No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MARC FISHMAN,

Petitioner,

VS.

NEW YORK

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

Law Office of Caner Demirayak, Esq., P.C.
Attorneys for Petitioner
300 Cadman Plaza West, 12th Floor
Brooklyn, New York 11201
718-344-6048
caner@canerlawoffice.com

December 18, 2023

QUESTIONS PRESENTED

New York's statutory scheme for the issuance of temporary and final orders of protection violates the minimum fundamental procedural due process requirements established by this Court. Under New York's statutory framework, a defendant is not afforded with prior notice and is not given a right to an opportunity to be heard. Even where a defendant seeks a hearing, he must do it through a motion which may be denied without a hearing. A defendant has no right to appeal the issuance of a temporary order of protection nor the denial of a motion seeking a hearing. New York thus deprives its citizens of fundamental rights, including but not limited to parenting and the right to bear arms through its statutory framework without notice or an opportunity to be heard.

The question presented is:

1. Whether New York State's statutory framework which permitted a court to issue an order of protection depriving a defendant of access to his children and his right to bear arms without notice or an opportunity to be heard and misrepresents that such notice or a hearing was provided by falsely stating defendant and his attorney were present in court when the order was issued, and thereafter issues an order prohibiting the defendant and his attorney from filing a motion seeking to vacate or modify the order to which the defendant has no right to appellate review in New York, violates procedural due process?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner is Marc Fishman.

Respondent is New York.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Page(s)

Cases

Statutes

Constitutional Provisions

Petitioner Marc Fishman respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York.

OPINIONS BELOW

The order denying the timely application for reconsideration by the Court of Appeals of the State of New York is unreported and is found at App. 9. The order denying leave to appeal to the Court of Appeals of the State of New York is unreported and is found at App. 1. The order dismissing petitioner's timely appeal by the New York State Supreme Court, Appellate Division, Second Department is unreported and is found at App 4. The order of protection in dispute issued by the County Court of the State of New York, County of Westchester is unreported and is found at App. 6-7.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on May 10, 2023 when it denied petitioner's application to appeal. The Court of Appeals of the State of New York denied a timely application for reconsideration on July 25, 2023. On October 4, 2023 the Honorable Justice Sonia Sotomayor granted petitioner's application to extend the time to file a petition for a writ of certiorari to December 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14th Amendment, Section 1 and New York Criminal Procedure Law §§ 530.12 and 510.20. U.S. Const. amend. XIV § 1; N.Y. C.P.L. § 530.12; N.Y. C.P.L. § 510.20.

STATEMENT OF THE CASE

On June 9, 2022, without notifying petitioner or his defense attorney, the trial judge issued an order of protection, which among other things prohibited any and all communication with his children, at least one of whom is an adult and who were not involved in the underlying criminal allegations and revoked petitioner's right to bear arms. App. 6-7. The trial court did not hold a hearing on the issuance of the order of protection. App. 14-20.

The trial court falsely stated that Petitioner and his attorney were present in court and served with the order of protection. App. 6. However, neither Petitioner nor his defense attorney received a copy of the order of protection. App. 14. A month later when petitioner sought to participate in one of his disabled children's section 504 meetings at his school, petitioner was first made aware of the June 9, 2022, order of protection by an attorney for the school. App. 18-20.

Prior to June 9, 2022 the trial court issued an order barring any motions to the court without permission of the trial judge. App. 27-28. Thus, on July 5, 2022, petitioner's attorney wrote to the trial judge requesting leave to file a motion to modify the incorrectly issued order of protection. App. 14. The request was not responded to and permission to file a motion was not granted.

The trial court's prohibition on motions without its permission followed years of violations of petitioner's rights by the assigned judge. Although petitioner was convicted at a jury trial of criminal contempt in the second degree and attempted criminal contempt in the second degree on January 28, 2020, nearly four years have

passed and petitioner has not been sentenced on the verdict. It appears that the trial court dragged out sentencing as a way to keep an illegal temporary order of protection in place before it had to make a final decision as to a final order of protection at sentencing.

The trial judge even refused to order a new trial or dismiss the case despite a concession by the prosecutor on November 12, 2021 in response to a motion to set aside the verdict that it was legally defective due to the inconsistent findings as to a completed and inchoate offense.

With no other recourse available in the trial court, on or about July 9, 2022, petitioner filed a timely notice of appeal to the New York State Supreme Court Appellate Division Second Department. Petitioner also filed a motion to stay enforcement of the order of protection.

The Clerk of the trial court confirmed that there was no court proceeding held on June 9, 2022 via correspondence on December 1, 2022. App. 16. Which makes sense considering that petitioner and his attorney were not notified of the phantom proceeding and were not served with the order despite language on the order falsely claiming otherwise. App. 6-7.

On February 17, 2023 and in response to the petitioner's motion to stay enforcement of the order of protection, the New York State Appellate Division Second Department *sua sponte* dismissed the appeal and denied the motion to stay as academic. App. 4.

On April 28, 2023 the trial court reissued the same unconstitutional order of protection and crossed-out some language and the date from the prior order. App. 24-25. It again falsely stated the defendant was in court and personally served with the order of protection. App. 25. No prior notice or an opportunity to be heard was provided. Petitioner was still prohibited from filing any motions without prior permission of the Court and he was not provided with notice or an opportunity to be heard. App. 27-28.

Petitioner then timely filed an application for leave to appeal the February 17, 2023 order of dismissal of the Second Department to the Court of Appeals of the State of New York which was denied on May 10, 2023. App. 2.

On July 25, 2023 Petitioner's request for reconsideration by the Court of Appeals of the State of New York was denied. App. 9. A letter from Disability Rights New York as amicus support was rejected by the Court of Appeals.

Petitioner's case raises exceedingly important questions regarding the minimum due process guarantees afforded under the Fourteenth Amendment when denied substantial property and liberty interests, i.e., the right to a parental relationship. *See Matthews v. Eldridge*, 424 U.S. 319, 331-332 (U.S. 1976); *Fuentes v. Shevin*, 407 U.S. 67, 81 (U.S. 1972); *Santosky v. Kramer*, 455 U.S. 745, 753 (U.S. 1982); *Quillon v. Walvott*, 434 U.S. 246, 255 (U.S. 1978). New York Criminal Procedure Law § 530.12 relating to orders of protection violates the minimum due process requirements under the United States Constitution as it does not provide for

an adequate pre-deprivation hearing nor any post-deprivation remedy. N.Y. C.P.L. § 530.12.

As this specific case demonstrates, under New York's statutory scheme an individual can be denied minimum due process and be left without any post-deprivation remedy. In fact, the statute does not provide for such relief and there is no right or ability to obtain permission to seek judicial review of the issuance of an order of protection under that statute. This due process violation exacerbated Petitioner's inability to meaningfully participate in the defense of his case due to his hearing and cognitive disabilities which were not accommodated. *See Ake v. Oklahoma*, 470 U.S. 68, 76 (U.S. 1985) (explaining that a criminal defense must be able to meaningfully participate in his defense to avoid deprivation of due process).

Considering the due process violation in 2021 an intermediate appellate court of New York set forth the requirement for an immediate hearing on a temporary order of protection in *Matter of Crawford v. Ally*, 197 A.D.3d 27 (N.Y. App. Div. 1st Dep't. 2021). This decision displays the repugnancy of the statute to the due process guarantee under the United States Constitution. On its face, the statute does not provide for notice, an opportunity to be heard or a post-deprivation remedy. The statute even states that a violation of its requirement to set forth the reasons for the issuance of an order of protection does not impact the validity of such order.

Here, the trial court did not notify Petitioner of the intent to issue the order of protection, did not provide for a hearing, and barred any motions to seek a post-deprivation remedy. The trial court went further and did not serve the order of

protection on Petitioner or his attorney, despite falsely claiming to have done so. Petitioner would then be notified of the order when attempting to exercise his fundamental right of parenting.

More recently petitioner has uncovered additional violations of his rights during the subject criminal matter. In a collateral disability discrimination action pending in the United States District Court for the Southern District of New York arising from the police encounter which started the criminal case, petitioner has learned that (1) prior inconsistent statements by the complaining witness were not turned over but were in possession of law enforcement and prosecutor via recorded phone calls to the police station and (2) prior video and audio statements of other testifying witnesses, including the arresting officer who stated on the recordings that he did not feel the defendant possessed any criminal intent, were not turned over until October 2023. These facts give context to the overall due process violations faced by petitioner on account of New York's statutory scheme and the ability of its prosecutors to continuously violate petitioner's rights.

REASONS FOR GRANTING CERTIORARI

A. Certiorari Should be Granted as the Court of Appeals of the State of New York has Decided the Important Federal Question of the Procedural Due Process Requirements of Notice and an Opportunity to be Heard Prior to the Issuance of Temporary and Final Orders of Protection in a Way That Conflicts With This Court's Decisions in *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Matthews v. Eldridge*, 424 U.S. 310 (1976)

It is established that "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes*, 407 U.S. at 79. This Court "Has traditionally insisted that, whatever its form, opportunity for [a] hearing must be provided before the deprivation at issue takes effect." *Id* at 82.

A pre-deprivation hearing may not be required under "Extraordinary situations that justify postponing notice and opportunity for a hearing." *Id* at 90. Such situations are "truly unusual." *Id*.

In *Fuentes* this Court set forth a three factor test to determine whether denying a pre-deprivation hearing would comport with due process. First, the Court is to consider the important governmental or public interests at stake. Second, the Court is to consider the special needs of the State for prompt action. Finally, it must be determined whether the denial arose from a narrowly drawn statute and such denial was necessary and justified in the particular instance in dispute. *Id* at 91-92.

Several years later this Court expanded on *Fuentes* and provided an example of a situation in which the absence of a pre-deprivation hearing comported with procedural due process with the decision in *Matthews*, 424 U.S. at 319.. In *Matthews*

it was held that due process is not necessarily violated where a person (1) can assert a claim to a particular interest (2) has a right to an evidentiary hearing and (3) has a right to subsequent judicial review before a final determination. *Id* at 349.

Here, petitioner was denied any notice of the intent to issue the temporary order of protection on June 9, 2022. Court was not even in session and no proceedings were held that day. The Court falsely claimed on the order that the defendant and his attorney were present in court when it was issued. The Court also falsely claimed that it was served on defendant's attorney and the defendant. The Court further mislabeled the temporary order of protection as a final one. Defendant would only receive notice of the order by his son's school when he attempted to participate in a section 504 meeting with school officials for his son. The school disallowed participation on the basis of the order.

Petitioner could not challenge the issuance of the order of protection via motion as the trial judge previously prohibited any further motions without court approval. When petitioner's attorney wrote to the trial judge requesting permission to file a motion to modify the order, the trial judge did not respond to the request. In that same letter the petitioner's attorney advised the court that its order falsely stated petitioner and his attorney were in court and served with the order.

When petitioner filed a timely notice of appeal of the order, such appeal would be dismissed *sua sponte* on the basis that New York does not permit an appeal as of right for the issuance of a temporary order of protection. As held by its intermediate appellate courts, "No statutory right to appeal exists," from denial of a motion to

modify an order of protection. *Matter of Utter v. Usher*, 150 A.D.3d 863 (N.Y. App. Div. 2d Dep't. 2017). Petitioner's subsequent applications to the state court of last resort likewise failed as New York does not permit an appeal as of right under such circumstances to the Court of Appeals. This is because "A defendant's right to appeal within the criminal procedure universe is purely statutory and, therefore is strictly limited." *People v. Whalen*, 49 A.d.3d 916, 916-017 (N.Y. App. Div. 3rd Dep't. 2008). The Court of Appeals even refused to consider an amicus letter submitted to it.

Once that order expired in April 2023, it was issued again by the trial court. Petitioner was again denied notice or an opportunity to be heard. The only difference was that petitioner's attorney received a copy by e-mail and certain sections of the typed order were crossed out by pen by the court. Petitioner is still subject to a prohibition on any motions without prior permission of the trial court and thus has no recourse to challenge this due process violation aside from the present petition.

New York's lower courts have explained that there is "No specific provision for a hearing included in C.P.L. § 530.12." *People v. Derisi*, 110 Misc. 2d 718, 719 (N.Y. Dist. Ct. 1981). To have a hearing, a defendant is required to file a motion to modify the conditions of release under a different statute, N.Y. C.P.L. § 510.20. *See id.* However, the determination of the motion is up to the discretion of the court and a defendant is not entitled to a hearing, it is only permissive by the court. At least one lower court in New York previously held that "The denial of such a motion may under certain circumstances, constitute a denial of due process." *People v. Faieta*, 109 Misc. 2d 841 (N.Y. Dist. Ct. 1981). Ironically, pursuant to N.Y. C.P.L. § 530.12(15) it is the

non-movant and person not subject to the deprivation that is entitled to notice on a motion seeking to vacate or modify the order of protection. N.Y. C.P.L. § 530.12(15).

More recently, an intermediate New York Appellate Court issued a decision directing that a prompt evidentiary hearing be held after the issuance of a temporary order of protection. *See Matter of Crawford*, 197 A.D.3d at 27. However, this is not statutorily required in New York. Even under *Crawford* a defendant is still not entitled to any notice prior to the issuance of an *ex parte* order of protection or an opportunity to be heard. And, a post deprivation hearing is only available under *Crawford* where a defendant shows information to the Court as to an immediate and significant deprivation of a personal or property interest. The burden rests on the defendant to show an entitlement to a hearing, and again in New York there is no right to an opportunity to be heard, even where *Crawford* tries to save the constitutionally repugnant N.Y. C.P.L. § 530.12. Here, the trial court did not even follow *Crawford* and it was not required since it goes beyond the text of section 530.12 as it stands written.

As such, it is abundantly clear that N.Y. C.P.L. § 530.12 runs afoul of this Court's decisions in *Fuentes* and *Matthews*. With respect to the specifics of this case the due process violations did not stop at a denial of notice and an opportunity to be heard. Defendant was also subjected to an order with false information that he was prohibited from correcting without permission by the trial court, which was also denied. New York is an outlier as against the various other states in adopting statutes that provide the minimum due process required by this Court.

The application of such statute to petitioner displays the extreme harms that a person can face where there are insufficient procedural safeguards imposed by statute and the courts. The harms are more severe when considering petitioner's status as a person with a cognitive and hearing disability attempting to navigate the court system.

B. Certiorari Should be Granted as the Court of Appeals of the State of New York has Decided the Important Federal Question of the Procedural Due Process Requirements of Notice and an Opportunity to be Heard Prior to the Issuance of Temporary and Final Orders of Protection in a Way That Conflicts with Decisions from the Highest Courts of the States of Michigan, South Carolina, Minnesota, Wisconsin, Connecticut, Indiana and Kansas

Most States have adopted statutes that follow this Court's directives enunciated in *Fuentes* and *Matthews*. For seven States, their statutory schemes require prior notice and a hearing even before a temporary order of protection is issued. Such hearing may be postponed and the order issued ex parte under specific circumstances in which the application shows special circumstances. Where an ex parte order is issued the defendant would be entitled, by the various state statutes to hearing from as soon as 1 day or up to 14 days after the deprivation of rights.

New York has not adopted a statute in line with *Fuentes* and *Matthews* and its decision to deny petitioner any relief conflicts with the highest courts of Michigan, South Carolina, Minnesota, Wisconsin, Connecticut, Indiana and Kansas and each court's interpretation of its respective relevant statutory scheme.

Indiana's Supreme Court could not be clearer: "An after the fact notice of a protective order is insufficient to meet the demands of due process." *Malone v. State*, 2007 Ind. App. Unpub. LEXIS 2124 (Ind. 2007). The Court of Appeals of the State of New York's decision to deny consideration of petitioner's appeal conflicts with Indiana's Supreme Court as the Court of Appeals permitted a temporary order of protection to stand to which petitioner had no notice of or an opportunity to be heard.

The decision of the Kansas Supreme Court in *Kerry G. v. Stacy C.*, 55 Kan. App. 2d 246 (Kan. 2018) found that due process was violated where a defendant was subjected to the extension of an order of protection in the absence of factual findings and without providing defendant with notice or a hearing before the order was issued. Likewise here the temporary order of protection against petitioner had "expired" weeks prior to June 9, 2022. The issuance of the order on June 9, 2022 was essentially an extension of the prior order. However, petitioner was not notified of the intent to enter such order against him, no factual findings were made, court was not even in session and no hearing was held or available.

Worsening the due process violation was the falsification by the court that defendant and his attorney were present and that they were served with the order. More damaging to the validity of the order was the complete prohibition on an application to modify the order without prior permission of the trial court. And, the petitioner does not even have a legal right under New York law to appellate review of such an order.

Connecticut's Supreme Court previously held that it is a violation of due process for one judge to issue a final order of protection without a hearing even where another judge already determined the need for a temporary order of protection. In *State v. Fernando A.*, 294 Conn. 1 (Conn. 2009), the court explained that although its statutory scheme allowed for the issuance of a temporary order of protection without notice or a pre-deprivation hearing, the statute did require a hearing within 3 days. The refusal of the court to conduct a hearing at which the State has the burden of proof violated due process.

Here, N.Y. C.P.L. § 530.12 does not provide for any prior or post deprivation hearing whatsoever. Additionally, although a defendant may file a motion under N.Y. C.P.L. § 510.20 to modify the "conditions of release," the trial court is permitted to deny the motion without a hearing. A defendant is then unable to file an appeal after the issuance of the temporary order of protection. In this case the Court conflicted with Connecticut as it permitted a temporary order of protection to be issued without a hearing either before or after the deprivation.

Wisconsin has made clear that a defendant/respondent is entitled to notice and an opportunity to be heard before a temporary protective order is issued. In *Schramek v. Bohren*, 145 Wis. 29695 (Wis. 1988), the Court explained that its statutory scheme required service on the respondent with notice and then a hearing on a request for a temporary protective order. While there is a provision allowing for the issuance of a temporary protective order without notice, a hearing is mandated to be held within 7 days. Again, New York's statutory scheme provides no mandatory right to a hearing

on the issuance of a temporary order of protection. The trial court does not even have to set forth its reasons on the record or in a decision in issuing such an order. And while a defendant could file a motion to modify the order, such motion is up to the discretion of the court and could be denied without a hearing.

Minnesota's highest court explained in *Baker v. Baker*, 494 N.W. 2d 282 (Minn. 1992) that its "statute requires prior notice to respondent for the issuance of a temporary order of protection, unless it is clearly shown with affidavits of irreparable injury, loss or damage and the reasons are set forth for denying notice." In 2002 the Minnesota Legislature amended portions of the relevant statute, section 518B.01 in ways not relevant to the holding in *Baker*. Minn. Stat. § 518B.01 (2002). The statute still requires at least 12 hours of notice to a defendant before a hearing is held on the issuance of a temporary order of protection. The decision by the Court of Appeals of the State of New York and N.Y. C.P.L. § 530.12 directly conflict with Minnesota in *Baker* and its statute.

Michigan's statutory scheme is similar to Minnesota. As Michigan's Court of Appeals explained in *Kampf v. Kampf*, 237 Mich. App. 377 (Mich. 1999), an emergency order of protection may only be issued without notice where supported by affidavits demonstrating exigent circumstances and an appropriate notice and opportunity to be heard after the order is issued. Under its statute, a Michigan citizen is entitled to file a motion to challenge the order within 14 days to which a hearing is mandated within 5 days. Michigan's statute even provides a safe harbor to a

defendant who violates an order of protection to which he had no notice of. The decision by the Court of Appeals here is in direct conflict with *Kampf*.

South Carolina's highest court in *Moore v. Moore*, 376 S.C. 467 (S.C. 2008) explained that "Emergency orders of protection must be made with notice to respondent," and an expedited hearing is available within 24 hours. As set forth above, New York's statute does not even provide a defendant with any prior notice or opportunity to be heard as a matter of right. It is either completely denied or up to the discretion of the assigned trial judge.

In sum, the Court of Appeals of the State of New York's decision in this case conflicts with decisions by seven other state courts of last resort. Each other state and its courts have painstakingly attempted to develop a framework for the issuance of temporary orders of protection which afford the due process guarantees mandated by *Fuentes* and *Matthews*. New York has refused to do so and as a result its statute, N.Y. C.P.L. §530.12 is unconstitutional and must be struck down. The issue at hand is not moot as it is capable of repetition but may evade review as the subsequent nearly identical issuance of an order of protection on April 28, 2023 demonstrates.

It is not surprising that the Court of Appeals of the State of New York has not issued a decision on the constitutionality of this statute. Its lower courts have consistently made mention of the lack of any due process and have tried to find ways to make the repugnant statute remain viable. However, the time has come for New York to heed the directives of this Court and cease its daily deprivation of parental rights and the right to bear arms without notice or an opportunity to be heard.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition.