Ex. 6

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF DUTCHESS

----------X

The State of New York

on Relation of DOMINIC M. FRANZA, 92A3659,

Petitioner,

V.

WILLIAM J. CONNOLLY, Superintendent of

Fishkill Correctional Facility,

Respondent.

----------X

VERIFIED PETITION

Index No. _____

TO THE SUPREME COURT OF THE STATE OF NEW YORK

Your petitioner respectfully alleges and shows:

1. That Dominic M. Franza, the petitioner makes this verified application herein on his own for a writ of habeas corpus. Petitioner does not want an attorney assigned and will proceed pro-se at all times.[1]

2. The place where said Dominic M. Franza is imprisoned and restrained of Liberty is Fishkill Correctional Facility in the City of Beacon, County of Dutchess, State of New York.

3. That the officer by who the petitioner is so detained is William J. Connolly, Superintendent of Fishkill Correctional Facility for the State of New York.

4. That the detention of said Dominic M. Franza is by virtue of four (4) mandates under waived indictment 11987/91 (Attached hereto and marked as Exhibit "1" [Mandates]).

1- This petition is supported with new facts and evidence "**never presented and determined**" in any previous habeas proceeding (CPLR §7003[b]).

5. That the cause or pretense of said Dominic M. Franza, is because of the judgment of conviction and sentence upon petitioner on waived indictment 11987/91, thereby causing the mandates to issue (Attached hereto and marked as Exhibit "2" [Copy of Certified waived indictment 11987/91 and receipt for payment; See, www.nypdprosecutorcorruption.com).

6. That a court or judge of the United States does not have exclusive jurisdiction to order the release of Dominic M. Franza.

7. That Dominic M. Franza is unconstitutionally/illegally imprisoned and restrained of Liberty for the following reason.

8. That Dominic M. Franza is unconstitutionally imprisoned and restrained of his Liberty within the State of New York, as revealed by the N.Y. County District Attorney office's F.O.I.L. responses, proving the indictment was filed under the document status designation of "waived case", therefore petitioner not being Constitutionally and statutorily legally prosecuted, in violation of Article I, §6 of the New York State Constitution; CPL §40.30(1)(2)(a); CPL §200.10; CPL §210.05; People v. Correa, 15 N.Y.3d 213, 228 (2010), as a result rendering the mandates null and void, as the mandates were issued under said filed waived indictment.

> N.Y. State Const., Art. I, §6
>
> No person shall be held to answer for a capitol or otherwise infamous crime..., unless on indictment of a grand jury,...
>
> No person shall be deprived of life, liberty or property without due process of law.

U.S. Const. 14th Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CPL §40.30 Previous prosecutions; what constitutes

1. Except as otherwise provided in this section, a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.

2. Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have been prosecuted for an offense, within the meaning of section 40.20 when:

(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense;....

CPL §200.10 Indictment; definition

An indictment is a written accusation by a grand jury, filed with a superior court, charging a person, or two or more persons jointly, with the commission of a crime, or with the commission of two or more offenses at least one of which is a crime. Except as used in Article 190, the term indictment shall include a superior court informsation.

CPL §210.05 Indictment and superior court information exclusive methods of prosecution

The only methods of prosecuting an offense in a superior court are by an indictment filed therewith by a grand

jury or by a superior court information filed therewith by a district attorney.

Like every other court in New York State, Supreme Court may not convict a defendant of a felony absent compliance with the indictment and waiver provisions in article I, §6 of the New York Constitution. People v. Correa, 15 N.Y.2d 213, 228 (2010).

It is "the law of the land" that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal (Matter of Oliver, 333 U.S. 257, 278, 68 S.Ct. 499, 510, 92 L.Ed.2d 682). Such a right constitutes the most fundamental of all freedoms (Estes v. Texas, 381 U.S. 532, 540, 85 S.Ct. 1628, 14 L.Ed. 2d 543). People v. DeJesus, 42 N.Y.2d 519, 520 (1977).

[A] criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law. People v. Levan, 295 N.Y. 26, 32 (1945).

It matters not what the general powers and jurisdiction of a court may be; if it act without authority in the particular case, its judgments and orders are mere nullities, not voidable, but simply void, protecting no one acting under them, and constituting no hindrance to the prosecution of any right. People ex rel. Tweed v. Liscomb, 60 N.Y. 559, 568 (1875).

The law is no respector of persons, and suffers no man be he guilty or innocent, to be deprived of his liberty except by due process of law.... id, at 568 (1875).

No court can give a judgment valid for any purpose not authorized by law. id, at 591.

No court is or can be competent to pronounce a sentence and give judgment in open and palpable violation of a positive statue, and a judgment thus given is simply void. id, at 591.

It is Axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. Jackson v. Virginia, 443 U.S. 307, 314 (1979).

It is fundamental that the State cannot hold and physically punish an individual except in accordance with due process. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

Nor may he be fined or sentenced to jail until he has been afforded the procedural safeguards required by due process of law.... It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. In Re Oliver, 333 U.S. 257, 265 (1948).

The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history.... From the popular hatred and abhorrence of illegal confinement,... violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there has been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed. Chambers v. State of Florida, 309 U.S. 227, 236-237 (1940).

That clause of the fourteenth amendment is founded in the almost identical language in the several state constitutions, and is intended as additional security against the arbitrary deprivation of life and liberty and the arbitrary deprivation spoliation of property. Neither can be taken away without due process of law.... It is sufficient to observe here that 'by due process' is meant one which, following the forms of law, is appropriate to the

> case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whether it is necessary for the protection of the parties, it must give them them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observances of those general rules established in our jurisprudence for the security of private rights. Hagar v. Reclamation Dist. 180.1, 111 U.S. 701, 707-708 (1884).

9. The sole purpose of a habeas corpus proceeding is to inquire into the cause of imprisonment or restraint of the person; and the sole inquiry is whether the mandate, by virtue of which the person is detained is void. This is the practice in this State. People ex rel. Wachowicz v. Martin, 293 N.Y. 361, 366 (1944); People ex rel. Morhous v. Supreme Court of New York, 293 N.Y. 131, 138-139 (1944):

> "To bar the applicant from discharge from arrest by virtue of a judgment or decree, or an execution thereon, the court in which the judgment or decree is given must have had jurisdiction to render such judgment. The tribunal must be competent to render the judgment under some circumstaces." ... That is the test which this court has consistently applied. See People ex rel. Carr v. Martin, supra. It accords with the historic nature and object of the writ, yet does not exceed those limitations upon its use which have been observed for centuries. "Upon the writ of habeas corpus, the court could not go behind the judgment, but upon the whole record, the question was whether the judgment was warranted by law, and within the jurisdiction of the court." That conclusion leaves untouched the potency and efficiency of the writ of

> habeas corpus to test the jurisdiction of every court in the land, assuming by its judgments decrees and process, to deprive the citizen of his liberty. Morhous, 293 N.Y., at 138-139.
>
> What we have said is, of course, intended to apply only to the scope of the inquiry upon a writ of habeas corpus at common law, and under the practice in this State. id, at 139.

10. A viewing of the facts below will prove the mandates are null & void. It should be noted, this habeas petition contains new facts and evidence which were never presented and determined in any other habeas proceeding.

11. At petitioner's request, petitioner's Brother, Michael Franza, on April 24th of 2009, acquired numerous copies of your petitioner's indictments, number 1647/91, superseded by 11987/91. All copies were Certified and placed under the seal of the court. The originals will be produced in open court (Ex. "2" [Copy of 11987/91]; Attached hereto and marked as Exhibit "3" [Copy of 1647/91]; Attached hereto and marked as Exhibit "4" [Court receipt made out to Michael Franza]).

12. Also at petitioner's request, Miss Rose Marie Gonzalez, on June 4th of 2010, additionally acquired numerous copies of the same indictments. All copies were Certified and placed under the seal of the Court. The originals will be provided in open court (Attached hereto and marked as Exhibit "5" [Copy of 1647/91]; Attached hereto and marked as Exhibit "6" [Copy of 11987/91]; Attached hereto and marked as Exhibit "7" [Copy of court receipt made out to Rose Marie Gonzalez]).

13. By letter dated August 8th of 2011, Miss Gonzalez made a F.O.I.L. request to the N.Y. County District Attorney's office. Requesting the definition of the typewritten letters "CCI", which appear on indictment 1647/91 (Ex.'s 3 & 5), commenced by a felony complaint. Miss Gonzalez has made a sworn attestation as to her inquiry. Both originals will be presented in open court (Attached hereto and marked as Exhibit "8" [Copy of August 8th letter]; Attached hereto and marked as Exhibit "9" [Copy of sworn attestation]; Attached hereto and marked as Exhibit "10" [N.Y.C. Criminal Court Arraignment Sheet]).

14. A.D.A. Susan Roque, record access officer, responded to Miss Gonzalez's F.O.I.L. request, and explained what the "**CCI**" designation "**usually means**," and the "**on the other hand**" version explaining, before a defendant "has been released from custody, his/her attorney will "waive" to the case to Supreme Court, obviating the need to involve the Clerk of the Criminal Court in a formal notice of indictment and transfer. As well, revealing there are three types of indictments: "CCI" indictment; "Waived" indictment, and; "WGJ" indictment. Further revealing "Waived" and "WGJ" constitute a "waived" case. A.D.A. Roque further stated as well, the designation "CCI" has only a clerical significance. Miss Gonzalez has made a sworn attestation as to receiving this letter, and its communication. The originals will be produced in open court (Attached hereto and marked as Exhibit "11" [Copy of A.D.A. Roque's 8/11/11 letter with envelope]; Attached hereto and marked as Exhibit "12" [Copy of sworn attestation]).

15. By letter dated November 13th of 2012, Miss Gonzalez wrote to A.D.A. Roque and asked her, "What does "WGJ" precisely stand for? Is it "Waived Grand Jury" or "Withdrawn Grand Jury"?" Miss Gonzalez has made a sworn attestation as to her inquiry. The original will be produced in open court (Attached hereto and marked as Exhibit "13" [Copy of November 13th of 2012 letter]; Attached hereto and marked as Exhibit "14" [Copy of sworn attestation]).

16. A.D.A. Roque, in response, sent Miss Gonzalez a copy of her previous August 11th of 2011 response letter, with handwritten notations and highlights. A.D.A. Roque highlighted the word "waived" and placed a star (*) to the left of the highlighted word "waived." A.D.A. Roque at the bottom of the page handwrote, "* Waived, not withdrawn." It is most evident the answer to Miss Gonzalez's inquiry was that, "WGJ" means Waived Grand Jury. Miss Gonzalez has made a sworn attestation as to receiving this response. The originals will be produced in open court (Attached hereto and marked as Exhibit "15" [A.D.A. Roque's response and envelope]; Attached hereto and marked as Exhibit "16" [Copy of sworn attestation]).

17. A viewing of indictment 1647/91 reveals, the file date, thereafter to the direct right the typewritten letters "CCI" which is crossed out by hand, and a handwritten "W" placed above the crossed out "CCI" letters. The G.J. Foreman's signature was redacted by a Court Clerk (Ex,'s 3 & 5).

18. A viewing of indictment 11987/91 reveals, the file date, thereafter to the direct right the typewritten word "WAIVED".

Once again, the Grand Jury Foreman's signature was redacted by a Court Clerk (Ex.'s 2 & 6).

19. As for indictment 1647/91, it is clear the handwritten "W" meant "WAIVED". After all, A.D.A. Roque identified the "W" in "WGJ" as waived.

20. By the words of the N.Y. County D.A.'s office, the meaning of the clerical significance of "WAIVED" and "WGJ" (Waived Grand Jury) is "Waived Case", the document status designation. Thus, petitioner's prosecution under indictment 1647/91 and 11987/91 were indeed discontinued, via indictment, according to the D.A. office's document status designation.

21. Most definitely the above is so. Just as a **waived grand jury** creates no indictment for prosecution, Hughes v. Farray, 11 Misc.3d 1067(A)(N.Y. County 2006)("[D]efendant **waived grand jury** indictment and was prosecuted by a ... superior court information."); People v. Wilson., 12 Misc.3d 1195(A)(Kings County 2006)("He **waived grand jury** action and plead guilty ... to Kings County Superior Court Information."), so does the word "WAIVED" have the same effect of a Waived Grand Jury, thus constituting a "Waived Case", as the clerical significance's "WAIVED" and "WGJ" are jointly mentioned with the same document status designation "WAIVED CASE", signed by the Grand Jury Foreman. This is indisputable, the Grand Jury Foreman signed off on the clerical significance, the filing made it final, e.g., People v. Montanez, 90 N.Y.2d 690, 694 (1997)(Grand Jury dismissal not final until filed thereby constituting a final finding).

22. Irrespective of whether or not petitioner waived grand jury action the same result above obtains. Once again, the Grand Jury Foreman signed off on the clerical significance, a final finding as the accusatory instrument was filed.

23. The below is further proof the letters "W", "WGJ", and the word "WAIVED" have nothing to do with Supreme Court.

24. On February 12th of 1991, petitioner was arraigned in the Criminal Court of N.Y.C., Part AR3. The court held your petitioner for the action of the grand jury, setting bail and the CPL §180.80 date for Part "F" on February 15th of 1991. Before concluding the court asked counsel if petitioner wished to testify before the grand jury, answering, "Well, we have not decided yet" (Exhibit "10"; Attached hereto and marked as Exhibit "17" [2/12/91 arraignment transcript]).

25. Miss Gonzalez, at petitioner's request, on October 18th of 2012, acquired from petitioner's court file the "RECORD OF COURT ACTION." Various copies were Certified and placed under the seal of the court. Miss Gonzalez has made a sworn attestation as to acquiring the Record of Court Action sheet. The originals will be produced in open court (Attached hereto and marked as Exhibit "18" [Copy of Certified Record of Court Action sheet]; Attached hereto and marked as Exhibit "19" [Copy of sworn attestation]).

26. A viewing of the "RECORD OF COURT ACTION" sheet reveals, there was court action on February 15th of 1991 in Part "F", before the Hon. Sheryl L. Parker. The Record of Court Action sheet further stated, "INDICTED TRANSFERRED TO SUPREME COURT."

The present section box revealed petitioner's attorney and petitioner were present. This pertained to indictment 1647/91.

27. It is beyond question, there was a proceeding with your petitioner's counsel and petitioner being in attendance, with direction by the court, thus involving the Clerk of the Court as there was a formal notice of indictment and transfer, as ordered.

28. It is beyond question, the showings above reveal indictments 1647/91 and 11987/91 were "waived cases", discontinued via indictment, and had nothing to do with a waiver to the case to supreme court, as evidenced by the N.Y.C. Criminal Court documents and the arraignment transcript.

29. While, it is undeniable a status designation of an indictment is important in determining the level of judicial involvement pertaining to jurisdiction, the trial prosecutor should not of have hoodwinked the trial court into acquiring jurisdiction, fully knowing the status designation constituted a "waived case", fully unbeknownst to the trial court. A total disrespect and disgrace to the N.Y. Constitution, U.S. Constitution, the People of the State of New York, and the criminal justice system.

30. In sum, the trial prosecutor exhibited gross reckless Constitutional abandonment as he allowed petitioner, by will alone, to be prosecuted, without an indictment being filed, thereby denying your petitioner of process due, in direct violation of N.Y. Const. Art. I, §6 and the 14th Amendment of the U.S. Const., as he ignored the filed status designation.

Instead of seeking a new indictment.

31. Indeed, your petitioner is an unconstitutionally/illegally imprisoned N.Y. & U.S. Citizen, restrained of his Liberty interest, who as a matter of law is not considered prosecuted, as no indictments were filed for a basis of prosecution. Clearly the mandates are null & void.

32. That in consequence of the aforesaid, your petitioner is unconstitutionally/illegally imprisoned, without due process of law, infringing on petitioner's Liberty interest, in violation of Article I, §6 of the N.Y. Constitution and the 14th Amendment of the U.S. Constitution.

33. In light of the foregoing circumstance, habeas corpus relief is the proper remedy at law, even if the issue/ground is not raised on direct appeal or in a post conviction proceeding, as held by the N.Y. State Legislature and the N.Y. Court of Appeals. Therefore, should this Court dismiss/deny your petitioner's habeas petition on the basis that the issue/ground could have been raised on direct appeal or in a post conviction proceeding, such a ruling would be unconstitutional as it would amount to a violation of due process of law, as well amounting to an unconstitutional suspension of the writ. This is so for the reasons below.

34. In 1920 civil procedure was governed by the Civil Practice Act, Roslyn, Union Free School Dist. v. Barken, 16 N.Y.3d 643, 651 (2011), which was replaced by the Civil Practice Law and Rules, Parochial Bus System, Inc. v. Board of Educ. City of New York, 60 N.Y.2d 539, 545 (1983); Thomas v. Melbert Foods,

Inc., 19 N.Y.2d 216, 223 (1967).

35. During the enactment of the Civil Practice Act, two Court of Appeal rulings held habeas corpus relief for jurisdictional issues/grounds is available, even when the jurisdictional issue/ground is not raised on direct appeal:

> Although the challenge to the jurisdiction of the Magistrates' Court could have been raised by the defendant on appeal from the judgment of conviction (see People v. Scott, 3 N.Y.2d 148, 164 N.Y.S.2d 707), and although that might have been a more orderly and regular method of procedure, the right to invoke habeas corpus, "the historic writ of liberty", the "greatest of all writs", is so primary and fundamental that it must take precedence over considerations of procedural orderliness and conformity. See U.S. Const. I, §9; N.Y. Const. art. I §4; People ex rel. Tweed v. Liscomb, 60 N.Y. 559, 591, supra; People ex rel. Sabatino v. Jennings, 246 N.Y. 258, 260, 158 N.E. 613, 614, 63 A.L.R. 1458. People v. Schildhaus, 8 N.Y.2d 33, 36 (1960).
>
> No such challenge to the jurisdiction was made during relator's trial or on his appeal to the Appellate Division from the judgment of conviction, which appeal resulted in a affirmance by that court (259 App. Div. 1065), or on a subsequent motion, denied by a Judge of this Court, for leave to appeal to this Court. We hold nonetheless, that the alleged jurisdictional question may properly be raised by these habeas corpus proceedings. (See People ex rel. Carr v. Martin, 286 N.Y. 27, 31, 32). People ex rel. Ray v. Martin, 294 N.Y. 61, 65 (1945).

36. The Court of Appeals in People v. Nicometi, 12 N.Y.2d 428, 431 (1963), made before CPLR took effect, even held, a jurisdictional defect can be raised at any time and can never be waived, and upon being substantiated undoubtedly presenting a

cognizable ground for the issuance of a writ of habeas corpus. As well, holding the issue can be remedied on appeal:

> Want of jurisdiction is a basic defect, not a trial error; it may be raised at any time and can never be waived. The record before us, therefore, contains a fundamental defect in the proceedings which could never be waived or cured, and such a defect in the record is disclosed "upon its face" (People v. Bradner, 107 N.Y. 1, 4, 13 N.E. 87; People v. Klein, 7 N.Y.2d 264, 267, 196 N.Y.S.2d 964, 967, 164 N.E.2d 845, supra; cf. People v. Kischel, 276 N.Y. 116, 11 N.E.2d 559, supra). Since this defect would undoubtedly be grounds for the issuance of a writ of habeas corpus, it most assuredly can be remedied on this appeal.

37. Since the rulings above were made during the time habeas corpus was governed by the Civil Practice Act, the legislative enactment of CPLR §'s 7001-7012 governing habeas corpus proceedings neither cites to the rulings above, nor does the language of the legislation make any effort to affect these decisions. "It is well settled that the legislative history of a particular enactment must be reviewed in light of the existing decisional law which the Legislature is presumed to be familiar with and to the extent it left it unchanged, that it accepted." Matter of Knight-Ridder Broadcasting v. Greenberg, 70 N.Y.2d 151, 157 (1987).

38. Thus, "it is a recognized principle that where a statue has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained (Id)."

39. It should be noted, "[t]he underlying concern, of course,

is that public policy determined by the Legislature is not to be altered by a court by reason of its notion of what the public policy ought to be" (Id., at 158).

40. The United States Supreme Court has held the same proposition in Forest Grove School Dist. v. T.A., 557 U.S. 230 (2009), 129 S.Ct. 2482, 2492 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statue and to adopt that interpretation when it re-enacts a statue without change."); See, Meilink v. Unemployed Reserves Commission of the State of California, 314 U.S. 564, 569-570 (1942)("We must give credit to a state legislature acting within its Constitutional sphere like that accorded to Congress acting in its Constitutional sphere."); Townsend v. Yeomans, 301 U.S. 441, 451 (1937)("But the Legislature, acting within its sphere, is presumed to know the needs of the people of the state."); 14 Penn Plaza, LLC v. Pyett, 556 U.S. 247, 270 (2009)("Absent a constitutional barrier, it is not for us to substitute our view of ... policy for the legislation which has been passed by Congress.").

41. Even the Court of Appeals in People ex rel. Keitt v. McMann, 18 N.Y.2d 257, 263 (1966), made during the enactment of the Civil Practice Law and Rules, recognized all the principles above by reflecting the rulings in People v. Schildhaus, Ray v. Martin, and People v. Nicometi state the correct and accepted legislative intent. In examining the history of CPLR §'s 7002(a) and CPLR 7003(a), the ruling acknowledged the Legislature did not intend to change the instances in which the writ was

available under the Civil Practice Act. That the Legislature did not make a new habeas corpus rule, recognizing the Court of Appeals decisional accretion in the increasing usage of habeas corpus. This is indisputable:

> Because this proceeding was brought under CPLR 7002 (subd. (a)) of which permits one 'illegally imprisoned or otherwise restrained in his liberty within the state' (see, also, CPLR 7003, subd. (a)) to institute habeas corpus proceedings, we have examined the history of the section and have concluded that the Legislature did not intend to change the instances in which the writ was available under the now repealed Civil Practice Act. Rather, it seems to us, what the Legislature did was not make a new habeas corpus rule, but merely recognized that we have, by the slow process of decisional accretion, made increasing use of 'one of the hallmarks of the writ *** its great flexibility and vague scope' (Third Preliminary Report of Advisory Committee on Practice and Procedure (N.Y. Legis. Doc. 1959, No. 17), p. 49; see Paulsen, Post-Conviction remedies in N.Y., 1959 Report of N.Y. Law Rev. Comm. (N.Y. Legis. Doc., 1959, No. 66(L)), p. 453 et seq.).

42. Clearly, it is well established, because the Legislature is presumed to be aware of the rulings in People v. Schildhaus, Ray v. Martin, and People v. Nicometi, as a matter of law, as reflected in Knight-Ridder Broadcasting v. Greenberg and Keitt v. McMann, and as the Legislature did not comment on or make any changes to blunt the effects of these rulings, it must be construed that the Legislature intended to incorporate these rulings - that habeas relief is still nonetheless still available to raise jurisdictional issues/grounds which were not raised on direct appeal.

43. Even the Court of Appeals in Keitt v. McMann, at 262, held, People v. Schildhaus is a case where "the right to invoke habeas corpus may take precedence over "procedural orderliness and conformity."" Further holding habeas corpus is the proper remedy for jurisdictional issues/grounds. That, in a non-jurisdictional matter, a substantiated fundamental Constitutional/Statutory deprivation meets the practicality and necessity prongs for habeas relief. That it is mere errors that may not pass.

> Our holding today that habeas corpus is available to test a claim that the introduction of certain evidence violated both due process and the privilege against self incrimination requires us to acknowledge that habeas corpus is an appropriate proceeding to test a claim that the relator has been deprived of a fundamental constitutional or statutory right in a criminal prosecution, including, but not limited to, the right to be tried and sentenced by a court having jurisdiction over the charge and the person.
>
> Departure from traditional proceedings, such as appeal, should be permitted only when dictated, as here by reason of practicality and necessity. We have emphasized that this is not a case where review of a mere error, allegedly committed at the trial is sought. In such case, the writ may not be utilized as a substitute for appeal or to gain review of the errors already passed on in an earlier appeal. id., at 262.
>
> Therefore, since relator is complaining that he is being incarcerated pursuant to a judgment of conviction which contains a deprivation of a substantial constitutional right on the face of the record, and since, if the claim is substantiated, his imprisonment would be illegal, we hold that habeas corpus is the proper remedy in these circumstances.

id., at 263.

44. It is beyond question, the Court of Appeals in Keitt v. McMann, made during the enactment of the CPLR, has interpreted Article 70 in the light of the conditions existing at the time of its passage, and held the same construction after its passage. Thus, adhering to the legislative intent and policy choice applicable to Article 70 proceedings, performing its judicial function to discern and apply the will of the Legislature, the proper work for the courts:

> The plain meaning of the language of a statue must be interpreted "in light of the conditions existing at the time of its passage and construed as the courts would have construed it soon after its passage. People v. Litto, 8 N.Y.3d 692, 697 (2007).
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> As we have repeatedly recognized, "[i]n matters of statutory ... interpretation, 'legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the [enactor].'" To that end, ascertaining legislative intent involves considering "'the spirit and purpose of the act and the object to be accomplished. Sedacca v. Mangano, 18 N.Y.3d 609, 615 (2012).
>
> We have consistently held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts (see Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 631 N.Y.S.2d 565, 655 N.E.2d 661 [1995]; Jiggetts v. Grinker, 75 N.Y.2d 411, 554 N.Y.S.2d 92, 554 N.E.2d 570 [1990]; McCain v. Koch, 70 N.Y.2d 109, 517 N.Y.S.2d 918, 511 N.E.2d 62 [1987]; Klostermann v. Cuomo, 61 N.Y.2d 525, 475 N.Y.S.2d 247, 463 N.E.2d 588 [1984],... Hurrell-Harring v. State, 15 N.Y.3d 8, 26 (2010).

> This Court has repeatedly declined to interfere with the Legislature's policy choices as beyond the realm of judicial authority (Iassetti v. City of New York, 94 N.Y.2d 183, 191, 701 N.Y.S.2d 332, 723 N.E.2d 81 [decided today]; Jensen v. General Elec. Co., 82 N.Y.2d 77, 603 N.Y.S.2d 420, 623 N.E.2d 547; Sherman v. Robinson, 80 N.Y.2d 483, 591 N.Y.S.2d 974, 606 N.E.2d 1365; Sheehy v. Big Flats Community Day, 73 N.Y.2d 629, 543 N.Y.S.2d 18, 541 N.E.2d 18; Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 417 N.Y.S.2d 920, 391 N.E.2d 1002; Matter of Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297). Moralez v. County of Nassau, 94 N.Y.2d 218, 224 (1999).

45. Thus, as a matter of law, habeas corpus is the proper remedy for jurisdictional issues/grounds, even if the issue/ground was not raised on direct appeal, as seen fit by the Legislature.

> "[F]or the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well to chose the goals themselves." People v. Litto, 8 N.Y.3d, at 705.

> N.Y. Const. Art. 6, §30 [Regulation of jurisdiction, practice and procedure of the courts].
>
> The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts. The chief administrator of the courts shall exercise any such power delegated to him or her with the advise

and consent of the Administrative board of the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statue or general rules.

****

Under the State Constitution the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature (N.Y. Const., art. VI §30). There are some matters which are not subject to legislative control because they deal with the inherent nature of the judicial function (see, e.g., Riglander v. Star Co., 98 App. Div. 101, 90 N.Y.S. 772, affd. 181 N.Y. 531, 73 N.E. 113). Generally, however the Legislature has the power to prescribe rules of practice governing court proceedings, and any rules the court adopt must be consistent with existing legislation and may be subsequently abrogated by statue (Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 303 N.Y.S.2d 633, 250 N.E.2d 690). In addition, court rules must be adopted in accordance with procedures prescribed by the Constitution and statue (N.Y. Const. art. VI §30; Judiciary Law §211[1][b]). A.G. Ship Maintenance v. Lezak, 69 N.Y.2d 1, 5-6 (1986).

[S]ection 30 of article VI of the Constitution explicitly grants the Legislature broad power to formulate rules of procedure, providing, as it does, that the courts may adopt 'regulations' as long as they are 'consistent with the general practice and procedure as provided by statue.' It does limit the Legislature's power to that which it 'has heretofore exercised,' and few would deny that there are some matters which, by virtue of the very nature of our governmental structure, are beyond the reach of legislative treatment. Nevertheless, the language of

> the constitution leaves little room for doubt that the authority to regulate practice and procedure in the courts lies principally with the Legislature. Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 247 (1969)

46. With respect to post conviction relief. In People v. Cuadrado, 9 N.Y.3d 362, 363-377 (2007), the defendant waived indictment and plead guilty to a charge contained in a superior court information. It was conceded by the D.A.'s office that, the waiver and plea were invalid. However, defendant appealed from his conviction without complaining of this jurisdictional defect. The Court of Appeals ruled that, the jurisdictional defect could not be raised for the first time in a motion to vacate the conviction, as defendant was barred under CPL §440.10(2)(c), for failing to raise the jurisdictional issue/ground on appeal.

47. It is clear CPL §440.10(1) is not the proper remedy. After all, the accusatory instruments were part of the court file. In any event, even if CPL §440 allowed review under your petitioner's circumstance, habeas relief was still available for the same reason that allows habeas relief when the jurisdictional issue/ground is not raised on direct appeal. This is so, as the Legislature has selected the method and chose the goal by allowing jurisdictional issues/grounds to be reached on habeas review. The Legislature in enacting CPL §440 said nothing about making the statue the exclusive remedy.

48. In light of all the foregoing, for this Court to hold your petitioner should have raised the jurisdictional issue/ground on direct appeal, or in a post conviction motion,

would be a failure of its judicial function to apply the will of the Legislature, as discerned by the Court of Appeals in Knight-Ridder and Keitt v. McMann. This Court must not engage in its own perception of what is equitable, rendering Article 70 relief ineffective by creating a non-existent loophole for dismissal/denial, when the legislative intent is to the contrary. A prohibited act, as this Court is to uphold the legislative intent of Article 70 regardless of consequences. This is so as the law in this State has never been that the clear and unambiguous legislative intent of a statue as interpreted, or Constitutional provision, may be overlooked entirely when it is seemingly inconsistent with the current practice and usage of the courts. Sedacca v. Mangano, 18 N.Y.3d 609, 615 (2012); Frank v. Meadowlakes Development Corp., 6 N.Y.3d 687, 691 (2006); People v. Cahill, 2 N.Y.3d 13, 100 (2003); Orens v. Novello, 99 N.Y.2d 180, 185 (2002); City of New York v. Stringfellow's of New York, LTD., 96 N.Y.2d 51, 56 (2001); Sutka v. Connors, 73 N.Y.2d 395, 403 (1989); Anderson v. Regan, 53 N.Y.2d 356, 362 (1981); Town of Smithtown v. Moore, 11 N.Y.2d 238, 244 (1962).

49. Thus, for this Court to rule your petitioner should have raised the jurisdictional issue/ground on direct appeal, or in a post conviction motion, such would amount to policy making, the functional equivalent of judicial legislation outside of this Court's Constitutional law-making authority (N.Y. Const. Art., VI §30), thereby legislating under the guise of interpretation when Knight-Ridder and Keitt v. McMann have already correctly

interpreted the legislative intent, leaving no room for construction as the interpretation is to be followed. As a result, no court has any right to add or take away from the legislative intent. Such an act would clearly be violative of the foundation of the separation of powers doctrine, as no court can enlarge or abridge rights conferred by statue, or invade recognized rights, nor impose additional procedural hurdles that impair statutory remedies. People v. Cahill, 2 N.Y.3d, at 100; People v. Owusu, 93 N.Y.2d 398, 408 (1999); People v. Ramos, 85 N.Y.2d 678, 687-688 (1995); People v. Finnegan, 85 N.Y.2d 53, 58 (1995); Knight-Ridder, 70 N.Y.2d, at 158; Sigety v. Hynes, 38 N.Y.2d 260, 266 (1975).

50. In sum, for this Court to hold your petitioner should have raised the jurisdictional issue/ground on direct appeal, or in a post conviction proceeding, would be violative of the Legislature's intent, in direct violation of the Constitutional mandate under N.Y. Const. Art., VI, §30.

51. As well, a dismissal/denial by this Court holding, the jurisdictional issue/ground could have been raised on direct appeal, or in a post conviction motion, in violation of the Legislature's intent, would amount to an unconstitutional denial of due process of law under N.Y. Const. Art., I, §6 and the 14th Amendment of the U.S. Const., as your petitioner is entitled to a merit determination in light of habeas corpus being the proper remedy at law, as held by the Legislature:

> The mandate of the Constitution of the United States that no State shall deprive a person of his liberty without due process is unheeded by a State ... where

a court having, "jurisdiction to redress the prohibited wrong" fails to accord to the injured person the remedy to which he is entitled. Morhous v. Supreme Court of New York, 293 N.Y. 131, 134 (1944).

[T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the State from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." Broddie v. Connecticut, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.E.2d 113 (1971). Logan v. Zimmerman, 455 U.S. 422, 429-430 (1982).

As our decisions have emphasized time and time again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. id., at 433.

Law, in its regular course of administration through the courts of justice, is due process, and, when secured by the laws of the state, the constitutional requisition is satisfied. Caldwell v. State, 137 U.S. 692, 697 (1875).

"We are not concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently one on which the opinion of the state court is not final.... Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in support.... [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless

> there is, or was afforded to him some real opportunity to protect it." Richards v. Jefferson County, Ala,, 517 U.S. 793, 804 (1996), citing, Brinherhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 6810682 (1930).

52. The writ of habeas corpus, an existing remedy at law, has not been destroyed for jurisdictional issues/grounds, evidenced by the fact a failure to raise the issue/ground on appeal is still reviewable. In a Constitutional sense, the writ of habeas corpus has not been destroyed as the "Legislature [cannot] deprive any person within the State of the privilege of a writ of habeas corpus." Hoff v. State, 279 N.Y. 490, 492 (1939). Clearly no court can as well.

53. Thus, for this Court to hold your petitioner's jurisdictional issue/ground could have been raised on direct appeal, or in a post conviction motion, such would amount to a denial of due process of law, as the writ of habeas corpus, the remedy at law, was the process due to your ppetitioner.

54. In sum, your petitioner is entitled to have the merits of the habeas petition presented and fairly judged.

55. As well, for this Court to dismiss/deny your petitioner's habeas petition holding, the jurisdictional issue/ground could have been raised on direct appeal, or in a post conviction motion, in violation of the Legislature's intent and due process of law, would amount to an unconstitutional suspension of the writ of habeas corpus, the proper remedy at law. As previously mentioned, just as the Legislature cannot deprive any person of the privilege of a writ of habeas corpus, so too a court may

not. N.Y. Const. Art., I, §4.

> Our constitutional guaranties of liberty are merely empty words unless a person imprisoned or detained against his will may challenge the legality of his imprisonment and detention. The writ of habeas corpus is the process devised centuries ago for the protection of free men. It has been cherished by generations of free men who had learned that it furnishes the only reliable protection of their freedom. The right of persons, deprived of liberty, to challenge in the courts the legality of their detention is safeguarded by the Constitution of the United States and by the Constitution of this State. The Legislature could not deprive any person within the State of the privilege of a writ of habeas coprus. N.Y. Const. art. 1, §4. Hoff v. State, 279 N.Y., at 492.

56. Thus, it is clear, for this Court to hold your petitioner could have raised the jurisdictional issue/ground on direct appeal, or in a post conviction motion, contrary to the Legislature's intent and due process of law, would amount to a direct violation of N.Y. Const. Art., I, §4, thereby suspending the writ of habeas corpus, as habeas corpus was the proper remedy at law, as held by the Legislature.

57. That in consequence of the aforesaid, your petitioner is unconsitutionally/illegally imprisoned and restrained of Liberty, without due process of law, in violation of Article I, §6 of the New York State Constitution and the 14th Amendment of the United States Constitution.

58. In sum, your petitioner is a wrongfully incarcerated N.Y. & U.S. Citizen, and demands his immediate discharge, forthwith.

59. With respect to the standard of review of this petition, your petitioner states the following.

60. As habeas corpus is designated as a special proceeding, CPLR §7001, such brings into play the parallel provisions of CPLR Rule 409(b) and CPLR §410 under Article 4 - Special Proceeding. People ex rel. Robertson v. N.Y. State Div. of Parole, 67 N.Y.2d 197, 201-203 (1986)(Applying the parallel provisions to CPLR §7009[c]). Thus, summary treatment of a habeas corpus proceeding is governed by the same standards that apply to a motion for summary judgment. Port of New York Authority v. 62 Cortlandt St. Reality Co., 18 N.Y.2d 250, 266 (1966)("The standard of summary judgment applied to actions should also be applied by the court to proceedings governed by CPLR 409 (Subd. (b))"). The standard of review pertaining to summary judgment motions appears in Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980):

> We repeat today a precept frequently stated where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do, and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement. id., at 560.
>
> We recently restated the principles applicable to the disposition of motions for summary judgment in Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065, 1067-1068, 416 N.Y.S.2d 790, 791-792, 390 N.E.2d 298, 299: "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must

> 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. (b)). Normally if the opponent is to succeed in defeating a summary judgment motion, he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form (e.g., Phillips v. Kantor & Co., 31 N.Y.2d 307, 338 N.Y.S.2d 882, 291 N.E.2d 129; Indig v. Finkelstein, 23 N.Y.2d 728, 296 N.Y.S.2d 370, 244 N.E.2d 61; also CPLR 3212. subd. (f)." We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rest his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (Alvord and Swift v. Stewart M. Muller Constr. Co., 46 N.Y.2d 276, 281-282, 413 N.Y.S.2d 309, 385 N.E.2d 1238; Fried v. Bower & Gardner, 46 N.Y.2d 765, 767, 413 N.Y.S.2d 650, 386 N.E.2d 258; Platzman v. American Totalisator Co., 45 N.Y.2d 910, 912, 411 N.Y.S.2d 230, 383 N.E.2d 876; Mallard Constr Corp. v. County Fed. Sav. & Loan Ass'n, 32 N.Y.2d 285, 290, 344 N.Y.S.2d 925, 298 N.E.2d 96).

61. Thus, when an opposition fails to meet the requirement to defeat a motion for summary judgment, when the cause of action is established, a movant's summary judgment **MUST** be granted in his favor as a matter of law. Zuckerman, 49 N.Y.2d, at 563-564; A.H.A. General Const., Inc. v. New York City Housing Authority, 92 N.Y.2d 20 (1998); Kaufman v. Silver, 90 N.Y.2d 204 (1997); Haynes v. Haynes, 83 N.Y.2d 863 (1994); Amatuli by Amatuli v.

Delhi Const. Corp., 77 N.Y.2d 525 (1991); Fairbanks Co. v. Simplex Supply Corp., 126 A.D.2d 882 (3rd Dept. 1987).

62. As well, under the circumstances above, summary judgment should be granted without a hearing, Robertson, 67 N.Y.2d, at 203, as "'bald conclusory assertions, even if believable , are not enough to [defeat summary judgment]'". S.J. Capelin Assoc. Inc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 342 (1974).

63. This Court should also note, while "it is proper for [a] court to look beyond a defendant's answer and deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense," Nassau Trust Co. v. Montrose Concrete Prod., 56 N.Y.2d 175, 182 (1982), the issue is not whether the answer raises a defense but whether the affidavit and proof submitted in opposition to the motion show any genuine basis for a defense, Curry v. McKenzie, 239 N.Y. 267.

64. In light of the above, this Court, while making a summary judgment determination **MUST** engage in issue finding, rather than issue determination, the function of the court, Ferrante v. American Lung Ass'n, 90 N.Y.2d 632, 630 (1997); Suffolk DDS v. James, 83 N.Y.2d 178, 182 (1994), and **MUST** not access credibility, Ferrante, 90 N.Y.2d, at 631, nor base a summary judgment decision on facts outside the record, independent knowledge, or other proceedings held before it, In Re Malone, 46 A.D.3d 975, 976 (2005).

Other Habeas Proceedings

65. That in August of 1996, an application for a writ of habeas corpus was asked for herein was made by your petitioner to the Hon. Phillip Berke at his Chamber in the County Courthouse of Washington, N.Y., which was denied. The issue presented was not a jurisdictional issue.

66. An appeal to the Appellate Division of the Third Judicial Department was taken, which affirmed the denial.

67. That in September of 1996, an application for a writ of habeas corpus asked for herein was made by your petitioner to the Hon. Phillip Berke at his Chamber in the County Courthouse of Washington, N.Y., which was denied. The issue presented was not a jurisdictional issue.

68. An Appeal to the Appellate Division of the Third Judicial Department was taken, which affirmed the denial.

69. That in August of 2008, an application for a writ of habeas corpus asked for herein was made by your petitioner to the Hon. Daniel K. Lalor at his Chamber in the County Courthouse of Greene, N.Y., which was denied. A jurisdictional issue was made claiming the indictment was procured by false evidence and false testimonies.

70. An Appeal to the Appellate Division of the Third Judicial Department was taken, which affirmed the denial.

71. That in July of 2009, an application for the writ of habeas corpus asked for herein was made by your petitioner to the Hon. Frank J. Labuda at his Chamber in the County of Sulivan, N.Y.. The issue presented was a jurisdictional issue.

The facts of the habeas petition solely revolved around instrument 11987/91, which was the only accusatory instrument provided. Petitioner asserted said indictment was filed as a waived instrument as the word "waived" appeared after the file date (Attached hereto and marked as Exhibit "20" [Sullivan County habeas corpus petition]).

72. Respondent asserted, there is a space after the word "waived" for indicating when an indictment is filed as a waived instrument, and that it is not filled in. In spite of the fact there being a file date already present (Attached hereto and marked as Exhibit "21" [Answer]).

73. Petitioner made reply, asserting no such space appears as claimed (Attached hereto and marked as Exhibit "22" [Reply]).

74. Justice Labuda dismissed the habeas petition holding, petitioner's reading of the indictment was wrong. That there is no indication on the indictment showing it was filed as a "waived" instrument (Attached hereto and marked as Exhibit "23" [Justice Labuda's Amended Decision & Order).

75. An appeal to the Appellate Division for the Third Judicial Department was taken, which affirmed the dismissal. The Appellate Court, however, did not reach the merits of Justice Labuda's Decision & Order, instead holding, your petitioner's argument could have been raised on direct appeal or in a CPL Article 440 motion, a ground not held by Justice Labuda. People ex rel. Franza v. Walsh, 76 A.D.3d 1160 (3rd Dept. 2010). Clearly this ruling was contrary to the Legislature's intent (¶'s 33-57 herein).

76. That in July of 2011, an application for the writ of habeas corpus was made by your petitioner to the Hon. James T. Hayden at his Chamber in the County Courthouse of Chemung, N.Y.. The issue presented was a jurisdictional issue. The habeas petition, including the facts and evidence within the Sullivan County habeas petition, was based upon additional new facts and evidence revolving around instrument 1647/91. In argument petitioner stated instrument 1647/91 reveals no date goes after the word "waived" in instrument 11987/91. Such proving the word "waived" in instrument 11987/91 stands as is. That indeed instrument 11987/91 was filed as a "waived" instrument. The new facts and instrument 1647/91 were never presented in any habeas petition and determined by any court (Attached hereto and marked as Exhibit "24" [Chemung County habeas petition]).

77. Respondent in answer did not deny the facts within the habeas petition, thereby admitting such as a matter of law under CPLR §3018(a). However, respondent asserted the issue/ground should have been raised on direct appeal or in a post conviction motion, as a basis for dismissal/denial (Attached hereto and marked as Exhibit "25" [Answer]).

78. Petitioner made reply contesting all of respondent's claims (Attached hereto and marked as Exhibit "26" [Reply]).

79. Justice Hayden wrote to Cyrus R. Vance, N.Y. County D.A., and invited him into the proceeding to state his position. Answering was petitioner's prosecutor who did not deny the facts of the habeas petition, thereby admitting. Simply joining in the Attorney General's answer (Attached hereto and marked as Exhibit

"27" [Justice Hayden's letter]; Attached hereto and marked as Exhibit "28" [Prosecutor's Answer]).

80. Petitioner made reply, directing the court to the reply against the Attorney General's answer (Attached hereto and marked as Exhibit "29" [reply]).

81. Justice Hayden dismissed the habeas petition, holding, the facts are not new in the habeas petition, that the issue was specifically decided by the Supreme Court of Sullivan County therefore res judicata and collateral estoppel applying (Attached hereto and marked as Exhibit "30" [Justice Hayden's Amended Order of Dismissal]).

82. An appeal to the Appellate Division of the Third Judicial Department was taken, which affirmed the dismissal. The Appellate Court held, your petitioner's argument before the Court was never "presented and determined" in the Sullivan County habeas proceeding, thereby negating Justice Hayden's ruling. However, for the basis of dismissal, without a remand, holding, your petitioner could have raised the argument on direct appeal or in an appropriate post conviction motion. People ex rel. Franza v. Walsh, 100 A.D.3d 1315 (3rd Dept. 2012). Once again, this ruling was contrary to the Legislature's intent (¶'s 33-57 herein).

83. That an application for a writ of habeas corpus was made by your petitioner to the Hon. Dennis S. Cohen at his Chamber in the County Courthouse of Livingston, N.Y.. Your petitioner raised the identical issue/ground presented in the Chemung County habeas petition, with the same evidence, asserting res

judicata and collateral estoppel do not apply, as the Appellate Court's affirmance was based upon a ground which was not held by the Chemung County habeas court (Attached hereto and marked as Exhibit "31" [Livingston County habeas corpus petition]).

84. Respondent, filing a motion to dismiss instead of an answer as ordered, did not deny the facts within the habeas petition, asserting collateral estoppel bars review. That petitioner is raising the exact same allegation which was rejected, when the Appellate Court in Franza v. Sheahan, cited within the motion to dismiss, found the allegation was not "presented and determined," thereby negating collateral estoppel (Attached hereto and marked as Exhibit "32" [Order to Show Cause & Motion to Dismiss]).

85. Petitioner made reply contesting all of respondent's claims, and apprised the court of the Franza v. Sheahan appellate decision (Attached hereto and marked as Exhibit "33" [Reply]).

86. In contravention of the Appellate Court's finding in Franza v. Sheahan Justice Cohen held, "The petition presented no ground not theretofore presented and determined (CPLR 7003(b)."Further holding, your petitioner's argument could have been raised on direct appeal or in a CPL §440 motion (Attached hereto and marked as Exhibit "34" [Justice Cohen's Order & Judgment]). Once again, this ruling was contrary to the Legislature's intent (¶'s 33-57 herein).

87. An appeal to the Appellate Division of the Fourth Judicial Department was taken, which is pending.

88. It is evident the respondents have engaged in chicanery,

and all of the court rulings are in violation of the Legislature's intent, unconstitutionally suspending the writ.

89. In light of the state of the previous habeas corpus proceedings there are no prohibitions preventing this Court from reaching the merits, as this petition includes additional new fact and evidence which were never "presented and determined" within any of the previous habeas corpus petitions.

> While we recognize that res judicata principles do not bar successive petitions for a writ of habeas corpus on the same ground (see, CPLR 7003[b]), orderly administration would require, at least, a showing of changed circumstances (see, People ex rel. Glendening v. Glendening, 259 App. Div. 384, 387, 19 N.Y.S.2d 693, affd. 284 N.Y. 598, 29 N.E.2d 926). People ex rel. Woodard v. Berry, 163 A.D.2d 758 (3rd Dept. 1990).

90. The above is so as courts are under a continuing duty to examine into the grounds of a petitioner's detention. Post v. Lyford, 285 A.D. 101 (3rd Dept. 1954).

91. As well, there are no prohibitions preventing habeas corpus review on the merits for another reason, as outlined below.

92. The Legislature's intent of CPLR §7010(c) unambiguously provides, "a final judgment shall be directed dismissing the proceeding,...." (See, CPLR Rule 411; CPLR Rule 5016(c).

> §7010. Determination of proceeding
>
> (c) Remand. If the person is not ordered discharged and not admitted to bail, a final judgment shall be directed dismissing the proceeding,....
>
> Rule 411. Judgment
>
> The court shall direct that a judgment be entered determining the rights of the

parties to the special proceeding.

Rule 5016. Entry of judgment

(c) Judgment upon decision. Judgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein.

93. Without question, it is legislatively mandated that, "a final judgment shall be directed dismissing the proceeding," this is the procedure prescribed by the Legislature exclusively for habeas corpus proceedings. CPLR §103(b):

§103. Form of civil judicial proceeding

(b) Action or special proceeding. All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized. Except where otherwise prescribed by law, procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings.

94. Thus, a directed final judgment constitutes the determination of a habeas corpus proceeding under CPLR §7010(c). Without a directed final judgment a previous habeas corpus proceeding cannot be considered successive under CPLR §7003(b) as there is no entry of a directed final judgment.

§7003. When the writ shall issue

(b) Successive petitions for writ. A court is not required to issue a writ of habeas corpus if the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will

not be served by granting it.

95. In sum, without a final judgment being directed and entered there are no prohibitions to a re-filing under CPLR §7002(a), which this Court must take action under CPLR §7003(a).

96. With respect to the Legislature's intent pertaining to appeals from habeas corpus proceedings, such appears under CPLR §7011:

> §7011. Appeal
>
> An appeal may be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under subdivision (a) of section 7003, or from a judgment made upon the return of such writ or order to show cause.

97. Thus, it is well established, "[n]o appeal lies from [a] "decision" of Supreme Court, ..." Berney v. General Accident Fire and Life Assurance Corporation, Ltd., 42 N.Y.2d 870, 871 (1977).

98. It is proven below there were no final judgments directed and filed by the clerk of the court in any of the previous habeas corpus proceedings. Thus, this proceeding may proceed under CPLR §7003(a).

99. The Sullivan County habeas court rendered a Decision & Order and an Amended Decision & order, not final judgments with direction. The only difference between the Decision & Order and the Amended Decision & Order is the change from counsel to petitioner (Ex "23"; Attached hereto and marked as Exhibit "35" [Decision & Order). The Appellate Court, without a final judgment with direction, "Ordered that the judgment is affirmed without cost." People ex rel. Franza v. Walsh, 76 A.D.3d 1160

(3rd Dept 2010).

100. The Chemung County habeas court rendered an Order of Dismissal and an Amended Order of Dismissal. In the Order of Dismissal Justice Hayden held petitioner was not legally detained. In the Amended Order of Dismissal Justice Hayden held petitioner was legally detained (Ex. "30"; Attached hereto and marked as Exhibit "36" [Order of Dismissal]). The Appellate Court, without a final judgment with direction, "Ordered that the judgment and the amended judgment are affirmed, without cost." People ex rel. Franza v. Sheahan, 100 A.D.3d 1315 (3rd Dept. 2012).

101. The Livingston County habeas court rendered an Order & Judgment, without direction (Ex. "34"). The appeal has been perfected, and is pending for decision in the Appellate Division for the Fourth Judicial Department. The case filing report reveals no judgment was entered (Attached hereto and marked as Exhibit "37" [case filing report]).

102. In light of the state of proceedings, it is clear there have been no final judgments with direction entered in any of the previous habeas proceedings. Thus, the habeas petition before this Court cannot be deemed successive under CPLR §7003(b), as there have been no determinations entered. This proceeding may proceed under CPLR §7002(a).

103. As for the Appellate Court decisions, clearly they are null & void as the Appellate Court was statutorily unauthorized, without jurisdiction, to render decisions as no appeal lies from a decision of the supreme court. Liscomb, 60 N.Y., at 568, 591.

104. As for collateral estoppel it does not apply to habeas proceedings. CPLR §7003(b); CPLR §103(b). In any event, collateral estoppel does not apply as there were no final judgments entered. Begelman v. Begelman, 170 A.D.2d 562, 563 (2nd Dept. 1991):

> The general rule is that "[a] decision or verdict upon which no final judgment has been entered has no conclusive character and is ineffective as a bar to subsequent proceedings."

Wherefore, your petitioner prays that a writ of Habeas Corpus issue directed to Superintendent William J. Connolly, or whosoever has custody of Dominic M. Franza, commanding him to produce the body of the said Dominic M. Franza before this Court, so that the cause and detention of your petitioner may be inquired into to the end that your petitioner may be discharged from imprisonment.

Dated 3/10/14

Dominic M. Franza

VERIFICATION

I, Dominic M. Franza, being duly sworn, state: The foregoing petition is true to my own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters I believe it to be true.

Dominic M. Franza
92A3659

Subscribed to and sworn to before me

this 26 day of March, 2014

Notary Public

PETER E CARDWELL
Notary Public, State of New York
No. 01CA6248895
Qualified in Dutchess County
Commission Expires Sept. 26, 2015