

**Ex. 10**

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.

AFFIDAVIT IN  
OPPOSITION

Index No. 1872-2014

Hon. Peter M. Forman  
A.J.S.C.

-----X

State of New York )  
County of Dutchess ) ss.:

I, Dominic M. Franza, being duly sworn, deposes and say:

1. I am the petitioner in the above captioned case and make this affidavit in opposition to respondent's motion to dismiss, and supplemental motion to dismiss, as respondent's motions are meritless, which contain misrepresentations as well. Most important of all proving petitioner is unlawfully imprisoned warranting habeas corpus relief immediately, as petitioner has met the statutory threshold for such relief in light of respondent's motion to dismiss.

2. Being statutorily authorized to make a motion to dismiss under CPLR Article 4 Special Proceedings §404(a), respondent moved to dismiss pursuant to CPLR §3211(a)(5)(7) on the grounds that the cause of action is barred by reason of the principles of collateral estoppel and res judicata, and that petitioner's

petition fails to state a cause of action for habeas relief (Respondent's notice of motion & affirmation p. 1).

§404. Objection in point of law

(a) By respondent. The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court may permit the respondent to answer, upon such terms as may be just;....

3. It should be noted, the N.Y. Court of appeals in People ex rel. Robertson v. New York State Division of Parole, 67 N.Y.2d 197, 201-203 (1986) held, the general provisions of CPLR Article 4 apply to a habeas corpus proceeding.

4. Thus, the CPLR statutory provision under §3211 applies to habeas corpus proceedings as such proceeding is a special proceeding, CPLR §§ 101 & 103; CPLR 7001:

§7001. Application of article; special proceeding

Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention. A proceeding under this article is a special proceeding.

§101. Short title; application

The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute.

§103. Form of civil judicial proceedings

(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.

5. As respondent has moved under CPLR §3211(a)(5)(7), this "Court[] must accept the facts as alleged in the [petition] as true, [and] accord [petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." ABN AMRO Bank, N.V. v. NBIA Inc., 17 N.Y.3d 208, 227 (2011); see, Schwab v. McElligott, 282 N.Y. 182 (1900)(deemed admitted); Signature Bank v. Holtz Rubenstein Reminick, 109 A.D.3d 465, 466 (2nd Dept. 2013).

6. In light of the foregoing, irrespective of any claimed impediment, petitioner has met the statutory threshold for a forthwith discharge from custody, as the facts within petitioner's petition must be accepted as true, as a matter of law, which state a cognizable ground for habeas corpus relief as held by the Legislature and N.Y. Court of Appeals, CPLR §§ 7002(a), 7010(a)(Petition pp. 2-30 ¶¶ 8-64).

§7002. Petition

(a) By whom made. A person illegally imprisoned or otherwise restrained in his liberty within the state, ..., may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance. A judge authorized to issue writs of habeas corpus having evidence, in a judicial proceeding before him, that any person is so detained shall, on his own initiative, issue a writ of habeas corpus for the relief of that person.

§7010. Determination of proceeding

(a) Discharge. If the person is illegally detained a final judgment shall be directed discharging him forthwith.

7. Based upon all the above respondent's motion to dismiss and supplemental should be denied in their entirety.

8. As this Court, evidenced by the issuance of an order to show cause, has found it is clear that there is no disputable issue of fact, CPLR §7003(a), petitioner ask for forthwith mandated release as an answer would be inconsequential. Should this Court decide to permit respondent to answer, pursuant to CPLR §404(a), petitioner ask that this Court order the answer to be forthwith, after all respondent has had over two months from the date of service to prepare the pleading. In the event, petitioner ask this Court for fifteen (15) days to prepare a reply.

9. In any event, the motion to dismiss should be denied for the following reasons.

10. In response to ¶2 of respondent's affirmation, such is an intentional misrepresentation. Petitioner is not seeking release from custody based upon the improperly filed indictment marked "W" (1647/91), as this accusatory instrument is not the accusatory instrument petitioner went to trial on. It is beyond question, petitioner sought release from custody based upon the F.O.I.L. responses, attestations, and other documents, that proved the accusatory instrument (11987/91) petitioner went to trial on was filed as a waived instrument constituting a waived

case as held by the N.Y. County D.A.'s office, which superseded accusatory instrument 1647/91. This was done to mislead this Court (Petition pp. 7-13 ¶¶ 10-32).

11. In response to ¶3 of respondent's affirmation, petitioner's claim is not barred by the principles of res judicata and collateral estoppel for the reasons below.

12. As previously mentioned herein at ¶4, the statutes enacted by the Legislature, CPLR §§ 101 and 103(b), are clear, the general provisions of the CPLR do not apply where a procedure is regulated by an inconsistent statute prescribed by law.

13. Article 70 of the CPLR governs the procedure for habeas corpus, the historic writ that protects the liberty of a free people. CPLR §7003(b) governs successive petitions for the writ of habeas corpus, which is an inconsistent statute prescribed by the Legislature for successive habeas petitions. A simple reading of the statute clearly reveals the Legislature's intent that, res judicata and collateral estoppel do not apply.

§7003. When the writ shall issued

(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.

14. Another factor that reveals petitioner's petition is not successive is as follows.

15. As previously mentioned in the petition the Appellate

Division for the Third Judicial Department in People ex rel. Franza v. Sheahan, 100 A.D.3d 1315 (3rd Dept. 2012) held, the facts and evidence before the habeas court, revolving around accusatory instruments 1647/91 and 11987/91, were never "presented and determined" in the previous habeas petition which solely revolved around accusatory instrument 1647/91. While the petition before your Honor contains the same facts and evidence, which have not been found to be "presented and determined", this petition also contains the F.O.I.L. responses, attestations, plus other documents, obviously never "presented and determined" by any habeas court. Thus, under the circumstances, as a result petitioner's petition cannot be statutorily classified as successive under CPLR §7003(b), as there are facts and evidence which were never "presented and determined" as a matter of statutory law. As for the Appellate Court's decision in People ex rel. Franza v. James, it is clearly in error (Petition pp. 31-35 ¶¶ 71, 76, 81-87; Respondent's Exhibit "A").

16. Lastly, petitioner would like to mention below, again, the Appellate Division Third Judicial Department's ruling, which holds res judicata does not bar successive habeas petitions (Petition p. 36 ¶89):

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).

17. 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)(Petition p. 36 ¶90).

18. In light of all the foregoing res judicata and collateral estoppel do not apply to habeas corpus proceedings as a matter of statutory law.

19. In response to the second ¶3 of respondent's affirmation, it should be noted, respondent did not cite any cases negating the Legislature's intent and public policy, which fully supports petitioner's assertion that, there have been no final judgments directed. As well, respondent did not cite any cases negating the Legislature's intent and public policy, and the Court of Appeals ruling which held the Appellate Courts did not have jurisdiction over the appeal.

20. Respondent himself has proven petitioner's assertion to be true by stating, A.J. Cohen's order was denominated a judgment, and the orders functioning as judgments. As well, the Appellate Courts construing the orders as judgments. All this was contrary to the Legislature's intent and public policy under CPLR §§ 7010(c) and 7011:

§7010. Determination of proceeding

(c) Remand. If the person detained is not ordered discharged and not admitted to bail, a final judgment shall be directed dismissing the proceeding,.....

§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.



Statutes §2. Lawmaking power vested in Legislature

Under the Constitution and provisions therein for distribution of governmental powers, the Legislature is given the power to determine policy and make laws.

Statutes §126. Public, governmental, or legislative policy

Public policy of the State is evidenced by expression of the will of the Legislature, contained in statutory enactments, and such policy is material in the exposition of legislative intent in other statutes in case of ambiguity.

Statutes §114. General words not limited

If there is nothing to indicate a contrary intent on the part of the lawmakers, terms of general import in a statute ordinarily are to receive their full significance.

Statutes §173. Mode of performance of act not material

A statute directing the performance of an act in a specific mode, which is not material, will be considered as directory only; but when the mode is prescribed so as to prohibit the performance in any other manner, the statute will be considered mandatory.

21. It is beyond question, the Legislature's intent and public policy mandates "a final judgment shall be directed dismissing the proceeding." The law is clear within the petition (Petition pp. 36-38 ¶¶92-95).

22. It is also beyond question the Legislature's intent and public policy mandates "an appeal may be taken from a judgment," not a decision, as "[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)(Petition p. 38 ¶97).

23. In sum, there have been no final judgments directed as mandated, as a result this proceeding cannot be statutorily considered successive under CPLR §7003(b) (Petition pp. 38-40 ¶¶ 98-103).

24. In response to ¶4 of respondent's affirmation, every case cited is contrary to the legislature's intent and public policy. As well, the Court of Appeal decisions cited in the petition. It should be noted, the Court of Appeals decision cited by respondent, People ex rel. Chakwin v. Warden, New York City Correctional Facility, Rikers Island, 63 N.Y.2d 120, 123, 127 (1984), supports petitioner's position. In that case, relator petitioned for a writ of habeas corpus based on his alleged unlawful detention in violation of CPL §30.30 (Subd 2, par. 2, [a]). The Court of Appeals reversed the appellate decision and granted the writ with direction to do so (Petition pp. 13-27 ¶¶ 33-58).

25. Based upon the Legislature's intent and public policy, as well the Court of Appeal rulings, which mandate that petitioner's jurisdictional issue/ground is cognizable for habeas corpus relief even if the issue/ground is not raised on direct appeal or in a post conviction motion, petitioner is not bound by the decisions of the Supreme Court or the Appellate Courts, as such rulings are unconstitutional as they have suspended the writ. As well, for the previous reason that no final judgment was directed, thereby rendering the decisions

non-determinations pursuant to CPLR §7010. Determination of proceeding (c) (Petition pp. 13-27 ¶¶ 33-58).

26. At this juncture petitioner would like to apprise the Court of a Second Department ruling, People ex rel. DeLia v. Munsey, 2014 Slip Op. 1782, 2014WL1043805, \*3 & \*5, March 19, 2014, that fully supports petitioner's assertion that, the writ of habeas corpus is primary and fundamental which must take precedence over considerations of procedural orderliness and conformity:

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" (People v. Schildhaus, 8 N.Y.2d 33, 36, 201 N.Y.S.2d 97, 167 N.E.2d 640 [internal quotation marks omitted]; see People ex rel. Tweed v. Liscomb, 60 N.Y. 559, 565 ["Relief from illegal imprisonment by means of this remedial writ is not the creature of any statute. The history of the writ is lost in antiquity. It was in use before magna charta, and came to us as part of the common law of the State"]. Hence the great writ is not derived from any statute or constitution, but is a fundamental right deeply rooted in our society. Further, the United States and New York Constitutions each provide that the privilege of a writ of habeas corpus shall not be suspended unless, in case of rebellion or invasion, the public safety requires it (see U.S. Const., art. I, §9 cl. 2; N.Y. Const., art. I, §4).

"A person illegally imprisoned or otherwise restrained in his liberty within the state ... may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance" (CPLR 7002[a]). CPLR 7001 provides, in relevant part, "Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory writs of

habeas corpus and common law writs of certiorari to inquire into detention." Although codified in CPLR article 70, the writ of habeas corpus is a "part of the common law of this State" (People ex rel. Lobenthal v. Koehler, 129 A.D.2d 28, 30, 516 N.Y.S.2d 928).

27. At this juncture petitioner, again, would like to assert his right to enforce a civil right to habeas corpus relief, N.Y. Adv. Comm. on Prac & Proc., Third Prelim. Rep., Legis. Doc. No. 17, p. 49 (1959)(Purpose of habeas corpus is to enforce a civil right).

28. CPL Articles 440, 460, 470 contain no language barring petitioner's common law remedy. The rule is that 'a statute in the affirmative, without any negative expressed or implied, takes away no preexisting rights or remedies; as a general rule, it operates merely to furnish an additional remedy for the enforcement of a right' (Statutes §34):

Statutes may be classified as affirmative or negative; and an affirmative statute generally operates merely to furnish an additional remedy for the enforcement of a right.

Statutes 395. Cumulative or exclusive statutes

A statute which provides a new remedy for an existing right does not abrogate the existing remedies for enforcing the same right.

29. As the Legislature has not barred the common law remedy of habeas corpus, petitioner enforces his civil right to relief under habeas corpus. This is petitioner's election, Tremain v. Richardson, 68 N.Y. 617 (1877). See, CPLR §104 (Emphasis added).

30. In sum, I am entitled to habeas corpus relief, the proper

remedy at law.

31. In response to ¶15 of respondent's affirmation, every case cited is contrary to the Legislature's intent and public policy under CPLR §7012:

§7012. Redetention after discharge

A person discharged upon the return of a writ of habeas corpus shall not be detained for the same cause, except by virtue of a subsequent lawful mandate.

32. The statute is clear, petitioner cannot be held for the same cause. Thus, petitioner is entitled to immediate release.

33. As for respondent claiming, "a defective indictment would, at best, mandate further proceedings in criminal court and not immediate release from custody," this is ludicrous. This is a civil proceeding, and the granting of habeas relief still leaves the conviction in place, as habeas corpus relief does not vacate a conviction. Therefore, there would be no further proceedings in supreme court or criminal court. The only way for there to be further proceedings the conviction itself would have to be vacated.

34. What respondent fails to realize is petitioner is not claiming the indictment is invalid. Petitioner is claiming a waived indictment was filed. In other words, no indictment was filed for jurisdictional purposes. Under this circumstance, N.Y. Const., Article. I, §6 forbids petitioner's imprisonment, directing that petitioner not be held, period. Most surely petitioner is entitled to forthwith release (Petition pp. 2, 7-14 ¶¶ 8, 10-32).

35. With respect to respondent's supplemental affirmation, in

light of all the foregoing herein, it is a travesty that such relief is asked for. There is nothing frivolous, and this petition clearly presents new facts and evidence from the N.Y. County D.A.'s office that proves indictment 11987/91 was filed as a waived instrument, constituting a waived case. New facts and evidence that were never before any previous habeas court, therefore not being "presented and determined."

36. With respect to respondent's assertion in ¶2, that petitioner failed to inform and provide the December 19, 2012 decision, such is a blatant lie. Petitioner provided such within petition Exhibit "34" for this Court's review.

37. It is petitioner who should ask for sanctions against the Attorney General's office. From day one to the present petitioner has been saying the indictment was filed as a waived instrument, and every time the Attorney General's office has wrongfully opposed. Petitioner has been right all along as the documents from the N.Y. County D.A.'s office proves. While Petitioner would be within his right to ask for sanctions, under the circumstances, petitioner will not.

38. In light of the circumstances herein, this Court is clearly faced with a major decision. Petitioner has full trust and faith that this Court will uphold Judicial Canno 3 under (B)(1)(4). Petitioner also trust this Court will uphold the Constitutional Oath taken. This Court must be above reproach, and not be tarnished.

**WHEREFORE**, by reason of the foregoing, petitioner prays that the motion to dismiss, and supplemental be denied in their

entirety.

*Dominic M. Franza*  
\_\_\_\_\_  
Dominic M. Franza  
92A3659

Subscribed to and sworn to before me  
this 1 day of August, 2014

*[Handwritten Signature]*  
\_\_\_\_\_  
Notary Public

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

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.

Affidavit of Service  
Index No. 1872-2014  
Hon. Peter M. Forman  
A.S.C.J.

-----X

State of New York )  
County of New York ) ss.:

I, Rose Marie Gonzalez, being duly sworn, deposes and says:

I am over the age of eighteen, and reside at 2086 Second Avenue, New York, N.Y. 10029.

On the 5<sup>th</sup> day of August, 2014, I served a true copy of the attached affidavit in opposition upon Eric T. Schneiderman, Attorney General of N.Y., at One Civic Center, Suite 401, Poughkeepsie, N.Y. 12601-3157, by U.S. Postal first class mail.

*Rose Marie Gonzalez*  
Rose Marie Gonzalez

Subscribed to and sworn to before me  
this 5<sup>th</sup> day of August, 2014

*[Signature]*  
\_\_\_\_\_  
Notary Public

JOHN W. GRACI  
NOTARY PUBLIC, State of New York  
No. 6617550  
Qualified in New York County  
Commission Expires May 31, 2018