1853).

12. The newly discovered evidence would have changed the outcome of the denials had the respondents and courts been apprised of the evidence. Petitioner's due process rights were violated and this Court now has the opportunity to correct said errors. *U.S. Const.* Amend. 14; *N.Y.S. Const.* Art. I §11; Art. V §7.

13. Petitioner received the newly discovered evidence in June 2019 (Appendix-K). Petitioner then commenced his administrative remedies to the state courts for permission to Renew in an effort to give the State Courts the opportunity to correct their errors.

14. The newly discovered evidence was not being re-litigated in this claim. It was merely being referenced to the original instance (the 2001 accident and the 2005 denial). The cause of

petitioner's injuries will never change, but this new evidence shows that petitioner was denied his entitlement to disability benefits and his equal protection rights, that the respondents and Courts decisions were not in accordance with the laws, statutes, rules, regulations and guidelines which denied petitioner of his due process rights. *U.S. Const.* Amend. 14; *N.Y.S. Const.* Art. I §11& Art. V §7; *RSSL* 363 & 363-c.

15. The newly discovered evidence could not have been known to petitioner at the time of the original filings of the disability applications on September 23, 2003 since he was not provided with the April 14, 2003 document from Mr. Gnacik of the Comptroller's Office until June 2019 which stated:

16. The said document regarding "Accident " Disability Retirement stated:

> If you are disabled to the extent that you cannot perform the duties of your position and if your disability results from an accident sustained in the performance of those duties, you may be eligible for Accidental Disability Retirement. (Appendix-K).

17. The said document regarding "Performance of Duty" Disability Retirement stated:

> If you are disabled to the extent that you cannot perform the duties of your position, you may be eligible for "Performance of Duty" Disability Retirement. Under this program, there is no requirement that you have sustained an "accident", rather, the disability must only have been incurred in the performance of duty. (Appendix-K).

18. The letter from Mr. Gnacik in 2003 contradicts the defendants disability requirements. *Retirement and Social Security Laws* §§363 & 363-c do not state that plaintiff must be permanently disabled, only that he is physically or mentally incapacitated for the performance of duty. Had defendants followed their guidelines and laws as stated in Gnacik's memo, instead of requiring plaintiff to be permanently disabled as Ms. Nowak did, plaintiff would have been granted Accident Disability Retirement Benefits.

19. Petitioner was denied his Equal Protection of the State Laws (*R.S.S.L.* 363 & 363-c) as neither one of these laws requires petitioner to be permanently disabled which was contrary to the respondents and the Courts decisions. The correct legal standards were not applied and substantial evidence does not support the decisions. *Butts v. Barnhardt*, 388 F.3d 377 (2d Cir. 2004).

20 In construing a statute, The United States Supreme Court must construe what Congress [Legislature] has written, and cannot add, subtract, delete or distort words used. *62 Cases, More or Less, Each Containing Six Jars of Jam v. U.S.*, 340 U.S. 593 (1951); *Williams v. Taylor*, 529 U.S. 420 (2000); *Dean v. U.S.*, 556 U.S. 568 (2009); *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014).

21.. The Court of Appeals held that the failure of the authority to comply with its own procedural safeguard(s) required that the determination be annulled and that the proceeding be remitted to the Authority. *Wallace v. Murphy*, 21 N.Y.2d 433 (1968); *see also, Ostrowski v. City of New York*, 601 F.2d 629 (2d Cir. 1979).

22. "The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended." *New York State Office of Victims Services ex rel. Balogh v. Raucci*, 97 A.D.3d 235, 239 (3d Dept. 2012); *quoting Pajak v. Pajak*, 56 N.Y.2d 394 (1982). Where the Legislative intent is clear, the statute must be strictly construed. *People v. Braunhut*, 101 Misc.2d 684 (Queens Cty 1979); *New York State Office of Victims Services ex rel. Balogh supra.*; *see also, Presbyterian Hosp. in City of N.Y. v. Maryland Cas. Co.*, 90 N.Y.2d 274, 285 (1997), *quoting Pajak v. Pajak, supra*; *McK. Statutes* §74.

23. Where intension of legislature was without doubt, court could not make it otherwise by supposing any condition not expressed in act under consideration. *Field v. Seabury*, 60 U.S. 323 (1856).

24. Under the Social Security Act "disability" means an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment ... which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 *U.S.C.* 423(d)(1)(A), *Burgess v. Astrue*, 537 F.3d 117, 120 (2d Cir. 2008). The impairment must be supported by medically acceptable clinical and laboratory techniques. *Kimberly Anne F. v. Andrew M. Saul*, 2020WL6882777 (N.D.N.Y. 2020).

25. Section 423 does not state that petitioner must be permanently disabled, only that a physical or mental impairment is required which has continuously lasted more than 12 months. Petitioner has met the requirements of 42 *U.S.C.* 423 (d)(1)(A) and is entitled to said benefits. Petitioner's impairment is supported by numerous medical examinations and reports. Petitioner has met these requirements and is entitled to Accident Disability Benefits.

26. Ms. Nowak's denials were contrary to clearly established state and federal laws (Appendix-G). Ms. Nowak's erroneous decisions, that petitioner was not permanently disabled were solely based on the disability applications which was contrary to the Comptroller's guidelines pursuant to the Gnacik letter dated April 14, 2003 (Appendix-K). Had Ms. Nowak followed the laws *RSSL* 363, 363-c and the Comptroller's guidelines then petitioner's Accident Disability Benefits would have been granted. Petitioner was denied his equal protection of the state laws. That was not the Legislatures intent.

27. The Hearing Officer failed to follow the laws *RSSL* 363, 363-c and the Comptroller's guidelines, Gnacik's letter, the hearing officer would have granted petitioner Accident Disability Benefits.

28. We note that "[g]enerally, the longer a treating source has treated [the claimant] and the more times [the claimant] ha[s] been seen by a treating source, the more weight [the Commissioner] will give to the sources medical opinion," 20 *CFR* §404.1527(d)(2)(i); 20 *CFR* §404.1520(a)(3) which states: We will consider all evidence in your case record .... (Nowak, the Hearing Officer or Storey failed to do this) (Appendix-I).

29. The Hearing Officer failed to reviewed all the medical records. (Appendix-H). The Hearing Officer failed to accord controlling weight or at least greater weight to Dr. Dunkelman's reports as petitioner's primary treating physician, during which time petitioner underwent numerous physical exams and diagnostic tests, which were supported by medically acceptable clinical and laboratory techniques. *Green-Younger v. Barnhardt,* 335 F.3d 99 (2d Cir. 2004); 42 *U.S.C.A.* §423; 20 *C.F.R.* § 404.1527(d)(2), (e)(1).

30. Failure to provide such "'good reasons' for not crediting the opinion of a claimants' treating physician is a ground for remand." *Snell v. Apfel,* 177 F.3d 128, 133 (2d Cir. 1999); *see also, Schoal v. Apfel*, 134 F.3d 496, 505 (2d Cir. 1998); ("Commissioner's failure to provide 'good reasons' for not affording weight to the opinion of petitioner's treating physician constituted legal error").

31. On September 23, 2003 Chief McCann filed for petitioner's Accident Disability since petitioner was unable to perform the duties of a police officer which included, unable to wear a gun belt or bullet proof vest which caused pain in the cervical and lumbar regions, could not sit for more than 20 minutes straight, unable to raise his arms for long periods of time to fire

weapons and unable to lift objects heavier than 15 pounds. Petitioner has limited range of motion in the neck and back, unable to sight and discharge weapons. Petitioner's disabling injuries would have placed fellow officers and civilians at risk/in danger.

32. Petitioner could not perform his duties as a police officer, such as the physical strenuous work of making arrests, restraining people, using firearms, driving long periods of time, which are plaintiff's actual duties.

33. Dr. Storey examined petitioner once, yet his report was the final deciding factor, which is contrary to the treating physicians rule. Dr. Storey did not review MRI reports or order any current test (EMG, MRI, CT Scan, etc.), he relied on test taken years prior. Dr. Storey did not indicate whether the straight leg-raising tests were in both the sitting and supine position and there is no evidence that the Hearing Officer made any effort to resolve the ambiguity which was/is required in order to support a finding of whether petitioner's impairments meet or equal the disability requirements. *Torres v. Commissioner of Social Security*, 408 F.Supp.3d 201, 202 (E.D.N.Y. 2019). Petitioner is unable to do his previous work and given his work experiences unable to engage in any other kind of substantial gainful work exists in the national economy. Petitioner continues to have cervical and lumbar pain which continues to restrict his movements even with medication.

34. Had this newly discovered evidence been provided, the Court would have reversed the Hearing Officer's decision and granted petitioner Accident Disability Retirement Benefits.

II. Petitioner's Entitlement to Accident Disability Retirement Benefits

35. The Due Process Clause of the Fourteenth Amendment states: nor shall any State deprive any person ... the equal protection of the laws. Petitioner was entitled to the equal protection of

the *N.Y.S. Const* Art I §11; Art V §7; and *RSSL* 363 & 363-c, which he was denied by the respondents and courts.

36. Petitioner is entitled to disability benefits as petitioner was/is disabled with an impairment that has lasted for more than 12 months from the onset date of July 19, 2001, and did not engage in any employment since that date. 42 *U.S.C.A.* § 423; *Barnhardt v. Walton*, 535 U.S. 212 (2002); *Walton v. Apel,* 235 F.3d 184, 189 (4th Cir. 2000); *Kimberly Anne F. v. Saul,* 2020WL6882777 (N.D.N.Y. 2020).

37. Pursuant to *RSSL* §363 (a)(1) petitioner was/is entitled to disability benefits which states (a) A member shall be entitled to an accidental disability retirement allowance if, at the time application therefore is filed, he is: (1) Physically or mentally incapacitated for performance of duty as the natural and proximate result of an accident not caused by his or her own willful negligence sustained in such service and while actually a member of the police and fire retirement system (Appendix-L).

38. Pursuant to *RSSL* 363-c (b)(1) entitles plaintiff to his disability retirement benefits, which states: (b) Eligibility. A member shall be entitled to retirement for disability incurred in the performance of duty if, at the time application therefore is filed. he is; (1) Physically or mentally incapacitated for performance of duty as the natural and proximate result of a disability not caused by his or her own willful negligence sustained in such service and while actually a member of the police and fire retirement system (Appendix-M).

39. The respondents concede that petitioner's injuries were the result of an accident incurred in the performance of duty. Petitioner has met all the requirements.

40. Due to petitioner's employment and continuous membership in the New York State Retirement System, since the date of his appointment into the system as a police officer in 1988,

entitled petitioner to all disability benefits. 42 *U.S.C.A.* §423(a)(1)(E); 42 *U.S.C.A.* § 423(d)(1)(A); *N.Y. Civ. Serv. Law* §201; *RSSL* 363 & 363-c.

III. Petitioner's Equal Protection Rights

41. The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne, Tex. V. Cleburne Living Center,* 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

42. New York's Equal Protection Clause states: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." *N.Y. Const.* Article I §11.

43. To establish an equal protection violation, petitioner must demonstrate that the classifications chosen by respondents are so unrelated to the achievement of any combination of legitimate purposes that [this Court] can only conclude that [their] actions were irrational. *Benjamin v. Town of Fenton,* 892 F.Supp. 64 (N.D.N.Y. 1995). The respondents denied petitioner the protections of *RSSL* 363 & 363-c which do not require petitioner to be permanently disabled and entitles petitioner to Accident Disability Benefits and Performance of Duty Benefits.

44. Oversight by the courts is due when state laws impinge on personal rights protected by the Constitutions. *City of Cleburne, Tex. supra; Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942).

45. The New York State Constitution states ... membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. *N.Y.S. Const.* Art. V §7.

46. The Fourteenth Amendment right to Equal Protection of the law is "essentially a direction that all persons similarly situated be treated alike." *Harris v. County of Nassau*, 581 F.Supp.2d 351 (E.D.N.Y. 2008); *City of Cleburne, Texas, supra.* Petitioner alleges factually differential treatment from "similarly situated" individuals in order to state a viable equal protection claim. *Witt v. Village of Mamaroneck*, 492 F.Supp.2d 350 (S.D.N.Y. 2014); *see Ruston v. Town of Skaneateles*, 610 F.3d 55, 59-60 (2d Cir. 2010); *Cartegena v. City of New York*, 345 F. Supp.2d 414 (S.D.N.Y. 2004).

47. Petitioner was unconstitutionally treated differently from other police officers with less or similar injuries which was wholly irrational and arbitrary in violation of the Fourteenth Amendment's Equal Protection Clause. Petitioner had a constitutionally protected right to accident disability benefits and to the equal protection of the state statutes, *RSSL* 363 & 363-c, *Bizzarro v. Miranda*, 394 F.3d 82, 86 (2d Cir. 2005); *Cartegena v. City of New York, supra; Harris v. County of Nassau, supra*; *Harlin Associates Inc. v. Village of Mineola*, 273 F.3d 494, 500 (2d Cir. 2001); *U.S. Const.* Amend. 14; *N.Y.S. Const.* Art. I §11.

48. In *McCambridge*, a police officer slipped on wet pavement as he was about to enter his patrol car, and the Court of Appeals held this to be an accident as a matter of law. *Matter of McCambridge v. McGuire*, 62 N.Y.2d 563, 568 (1984); see also, *Sullivan v. Regan*, 133 A.D.2d 993 (3d Dept. 1987).

49. The New York State Court of Appeals granted *Sullivan v. Regan, supra* Accident Disability Retirement Benefits since his accident occurred while performing his normal duties. In the case at bar, petitioner's accident occurred while performing his normal duties which the respondents conceded. Petitioner should be granted Accident Disability Retirement Benefits by the Court. *Matter of McCambridge v. McGuire, supra.*

50. The petitioner denied petitioner his equal protection rights in violation of the N.Y.S. Statutes, Constitution and the U.S. Constitution.

IV. Magistrate Judge Daniel J. Stewart's Report-Recommendation and Order

51. A Court should not dismiss a complaint if the petitioner has stated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has plausibility when the petitioner pleads factual content that allows the court to draw the reasonable inference that the respondent is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

52. Contrary to Judge Stewart's statement that the first and second complaints involved the same events. The event will never change, which was petitioner's motor vehicle accident while performing his duties as a police officer. Petitioner merely "referred" to the original issues to show how the new evidence would have changed the determinations. Had the respondent's not violated the State rules and regulations then petitioner would have been granted his Accident Disability Benefits from the onset. There is no way to explain or show that without referring to the first complaint.

53. Petitioner argues the denial of disability retirement benefits regarding newly discovered evidence. The Northern District Court Magistrate Judge Daniel J. Stewart issued a Report & Recommendation dated March 31, 2021 recommending dismissal, (Appendix-C) but granted petitioner permission to file objections regarding the Report & Recommendation brief. The Hon. Stewart stated that the letter from Mr. Gnacik dated April 14, 2003, discusses the possibility that petitioner could be eligible for performance of duty disability retirement and that petitioner did not state how or why the letter would undercut Judge Suddaby's prior determination (2016) (Appendix-C).

54. On August 30, 2017 the Honorable Suddaby stated that the "Memorandum of Law" contained factual allegations in numbered paragraphs as well as legal arguments (Appendix-n).

55. Petitioner did explain how the newly discovered evidence would have changed the outcome. The respondents and the State Courts stated petitioner was not permanently kJ). Had respondents followed the rules and regulations petitioner would have been granted Accident Disability Retirement Benefits.

56. Judge Stewart must have felt that petitioner was correct since he felt Gnacik's letter discussed the possibility that petitioner could be eligible for performance of duty disability benefits regarding the newly discovered evidence that petitioner received on June 3, 2019.

57. Judge Stewart stated that petitioner did not explain why he did not commence this action until 2021 when the newly discovered evidence was received in 2019. The reason is that petitioner exhausted his state remedies in order to give the respondents the opportunity to correct their errors, which they failed to do. The petition was timely filed.

58. Petitioner filed an Objection to Report and Recommendation Motion on April 12, 2021explaining how and why the letter from the comptroller would have or could have changed the decision of Judge Suddaby (Appendix-C).

59. Mr. Gnacik was acting under "Color of State Law" at the time the document was drafted. The document was drafted thirteen months prior to Ms. Nowak's denials. Permanency was not a required element of *R.S.S.L.* §§363 & 363-c.

60. Had Ms. Nowak followed the *R.S.S.L.* guidelines, petitioner would have been granted disability retirement benefits from the onset which was not the case since Ms. Nowak stated petitioner was not permanently disabled, and denied petitioner's disability applications. The

respondents and state courts failed to follow clearly established laws, state and federal guidelines regarding disability. *R.S.S.L.* § 363 & 363-c; *U.S. Const.* Amend.14; *N.Y.S. Const.* Art. I §11.

61. Ms. Nowak's denials of petitioner's Accident Disability and Performance of Duty Disability Retirement Benefits were based on two erroneous conditions (1) Nowak's decisions were based solely on the review of petitioner's disability applications. She failed to review any/all medical documents; (2) Nowak stated petitioner was not permanently disabled, where in fact permanency was not a requirement of said disability benefits. Nowak failed to follow the states own rules and regulations as stated in the April 14, 2003 letter issued by Mr. Gnacik, Assistant Director, Retirement Services – Disability Processing (Appendix-k).

62. The Appellate Division's May 29, 2014. denial (Appendix-f) which was affirmed by the Court of Appeal's was contrary to clearly established law, the *R.S.S.L.* §§363 and §363-c statutes, which are constitutional in nature *U.S. Const.* Amend. 14; *N.Y.S. Const.* Art. I§11. Had the Courts been provided with the new evidence there is a great probability that petitioner would have been granted his disability retirement benefits.

63. Petitioner should be granted Accident Disability Retirement Benefits since he was denied his equal protection rights of the State laws, rules and regulations. *U.S. Const.* Amend. 14; *N.Y.S. Const* Art. I §11.

V. District Court Judge Gary L. Sharpe's Denial

64. District Court Judge Gary L. Sharpe denied said petition stating that petitioner reargued the same issues as previously denied (Appendix-B). Petitioner did not reargue the same issues, petitioner merely referred to the original complaint to show how the newly discovered evidence would have changed the prior decisions.

65. Contrary to the District Court's 2016 determination that petitioner failed to allege a violation of petitioner's federal rights is an error. Petitioner raised his due process rights that the respondents failed to follow state laws which is in violation of petitioner's due process equal protection rights (equal protection of state and federal laws).

66. Contrary to Judge Sharpes determination, the facts in all the claims resulted from the same events (petitioner's accident) which caused petitioner's injuries. the events will never change.

67. Judge Sharpe did not address the fact that the defendants applied an erroneous legal standard of accident disability, by requiring petitioner to be permanently disabled only disabled to the extent that petitioner could not perform the duties of his position in violation of *RSSL* §363 & §363-c. Petitioner's Equal Protection Rights and its decisions should be set aside and petitioner's accident disability benefits granted. *McCambridge v. McGuire, supra.*

68. Had petitioner been provided with Gnacik's April 14, 2003 letter (Appendix-k), petitioner would have raised these facts in his first claim, which would have resulted in petitioner being granted his Accident Disability Benefits.

69. Petitioner did raise the fact that the new evidence would have changed the outcome of the 2016 decision by Judge Suddaby. Had Ms. Nowak and the state courts not stated that petitioner was not permanently disabled, which was contrary to the Comptroller's Office; *Retirement and Social Security Laws* 363 and 363-c, would have changed all the prior decisions. The respondents should not be permitted to violate petitioner's equal protection rights by failing to adhere to the respondents own rules and regulations. *U.S. Const.* Amend. 14; *N.Y.S. Const.* Art. I §11.

70. On November 18, 2021 the Honorable Sharpe erroneously stated that petitioner has failed to present any legal or factual basis to suggest that the claims are not based on the same "transaction or occurrence."

71. On August 30, 2017 the Honorable Suddaby stated that the "Memorandum of Law" contained factual allegations in numbered paragraphs as well as legal arguments (Appendix-n).

72. Petitioner's issues are the denial of Accident Disability Retirement Benefits. The Honorable Sharpe's denial was based on the same claim with the exception of the newly discovered evidence which if the Hon. Suddaby had, would have granted petitioner's claim, but due to the respondents prejudicial withholding of the document in question that was not the case.

73. The Hon. Stewart's Record and Recommendation stated that the letter from Mr. Gnacik dated April 14, 2003, discusses the possibility that petitioner could be eligible for performance of duty disability retirement.

74. This Honorable Court can correct the erroneous and prejudicial denials of petitioner's Accident Disability Retirement Benefits.

POINT TWO

THE SECOND CIRCUIT ERRED IN DENYING PETITIONER'S APPOINTMENT OF COUNSEL APPLICATION

Petitioner appeals the Court of Appeals denial of the appointment of counsel.

75. In the federal courts, the advice of counsel has long been required whenever a ... challenges ... that an appeal is not taken in good faith, *Johnson v. United States*, 352 U.S. 565 (1957), and such representation must be in the role of an advocate, *Ellis v. United States*, 356 U.S. 674, 675 (1958) ....

76. The court may request an attorney to represent any person unable to afford counsel. 28 *U.S.C.* §1915(e)(1). Equal protection of the law does not exist if the kind of an appeal a man

enjoys depends on the amount of money he has. *U.S. Const.* Amend. 14. see also, *Douglas v. People of the State of Cal.*, 372 U.S. 353 (1963).

77. "The factors to be considered in ruling on a motion for the appointment of counsel include the merits of petitioner's case, the petitioner's ability to pay for counsel, his efforts to obtain a lawyer, the availability of counsel, and the petitioner's ability to gather the facts and deal with issues if unassisted by counsel." *Pennington v. City of Rochester*, No. 13-cv-6304, 2014 WL 3894599 (W.D.N.Y. 2014); *Hodge v. Police Officers*, 802 F.2d 58 (2d Cir. 1986)

78. Where the factors set forth in *Hodge, supra* are satisfied, we may appoint counsel. "These factors include: (1) whether the party's claim has substantial merit; (2) whether the nature of the factual issues requires an investigation; and whether the party's ability to investigate is inhibited; (3) whether the claim's factual issues turn on credibility, which benefits from the skills of those trained in presentation of evidence and cross-examination; (4) the party's overall ability to present its case; and (5) whether the legal issues presented are complex." *Dolan, v. Connolly,* 794 F.3d 290 (2d Cir. 2015); see also, *Garcia v. USICE (Dept. of Homeland Security)*, 669 F.3d 91, 98-99 (2d Cir. 2011) (*citing Hodge*, 802 F.2d at 60-61). Here, we find that all of the *Hodge* factors favor appointment and, therefore, direct the district court, ... to appoint counsel to represent him. *See* 28 *U.S.C.* §1915(e), *Hodge* at 60-61.

79. The District Court stated petitioner presented factual allegations (Appendix-j), therefore, petitioner's claim meets the *Hodge* standard.

80. As in *Gideon* "in our adversary system of criminal justice, any person hailed into court. who is to poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." at 372 U.S. 335. 344(1963); see also *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429 (1988). A failure to appoint counsel is a violation of the Sixth Amendment, as set forth in

Gideon, supra.

81. The *N.Y.S. Const.* Art. 1 §6 states: In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.

82. The Hearing Notice failed to state retained or appointed counsel, it only stated petitioner "had a right to counsel." (Appendix-H). Petitioner was denied his due process right to counsel. *U.S. Const.* Amend. 6; *N.Y.S. Const.* Art. I§6.

83. During plaintiff's Article 78 proceeding plaintiff requested the appointment of counsel, as he was not familiar with Article 78 proceedings and was denied. Upon filing petitioner's §1983 claim, petitioner requested counsel twice and was denied. Had petitioner been appointed counsel, all motions would have been properly submitted to the courts.

84. As this Court recognized in *Custis*, the "failure to appoint counsel for an indigent [is] a unique constitutional defect ... ris[ing] to the level of a jurisdictional defect," which therefore warrants special treatment among alleged constitutional violations. *Custis v. U.S.*, 511 U.S. 485, 496 (1994).

85. As stated in *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir. 1978): "counsel will certainly be in a far better position to assist the litigant and the court than will the judge who chooses instead to struggle with an unlearned and sometimes barely literate prisoner." *See also Hodge v. Police Officers, supra.*

86. The *Maclin* court felt, for obvious reasons, that the trial judge should be more inclined to appoint counsel if the legal issues presented are complex. *Maclin v. Freake*, 650 F.2d at 888-89 (7th Cir. 1981); *See also Hodge v. Police Officers, supra.*

87. Petitioner has qualified for *in forma pauperis* status and is unable to hire an attorney to represent him. Petitioner has filed numerous letters to law firms. Petitioner claims this is a

complex case and should not be tried without the appointment of counsel.

88. This Court has held that the right to appointed counsel applies not only to "criminal prosecutions" within the meaning of the Sixth Amendment, but also to proceedings denominated as "civil" .... *Turner v. Rogers*, 2011 WL 49898 (2011) @ 30.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: August 24, 2022

Respectfully submitted,

Kevin Griffin, 04A6249

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 24, 2022

Kevin Griffin, 04A6249