To be argued by: Matthew Bova
20 Minutes Requested

Court of Appeals of the State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

APL 2022-00107

v.

ANTHONY DEBELLIS,

Defendant-Appellant.

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a May 19, 2022 order of the Appellate Division First Department. Appendix 2-3 ("A"); 205 A.D.3d 555 (1st Dept. 2022). That order affirmed an October 3, 2019 judgment of Bronx County Supreme Court convicting Appellant Anthony Debellis of second- and third-degree weapon possession and criminal possession of a firearm and sentencing him to seven years in prison followed by five years of post-release supervision (Lewis, J.). On August 8, 2022, Associate Judge Jenny Rivera issued a certificate granting leave to appeal. A1. This Court subsequently assigned the Center for Appellate Litigation to this appeal. 38 N.Y.3d 1159 (2022). Appellant is currently incarcerated under the judgment at issue.

This Court has jurisdiction to review the ineffective-assistance-of-counsel questions presented here as they present questions of law. C.P.L. § 470.35(1), 450.90(1). Further, the ineffective-assistance claims raised here are not subject to preservation requirements. *People v. Jones*, 55 N.Y.2d 771, 773 (1981).

STATUTORY PROVISIONS INVOLVED

Penal Law § 265.20(a)(1)(f)

> § 265.20 Exemptions.
>
> a. [the criminal-weapon-possession statutes] shall not apply to:
>
> 1. Possession of [a weapon] by the following: . . .
>
> (f) A person voluntarily surrendering such weapon . . . provided that such surrender shall be made to the . . . the police commissioner or head of the police force or department thereof or to a member of the force or department designated by such commissioner or head; and provided, further, that the same shall be surrendered by such person in accordance with such terms and conditions as may be established by such superintendent, sheriff, police force or department. . . .

QUESTIONS PRESENTED

1. At this weapon-possession trial, defense counsel conceded guilt of weapon possession and failed to present the only applicable defense—voluntary surrender under Penal Law 265.20(a)(1)(f). Was counsel ineffective?

2. Before sentence was imposed, Mr. Debellis submitted a pro se motion for a new trial on the grounds of ineffective assistance of counsel. Sentencing counsel stated that he had to be relieved because he did not "think [he] was ineffective" and was, in fact, "very effective." Did sentencing counsel take a position adverse to Mr. Debellis' pro se motion, thus creating a conflict of interest?

SUMMARY OF THE ARGUMENT

A.

Unprepared and ignorant of the applicable law, defense counsel failed to provide effective representation in this weapon-possession case. *People v. Benevento*, 91 N.Y.2d 708, 713-14 (1998); *Strickland v. Washington*, 466 U.S. 668 (1984). Trial counsel conceded weapon possession before the jury but, due to ignorance of the law, failed to present the only applicable defense: voluntary surrender of a firearm under Penal Law § 265.20(a)(1)(f). Instead, counsel went all-in on a baseless temporary-and-innocent possession defense that, as the court correctly held, did not apply as a matter of law. Defense counsel's prejudicial course of conduct

effectively directed a guilty verdict against his own client. These fundamentally unfair convictions should be reversed. *Benevento*, 91 N.Y.2d at 713-14; *Strickland*, 466 U.S. 668.

* * *

The prosecution alleged here that Mr. Debellis possessed a firearm while driving on the Bronx River Parkway on September 19, 2018. The case proceeded to trial.

At trial, defense counsel conceded weapon possession. His factual theory was that Mr. Debellis was driving to a New York City Police Department ("NYPD") precinct to exchange his firearm for money under the NYPD's long-established gun buyback program. Opening: A816-18; Debellis: A1329, A1350-52 (testifying to that effect). Under that program, an individual can surrender a firearm to the police in exchange for money. The NYPD will accept the firearm "no questions asked." *See*, *e.g.*, *People v. Watson*, 163 A.D.3d 855, 862 (2d Dept. 2018); WEBSITE OF THE CITY OF NEW YORK, CASH FOR GUNS PROGRAM, available at https://portal.311.nyc.gov/article/?kanumber=KA-01306; WEBSITE OF THE CITY OF NEW YORK-NYPD-GUN BUYBACK PROGRAM (as of September 1, 2018) (accessed through the "Wayback Machine Internet Archive"),

https://web.archive.org/web/20180901234243/http://www.nyc.gov/html/nypd/html/community_affairs/gun_buyback_program.shtml.[1]

Under the plain text of Penal Law § 265.20(a)(1)(f), "a person voluntarily surrendering" a firearm to the police under the buyback program is "exempt[ ]" and "immun[e]" from weapon-possession prosecution. *See also Watson*, 163 A.D.3d at 862. But because counsel was ignorant of "a point of law fundamental to his case" and "failed to perform basic research on that point," counsel never requested a voluntary-surrender instruction. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); *People v. Nesbitt*, 20 N.Y.3d 1080, 1082 (2013).

Instead, after counsel (in opening) and Mr. Debellis (on the stand at trial) conceded firearm possession, counsel requested a common-law temporary and innocent possession instruction ("temporary-possession"). But as any reasonable lawyer would have discerned, this instruction was inapplicable because Mr. Debellis, whose firearm license had been revoked since 2016, concededly possessed this firearm unlawfully for more than a year. There was nothing "temporary" about this firearm

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[1] Although readily available, a copy of this New York City government webpage has been provided in a compendium for the Court's convenience.

possession. CJI (2d) Temporary and Lawful Possession ("A person has innocent possession of a weapon when that person comes into possession of the weapon in an excusable manner, and maintains possession, or intends to maintain possession, of the weapon *only long enough to dispose of it safely*.") (emp. added). Thus, the court denied the temporary-possession instruction. Charge Conference: A1390-96.

Because counsel requested the wrong defense instruction, the court charged *no* defense to weapon possession. And as Mr. Debellis (during his testimony) and counsel (during opening and closing) conceded firearm possession, the jury convicted Mr. Debellis of second-degree weapon possession (and lesser possession charges). The court sentenced Mr. Debellis to seven years in prison.

As shown in Point I, counsel's failure to pursue a voluntary-surrender defense constituted ineffective assistance. That critical blunder ultimately led defense counsel to concede guilt with no defense whatsoever. This incompetence was "extremely prejudicial. In essence, counsel's errors" led both Mr. Debellis and defense counsel to "admit to facts establishing both of the charged crimes and prevented the jury from considering the only means of transforming those admissions into a true

defense. Defense counsel's failure to know or investigate . . . basic principles of criminal law deprived defendant of meaningful representation, and doomed the defense to failure." *People v. Logan*, 263 A.D.2d 397, 397-98 (1st Dept. 1999). This conviction, the result of a fundamentally unfair trial, should be reversed. *Benevento*, 91 N.Y.2d at 714; *Strickland*, 466 U.S. at 693-94.

B.

Furthermore, counsel was ineffective at sentencing on conflict-of-interest grounds as he took a position adverse to his client's motion for a new trial. Point II; *People v. Washington*, 25 N.Y.3d 1091, 1095 (2015); *People v. Mitchell*, 21 N.Y.3d 964, 966-67 (2013). At the sentencing hearing, counsel (who represented Mr. Debellis at trial) stated that his client's pro se motion, which had argued that he was ineffective, lacked merit. A1514-15 (counsel stated, "I don't think I want to adopt the motion where I am accused of ineffective assistance . . . at this point, I think I am going to have to be relieved. . . . [H]e is making allegations in here that I am not going to argue on his behalf. I am not going to argue that I was ineffective. *I think I was very effective*. . . . I do not adopt this motion.") (emphasis added). As counsel took a position adverse to the

merits of Mr. Debellis' motion, a conflict of interest arose requiring assignment of new sentencing counsel. *Washington*, 25 N.Y.3d at 1095; *Mitchell*, 21 N.Y.3d at 966-67. A new sentencing hearing should therefore be ordered.

STATEMENT OF FACTS

A. The Prosecution's Theory

The prosecution alleged that Mr. Debellis possessed a loaded firearm while driving a car on the Bronx River Parkway on September 19, 2018. The prosecution indicted Mr. Debellis for second-degree criminal possession of a weapon (loaded firearm) and lesser weapon-possession counts. A4-7; Penal Law § 265.03(3).[2]

The case proceeded to trial in September 2019. Mr. Debellis was represented by assigned counsel.

B. Defense counsel concedes possession in opening.

In opening, defense counsel conceded that Mr. Debellis possessed the firearm. Counsel pressed that, after a debilitating work accident seriously damaged Mr. Debellis' hand, he was prescribed painkillers and

[2] Mr. Debellis was also indicted for misdemeanor seventh-degree possession of a controlled substance. The jury acquitted him of that charge.

became addicted. Mr. Debellis' "life took a downturn." He lost his job and "serious marital problems" ensued. Mr. Debellis "had a gun at home" in his home upstate. "The gun, he bought legally[.]" But his "license had expired, we admit that, but he had it in a safe, and it was just there." A813-16.

On the day in question, defense counsel explained, Mr. Debellis argued with his wife over financial problems stemming from his addiction and unemployment. "In a fit of desperation," he decided to "turn [the weapon] in" to the NYPD in exchange for money. "That's what desperate people do." Mr. Debellis had "no criminal intent . . . He was holding those items . . . for a legitimate purpose, for a temporary period of time, to bring to the police, get rid of it. Not going to commit a crime. That's what happened here." A815-18.

C. The Traffic Stop[3]

At 3:35 p.m. on September 19, 2018, Officer Allen pulled Mr. Debellis over on the Bronx River Parkway (southbound) because he was driving a car with a suspended registration. The traffic stop was recorded with

[3] This statement of facts discussed in this section is based on the prosecution's witnesses' testimony and its video exhibit (Ex. 11).

Officer Allen's dash-cam. Pros. Trial Ex. 11 ("Video"). The camera recorded sound, but did not capture all of the conversations that ensued. Allen: A826-28, A941.

Officer Allen approached the driver-side window and asked Mr. Debellis for his license and registration. Mr. Debellis did not provide either. The officer saw a shiny object in Mr. Debellis' hand; Mr. Debellis said the object was a "magazine" and that he worked for the courts. Mr. Debellis also told Officer Allen that he had borrowed the car from a friend. Allen: A828-30, A865-66, A887; Video at 15:40-15:42; *see also* Debellis: A1304-06 (testifying about his career with the Citywide Administrative Services, where he worked under the supervision of the Office of Court Administration).

Officer Allen ordered Mr. Debellis out of the car and again requested identification. Mr. Debellis told the officer that he had left his house in a hurry after a fight with his wife. Officer Allen walked to the passenger side of the car and found a bag. Inside, the officer located ammunition (43 rounds), a holster, and another magazine. The officer asked Mr. Debellis if there was a gun in the car; Mr. Debellis said no. Mr. Debellis told the

officer that he had grabbed the bag while rushing out of his house. Allen: A830-31, A854, A866-67, A894; Video 15:42-15:43.

Mr. Debellis informed Officer Allen that he previously had a license to possess a firearm, but that it had been revoked. Officer Allen said that, if his gun had been seized, he should have put the ammunition in a safe. Mr. Debellis responded that the ammunition was in a safe in his house and, after an argument with his wife, he put the ammunition in a bag and ran out. Allen: A853-54, A894; Video 15:45-15:46.

At 4 p.m., an NYPD lieutenant arrived at the scene and spoke to Mr. Debellis without any audio recording device (for about four minutes). The lieutenant searched the car and found nothing. Video 15:56-16:02; Allen: A855, A869.

The officers decided to tow the vehicle because Mr. Debellis could not get in touch with the registered owner. While the officers and Mr. Debellis were standing by the trunk, Mr. Debellis asked whether he could retrieve his cell-phone charger from the car. Officer Allen allowed him to do so. Mr. Debellis then sat in the front driver's seat area for about two minutes and exited with the bag Officer Allen had previously searched. Video 16:18, 16:42-16:44; Allen: A856, A872.

Officer Allen then searched under the front driver's seat of the car and found a loaded firearm under the floor mat. He placed Mr. Debellis under arrest. Mr. Debellis informed the officer that he had purchased the firearm in Florida. A856-61, A878; *see also* A977.

Later that day in the precinct, Mr. Debellis ingested Xanax pills and told Officer Allen to "call [his] wife and tell her I'm just checking out." Officer Allen wrote on "medical treatment" forms that Mr. Debellis had tried to commit suicide. A876-78, A894-98.

D. Defense counsel presses a temporary-possession theory with the court.

During lengthy colloquies regarding the defense's position, which took place during the prosecution's case, counsel confirmed that his defense was temporary possession. *E.g.*, A918 (court asked, "What's the primary defense in this case," and counsel responded, "The primary defense in the case is that the defendant was acting in a legal and proper matter when he was going to turn over that gun to the police department. . . . He was harboring that item for a relatively temporary period of time for the purpose of legally turning it over to the police"); A1018-21 ("Essentially transitory possession. He took the gun for a temporary period of time to

deliver it to the police department and at the same time get a gift card from the [NYPD] for that purpose.”).

Counsel repeatedly conceded that Mr. Debellis’ license to possess the firearm had been revoked more than a year before the September 19, 2018 arrest at issue.[4] Nevertheless, he claimed “temporary” possession because Mr. Debellis removed the firearm for a “temporary” period to surrender it under the NYPD buyback program in exchange for money. A918, A1199, A1205-06. Counsel pressed that “even if he had [the gun] for years,” he could still claim temporary possession if he decided he was “going to temporarily possess this gun in the car to bring it to a police department.” A1206-07. Counsel cited no case law justifying his interpretation of the “temporary” requirement.

Counsel added a policy argument: if the temporary-possession defense did not apply to someone who was late in surrendering a firearm after license revocation, the person’s “back[ ] [would be] against the wall” and

[4] A1026 (“The permit was revoked some time before the arrest, but [the firearm] was kept in a secured location”), A1111 (admitting that the license was “expired”), A1191 (same), A1193-95 (“His license expired. We admitted it expired, right? There is no question about that.”); *see also* A1129 and A1197 (conceding that, in 2016, Mr. Debellis was previously ordered by a court to surrender his firearm).

he would just keep the firearm or throw it "in the woods" instead of surrendering it. A1105-07, A1111, A1160-63.

The prosecutor repeatedly responded that the possession was not temporary because Mr. Debellis possessed the firearm unlawfully for over a year before his arrest. A1107-08 (citing an order of protection from July 2017, which required that Mr. Debellis surrender any weapons, and adding that this fact "completely destroyed" any "temporary" claim); *see* A1161, A1195-98 (arguing that a March 2017 misdemeanor conviction under Penal Law § 400.00 for a firearm-regulation violation revoked any license as a matter of law), A1209; Penal Law § 400.00(11)(a) (a conviction of a "felony or serious offense shall operate as a revocation of the license"); Penal Law § 265.00(17) ("illegally using, carrying or possessing a pistol" constitutes a "serious offense").

Throughout these numerous colloquies, the court expressed skepticism of the temporary-possession defense because Mr. Debellis concededly possessed the firearm unlawfully for over a year.[5] The court

[5] A1025 (court reminded counsel, "Remember, the word is temporary"); 1103-05 ("[I]f the Court believes it's not temporary enough . . . then the court can take that away from the jury"); A1206 (counsel stated that the temporary-possession defense applied "[b]ecause he was taking that gun to dispose of it in a lawful manner to the

(footnote continued on next page…)

also told defense counsel that the precedents and the CJI instruction appeared to foreclose a temporary-and-innocent possession defense.[6]

As for counsel's policy concern that individuals won't surrender weapons "late" if they must fear prosecution, the court stated that this concern had to be addressed by the Legislature. A1107, A1111-12, A1160-61. "The Legislature makes those decisions, not individuals. . . . So back against the wall is a determination one makes. [A person is supposed to say to themselves,] I know what the law is, I know I turn in my gun [when the license is no longer valid]. My back is not against the wall. . . . When your driver's license expires you're supposed to stop driving. When your car is not registered you shouldn't be driving; do you see a pattern here[?]" A1162-64.

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police department"; court answered, "Here's where you're confused. No, he may not [ ] because of the length of time he possesses it. . . . [U]nder your theory, it could be 30 years and then when he decides to do something about it, that's when he turns in the gun. It's exactly the opposite of that.").

[6] A1103-05 (stating that it "is pretty clear that the quantum of proof on the temporary [issue] is really a problem. . . . it's a jury question, but under [Court of Appeals precedent], if the Court believes it's not temporary enough . . . then the court can take that away from the jury"); A1197-1208 (emphasizing that the standard requires "possession of a weapon, only long enough to dispose of it safely" and adding that "it took him over a year to divest himself of his possession . . . . Here's the problem you can't seem to grasp. . . . he comes into possession over a year [ago, but the] law requires a more immediate response. . . . it's immediate."); A1208 ("the turning in can't be whenever you have the urge. The charge is the problem. Only long enough to dispose of it [ ] safely") (quoting CJI (2d) Temporary and Lawful Possession).

After these lengthy discussions regarding the defense position, Mr. Debellis took the stand. A1304-57.

E. Mr. Debellis admits possession and testifies that he was bringing the weapon to the precinct under the buyback program.

Mr. Debellis testified that he resided in the Bronx, had been married for 15 years, and has two children. For 14 years, he had served as a building mechanic for the N.Y.C. Department of Citywide Administrative Services, working at 100 Centre Street under the supervision of the Office of Court Administration. He performed a wide range of tasks in city court buildings, including electrical work, plumbing, and carpentry. He had "hung up pictures for judges, plaques, placards, desks. . . . pretty much anything they needed me to do." He received numerous certificates of achievement at work, including eight certificates for perfect attendance as he had not taken sick leave for eight straight years. A1304-05, A1312.

In 2014, Mr. Debellis fell off a ladder at work while fixing a light and sliced open his finger. A doctor prescribed Oxycodone for the pain caused by nerve and ligament damage. After being out of work for a month, he had not fully recovered and was still suffering pain. But he rushed back to work to make sure he could earn overtime pay and provide for his

family. As he explained, “a lot of [city] employees depend on their overtime as income to provide for their families [and] I worked a lot of overtime. So I had to get back to work.” A1307-08.

In December 2016, he suffered a car accident. His car flipped over and his hand was caught between the sunroof and the ground. This accident permanently “grinded one finger down” and rendered another finger “pretty much useless.” He was hospitalized for about a month and underwent several surgeries to fix his hand. He could not work after this accident and applied for disability benefits. A1308-13.

After this second accident, his Oxycodone dose was increased and he was also prescribed Percocet, Xanax and other medication. At one point, his dose was increased to 150 Oxycodone pills per month. He ultimately became addicted to this addictive medication. Until this point, he had never had any problems with drugs. A1310-11.

Mr. Debellis lived with his wife and children in their Carmel, New York home until 2017. That year, he moved to his mother’s house in the Bronx because his drug addiction and inability to work caused “a lot of problems for [him] obviously. . . . Family, legal, financial. . . . every kind of problem you can think of.” A1313-14, A1326-27.

Mr. Debellis admitted that, on the day in question, he knowingly possessed a firearm in the car. He had purchased it in Florida during vacation and had a permit for it in Carmel. A1317-18; New York License: Def. Ex. S (in evidence at A1317-18). Later though, in September 2016, his license to possess the firearm was revoked because he was arrested for possessing the firearm in a parking lot after falling asleep in his car on his way to a shooting range. He had violated the terms of his permit because he had not gone directly to the range. He was convicted of a misdemeanor and received probation. A1320-21; *see also* A1352 (testifying that his Putnam County firearm license was no longer valid when he was driving the car on the day in question).

Also, orders of protection issued against him on July 27, 2017, August 29, 2017, and August 29, 2018 (which he had signed in court) had directed him to surrender his firearm. But instead, he kept it in his safe, where he had always kept it. A1321-22, A1344-47, A1352.

On the day in question (September 19, 2018), Mr. Debellis took the Metro-North train to Carmel to plan his son's birthday with his wife. The couple argued about their financial problems. A1326-29, A1349.

Inside the house, Mr. Debellis removed the pistol from the safe and put it in a bag, which also had ammunition and holsters. He then headed to the Bronx by train to "turn the firearm in" to the 49th NYPD Precinct (Bronx) in exchange for $200 under the NYPD buyback program. A1328-29, A1352.[7] He had "nothing else to s[ell]. [He] was down to nothing." "We needed money" and that "was the only thing [he] could think of." While he was not sure whether there were any buyback programs in Westchester or Putnam County, he "knew the city had one for sure." A1329, A1350, A1353.

When Mr. Debellis got off the train at White Plains, he drove his friend's car (which was parked at the train station) to the Bronx to surrender the firearm to the 49th Precinct. He was pulled over on the Bronx River Parkway on his way to the 49th Precinct. A1328-32.

After his arrest, he tried to commit suicide by taking prescription pills that he had on his possession. He told the arresting officer to call his wife and tell her that he was "checking out." A1332-33.

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[7] *See* COMPENDIUM: NYPD WEBSITE-GUN BUYBACK PROGRAM (as of September 1, 2018) (accessed through the "Wayback Machine Internet Archive"), https://web.archive.org/web/20180901234243/http://www.nyc.gov/html/nypd/html/community_affairs/gun_buyback_program.shtml.

F. The court denies the temporary-possession defense.

At the charge conference, defense counsel requested a temporary-possession defense. The prosecutor argued that the defense did not apply because Mr. Debellis possessed the gun unlawfully since 2017, when he was directed to surrender his firearm. Mr. Debellis was not, the prosecutor argued (quoting the CJI instruction), in possession of the weapon "only long enough to dispose of it safely." Defense counsel responded that Mr. Debellis "decided to bring it back to the Bronx to its buyback program. And I contend at that point he did have the gun for a temporary period of time." Defense counsel again conceded that a prior court order had previously required Mr. Debellis to surrender his weapon. A1370-72, A1376, A1390.

The court asked defense counsel whether he would "admit at least there is [not] a single case that says over a year constitutes temporary." Counsel responded, "of course," but added that there was "nothing absolutely fixed in stone as to what qualifies as temporary. Some cases are all over the place." The court responded, "[W]hat's wrong with this theory of yours. A little like the back [against] the wall theory. They are

all fine unless if you look at the gun laws none of this is right and we are not making this up as we go along." A1372, A1374, A1380.

The court denied the charge because, among other reasons, possession for "over a year" was not "temporary" as a matter of law. Accordingly, the court declined to instruct the jury on any defense to weapon possession. A1390-96.

G. In summation, counsel again conceded possession and presented no cognizable defense to the jury.

In summation, defense counsel acknowledged that Mr. Debellis "admitted he had that gun." And, counsel conceded, Mr. Debellis' firearm-possession permit was no longer valid when he was arrested. "In a fit of desperation he told you he just decided to take that gun, and the other items out of his safe, go to the 49th Precinct in the Bronx where he used to live in the Bronx, as he told you, and turn it in. Turn it in." "[H]e did take that gun and he put it in a bag and he was bringing it to the local police precincts" in exchange for a financial reward under the buyback program. A1411-12, A1420-22.

Counsel argued that Mr. Debellis "did the right thing." Counsel added, "The question is, did he exercise criminal judgment? I say he may have exercised poor judgment, but he is not a criminal and he was going there

to turn that gun over to the local authorities right there.” The court (sua sponte) instructed the jury: “The determination about whether or not a judgment is criminal or isn’t[,] is a jury determination based on the instructions of the law.” Counsel added, “do the right thing,” and the court again corrected him: “the jury is only to do what they are instructed to do. The right thing is not a correct interpretation.” A1412, A1420, A1422.

In her eight-page summation, the prosecutor reminded the jury that Mr. Debellis had “admitted” weapon possession. The prosecutor implored the jury to “listen to the law as the Judge instructs. Everything about defendant turning the gun in, that is not for you to consider. Consider the Judge’s instruction on the law.” A1431, A1434.

H. Charge and Verdict

The court instructed the jury that Mr. Debellis was guilty of all three weapon-possession counts if the jury found that he knowingly possessed the firearm. “Sympathy” could play no role in the deliberations. A1441, A1448-55.

The jury convicted Mr. Debellis of all three weapon-possession counts. A1499.

I. Sentencing Hearing

Before the October 3, 2019 sentencing hearing, Mr. Debellis filed a pro se motion to set aside the verdict on, among other grounds, "ineffective assistance of counsel." He sought a hearing on his claim. A8-10.

At the sentencing hearing, the court asked defense counsel whether he wanted to "adopt the motion." Counsel responded that he did not "think [he] want[ed] to adopt the motion where I am accused of ineffective assistance." Counsel declared, "he is making allegations in here that I am not going to argue on his behalf. I am not going to argue that I was ineffective. I think I was very effective. . . . I do not adopt this motion." A1514-15.

Although the pro se motion had been provided directly to the sentencing court, the court noted its view that it was not properly filed because Mr. Debellis had not filed it in the Clerk's Office. The court asked the prosecution whether it "object[ed]" to the court "render[ing] a decision on this at this time without - - " and the prosecution answered, "No." The court then denied the motion on the merits. A1513-18.

The court imposed an aggregate sentence of seven years and five years post-release supervision. A1538-39.[8]

J. Appellate Division

On appeal to the First Department, Mr. Debellis argued that counsel was ineffective for failing to pursue a voluntary-surrender instruction under Penal Law 265.20(a)(1)(f), which provides immunity for those surrendering weapons under a buyback program and does not require that the possession be "temporary" or "innocent." Debellis App. Div. Br. Pt. I. Mr. Debellis also contended that counsel was ineffective at sentencing because he took a position adverse to Mr. Debellis' pro se ineffective-assistance claim, creating a conflict of interest. *Id.* at Pt. II.

In a conclusory decision, the Appellate Division held that the "ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record." A2. The court alternatively found that the failure to request the voluntary surrender instruction was not deficient

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[8] The sentencing range for the top count was 3.5 to 15 years. Penal Law § 70.02 (3)(b) (sentencing range for a C-violent felony is 3.5 to 15 years); Penal Law § 70.45(2)(f) (post-release-supervision range is 2.5 to 5 years)

performance because "[t]here was no reasonable view of the evidence that defendant's conduct satisfied the requirements of that statute." A2-3.

The Appellate Division also found no "prejudice because there is no reasonable possibility that the outcome of the trial would have been different. Defendant's actions and statements before and during his arrest, including denying having a weapon, were utterly incompatible with his incredible testimony that he happened to be stopped by the police while driving to a police station to surrender his pistol as part of a buyback program." A3 (comma omitted).

As for the sentencing-conflict claim, the Appellate Division held:

> [C]ounsel did not create a conflict of interest with respect to defendant's pro se motion to set aside the verdict by making a brief and conclusory remark that he believed that he had provided effective assistance. Counsel never went beyond "defending his performance" (quoting *People v. Washington*, 25 N.Y.3d 1091, 1095 (2015)). "Furthermore, through its own familiarity with the case, the court readily recognized the motion's lack of merit, independently of anything said by counsel" (quoting *People v. Torres*, 159 A.D.3d 473 (1st Dept. 2018)). A3.

Judge Rivera subsequently granted Appellant leave to appeal. A1.

ARGUMENT

POINT I

Counsel's unreasonable failure to request the voluntary-surrender instruction constituted ineffective assistance of counsel.

A. Governing Legal Standards

"The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). To establish ineffective assistance under the state or federal constitutions, the accused must identify an objectively unreasonable error. *Hinton v. Alabama*, 571 U.S. 263, 264 (2014) (per curiam); *People v. Turner*, 5 N.Y.3d 476, 480 (2005); *Strickland v. Washington*, 466 U.S. 668, 688-91 (1984); U.S. Const. Amend. VI; N.Y. Const. Art. I § 6.

A reasonable attorney "take[s] the time to review and prepare both the law and the facts relevant to the defense." *People v. Droz*, 39 N.Y.2d 457, 462 (1976). Counsel's performance is deficient where, due to an unreasonable mistake of law or failure to perform research, counsel fails to present a valid defense. *Hinton*, 571 U.S. at 274 ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential

example of unreasonable performance under *Strickland*."); *People v. Nesbitt*, 20 N.Y.3d 1080, 1082 (2013) (failure to present a defense due to a "mistaken" assessment of the available defenses constituted ineffective assistance); *People v. Bennett*, 29 N.Y.2d 462, 467 (1972) ("Clearly, [where] the record unequivocally demonstrates a complete lack of investigation or preparation whatever on *the only possible defense available*, the lawyer, far from providing the sort of assistance which the Constitution guarantees to the most lowly defendant, has, in truth, rendered 'the trial a farce and a mockery of justice.'") (emphasis added). Counsel's performance is particularly deficient where counsel fails to present a valid defense after conceding guilt. Under those circumstances, counsel has essentially directed a verdict against the client. *Nesbitt*, 20 N.Y.3d at 1082; *Logan*, 263 A.D.2d at 397-98.

Under the Sixth Amendment, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is [one] sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693-94. Thus, it is constitutional error to require the defendant to establish it was more "likely than not" that, but for the identified error,

the jury would have acquitted. *Nix. v. Whiteside*, 475 U.S. 157, 175 (1986).

The state-prejudice standard "offers greater protection than the federal test." *People v. Caban*, 5 N.Y.3d 143, 156 (2005). That standard focuses on whether counsel provided "meaningful representation." *People v. Benevento*, 91 N.Y.2d 708, 712-14 (1998). Under this independent state-constitutional analysis, "the harmless error doctrine" does not apply to "cases involving substantiated claims of ineffective assistance." *Id.* at 714. Although prejudice is relevant, a state claim of ineffective assistance "is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." *Id.* at 714; *Caban*, 5 N.Y.3d at 155-56 ("Our state standard of meaningful representation, by contrast, does not require a defendant to fully satisfy the prejudice test of *Strickland,* although we continue to regard a defendant's showing of prejudice as a significant but not indispensable element in assessing meaningful representation") (internal quotation marks omitted).

B. Counsel's failure to request the *only* applicable defense instruction was deficient performance.

Trial counsel's failure to request a voluntary-surrender instruction was objectively unreasonable. *Hinton*, 571 U.S. at 264; *Nesbitt*, 20 N.Y.3d at 1082; Penal Law § 265.20(a)(1)(f) ("A person voluntarily surrendering [a] weapon" is immune from prosecution). Counsel conceded weapon possession and pursued the factual theory that Mr. Debellis was surrendering the firearm to the NYPD buyback program. *E.g.*, Opening: A816-18; Summation: A1420. Mr. Debellis testified to the same effect too. A1328-30, A1352-53. But, due to counsel's ignorance of a "point of law" "fundamental" to the defense—and his failure to perform basic research—counsel failed to request the only applicable defense instruction: voluntary surrender under Penal Law § 265.20(a)(1)(f). *See Hinton*, 571 U.S. at 274; *Bennett*, 29 N.Y.2d at 467. Instead, counsel requested an obviously inapplicable temporary-possession instruction that, the court correctly found, failed as a matter of law. *E.g.*, Charge Conference: A1392-96. Counsel's concession of guilt, combined with his egregious failure to present "the only possible defense available" (*Bennett*, 29 N.Y.2d at 467), effectively directed a guilty verdict against

his client. *Nesbitt*, 20 N.Y.3d at 1082; *Logan*, 263 A.D.2d at 397-98. There was no meaningful representation here.

* * *

First, the facts here required a voluntary-surrender instruction as a matter of law. *E.g.*, *People v. Watts*, 57 N.Y.2d 299, 301 (1982) ("When evidence at trial viewed in the light most favorable to the accused, sufficiently supports a claimed defense, the court should instruct the jury as to the defense, and must when so requested."). Under Penal Law § 265.20(a)(1)(f), an individual is "exempt[ ]" and "immun[e]" from weapon-possession prosecution if the individual is "voluntarily surrendering" a weapon to the "police." Here, Mr. Debellis testified that, when the police pulled him over on the day in question, he was in the process of voluntarily surrendering the weapon to the 49th NYPD Precinct in exchange for money under the NYPD buyback program. *See* Debellis: A1328-29, A1350-53. Mr. Debellis' testimony required a voluntary-surrender instruction under Penal Law § 265.20(a)(1)(f) as a matter of law. *E.g.*, *Watts*, 57 N.Y.2d at 301; *People v. Tatis*, 170 A.D.3d 45, 49 (1st Dept. 2019) (after the "exemptions" in Penal Law § 265.20 are "raised by a defendant," the prosecution has the burden of disproving them).

Counsel's failure to request this applicable instruction was objectively unreasonable. Any reasonable attorney planning on conceding weapon possession under a buyback-surrender theory would not only have located the governing statute—Penal Law § 265.20(a)(1)(f)—but also located *People v. Watson*, which further mandated a voluntary-surrender instruction. 163 A.D.3d 855, 856, 861-62 (2d Dept. 2018); *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664-65 (2d Dept. 1984) ("trial courts" are bound by "precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule"); *Turner*, 5 N.Y.3d at 482; *Droz*, 39 N.Y.2d at 462 (reasonable counsel "take[s] the time to review and prepare both the law and the facts relevant to the defense").[9] *Watson* held that testimony that the defendant was "carrying a gun [on his hip]" and "was on his way to the precinct station house to turn the gun in for payment under the

[9] Voluntary-surrender immunity under § 265.20(a)(1)(f) does not require that the possession be "temporary." *Compare* Penal Law § 265.20(a)(1)(f) (merely requiring that the individual be voluntarily surrendering the firearm to the police without imposing any temporary-possession requirement), *and Watson*, 163 A.D.3d at 862 (voluntary surrender alone justifies a surrender instruction under § 265.20(a)(1)(f)), *with* Temporary-and-Innocent Possession Instruction, CJI, *above* (requiring that the accused only possess the weapon "long enough" to "dispose of it safely"); *People v. Williams*, 36 N.Y.3d 156, 166-67 (2020) (Wilson, J., concurring) ("the statutory exemption post-dates the common-law defense of temporary and lawful possession and constitutes a different legal defense to liability").

buyback program . . . raised . . . the exemption from criminal liability for a person engaged in the voluntary surrender of a weapon to the authorities[.] . . . [T]he burden was on the prosecution to disprove the defense beyond a reasonable doubt." 163 A.D.3d at 857, 862 (citing Penal Law § 265.20(a)(1)(f)). Under *Watson*, which bound the trial court (*Mountain View*, 102 A.D.2d at 664-65), Mr. Debellis' testimony that he was surrendering the firearm "raised . . . the exemption from criminal liability for a person engaged in the voluntary surrender of a weapon." *Watson*, 163 A.D.3d at 857, 862; Debellis: A1328-29, A1350-52.

The court's comments in response to counsel's policy arguments also placed counsel on notice of the need to do further research into the defense position. Defense counsel repeatedly argued to the court that the law must immunize individuals from prosecution when they surrender weapons "late" to the police because, if not, they will just keep them or throw them "in the woods." A1111-12, A1161-63. In turn, the court responded that counsel's policy argument had to be taken up with the Legislature. A1107, A1111-12, A1160-64. But counsel's policy argument *had* been taken up by the Legislature when it enacted Penal Law § 265.20(a)(1)(f) to immunize those surrendering firearms to the police.

Nevertheless, counsel failed to locate the statute that had addressed the precise policy theory he was attempting to present to the court and jury.

Instead of pursuing a voluntary-surrender defense under § 265.20(a)(1)(f), counsel unreasonably went all in on a common-law temporary-possession defense. *People v. Moses*, 112 A.D.3d 447, 448 (1st Dept. 2013). But as the court correctly held, this defense was deficient as a matter of law because Mr. Debellis testified, and counsel conceded, that Mr. Debellis unlawfully possessed the weapon for over a year.[10] As any reasonable lawyer would have seen, there was nothing "temporary" about this unlicensed-firearm possession at all. *People v. Holland*, 115 A.D.3d 492, 493 (1st Dept. 2014) ("Counsel demonstrated a lack of familiarity with the applicable criminal law" by ultimately conceding guilt in pursuit of a baseless defense theory); *People v. Gordian*, 99 A.D.3d 538, 538-39 (1st Dept. 2012) (counsel mistakenly concluded that possession of ammunition that was not inside the weapon did not constitute possession of a "loaded firearm," thus causing counsel to focus on this "legally

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[10] *See* Counsel's Colloquy With the Court: A1026, A1088, A1111, A1129, A1191-97; Debellis: A1320-22, A1344-47, A1352; CJI, *above* (requiring that the accused only possess the weapon "long enough" to "dispose of it safely"); *People v. Moses*, 112 A.D.3d 447, 448 (1st Dept. 2013) ("The court's instruction on temporary and innocent possession, which tracked the language of the Criminal Jury Instructions, correctly stated the law.").

irrelevant fact" throughout trial and to abandon a "more appropriate line of defense").

Of course, there was no reasonable strategic rationale for conceding possession without pursuing the only valid defense. *Strickland*, 466 U.S. at 688.[11] Instead, counsel simply pursued the wrong legal defense because he was ignorant of the law. *Nesbitt*, 20 N.Y.3d at 1082; *Holland*, 115 A.D.3d at 493; *Logan*, 263 A.D.2d at 397-98. Counsel had one factual theory: Mr. Debellis was surrendering the weapon under the buyback program.[12] But instead of pursuing the defense tailor-made for that precise factual scenario—voluntary surrender—counsel attempted to spin this factual pattern into a legally and factually defective temporary-possession theory that failed as a matter of law. *See* CJI, *above* (requiring that the accused only possess the weapon "long enough" to "dispose of it safely"); *Moses*, 112 A.D.3d at 448 (holding that the CJI instruction

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[11] Nothing prevented counsel from requesting both a temporary-possession instruction and a voluntary-surrender instruction as his temporary-possession theory was predicated on identical evidence: Mr. Debellis' testimony that he was surrendering the firearm to the NYPD. Counsel did not have to request only one defense. *E.g.*, *Turner*, 5 N.Y.3d at 484.

[12] *E.g.*, Debellis: A1328-29, A1349-52; Opening: A815-18; Mid-Trial Colloquies: A918, A1019-21, A1207.

correctly states the law).[13] These egregious blunders could only have resulted from ignorance of the law, not any reasonable strategy.

This Court should also reject any suggestion that this voluntary surrender was inconsistent with the formal "terms and conditions" of the NYPD's public buyback program. *See* Resp. App. Div. Br. 40-41 (suggesting this theory before the Appellate Division and quoting Penal Law § 265.20(a)(1)(f), which states that the surrender must be "in accordance with such terms and conditions as may be established by such superintendent, sheriff, police force or department"). The *Watson* decision, binding on the trial court, did not require formal evidence of the Buyback Program's "terms and conditions." Instead, *Watson* held that once there is, as here, evidence that the defendant is surrendering the firearm to the NYPD buyback program, the prosecution has the burden of disproving the defense. 163 A.D.3d at 862; *Tatis*, 170 A.D.3d at 49 (after the "exemptions" in Penal Law § 265.20 are "raised by a defendant," the prosecution has the burden of disproving them).

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[13] A1026, A1111, and A1197 (defense counsel conceded Mr. Debellis unlawfully possessed the firearm for at least a year); A1025 (court reminded counsel that the key "word is temporary"); Charge Conference: A1390-96 (court denied the instruction because Mr. Debellis concededly possessed the firearm unlawfully for over a year).

In any event, the NYPD's publicly available website confirms that the terms and conditions of the NYPD buyback program merely require, as here, a surrender to an NYPD precinct. As the NYPD's official website stated, at the time of Mr. Debellis' arrest:

> The Cash for Guns Program is a program in which the New York City Police Department will pay [$100] to any individual . . . who present[s] any handgun [to] any precinct, transit district or police service area (PSA). Weapons that do not qualify will be taken under the Cash for Guns Program, but will not qualify for the cash payment.

Appellant's Compendium: NYC Government Website-NYPD-Gun Buyback Program (as of September 1, 2018; "Copyright 2018 The City of New York") (accessed through the Wayback Archive), https://web.archive.org/web/20180901234243/http://www.nyc.gov/html/nypd/html/community_affairs/gun_buyback_program.shtml. The NYPD's publicly available policy further declares that "[a]ny individual turning in a qualifying weapon may do so at any precinct, transit district or PSA, 24-hours a day, seven days a week. No questions asked and no identification will be required, as the identity of all individuals will remain anonymous." *Id.* As Mr. Debellis' surrender here was in accord

with these official "terms and conditions," there was no basis to deny the defense on "terms and conditions" grounds.[14]

Finally, it is irrelevant that, after *failing* to request a voluntary-surrender instruction, counsel desperately asked the jury to ignore the court's jury instruction on the grounds that Mr. Debellis was doing the "right thing" in surrendering the firearm.[15] Jury nullification is not "'legally sanctioned,'" as the trial court expressly instructed the jury during defense counsel's summation.[16] No reasonable attorney pursues

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[14] This Court should take judicial notice of this readily available and indisputably accurate government website, which bears a copyright date of 2018 and reflects the NYPD's Buyback Program Policy at the time of Mr. Debellis' arrest. *LaSonde v. Seabrook*, 89 A.D.3d 132, 137 n.8 (1st Dept. 2011) ("[Appellate courts have] discretion to take judicial notice of material derived from official government web sites"); *People v. Jones*, 73 N.Y.2d 427, 431 (1989) ("To be sure, a court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.") (internal quotation marks omitted); *Matter of Siwek v. Mahoney*, 39 N.Y.2d 159, 163 n.2 (1976) (court may take judicial notice of "[d]ata culled from public records"); *see also Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1374 (Fed. Cir. 2021) (taking judicial notice of Wayback-Machine website); *United States ex. Rel. v. Newport Sensors, Inc.*, 2016 WL 8929246, *3 (C.D. Cal. May 19, 2016).

[15] Summation: A1412 (arguing that, "[i]n a fit of desperation," Mr. Debellis decided to turn the gun in," adding, "he did the right thing"); A1420 (counsel argued that Mr. Debellis exercised "poor judgment" but not "criminal judgment . . . he is not a criminal and he was going there to turn that gun over to the local authorities right there."); A1421 ("He tried to do what was right. And you don't convict somebody for doing what is right.").

[16] *People v. Weinberg*, 83 N.Y.2d 262, 268 (1994) (quoting *People v. Goetz*, 73 N.Y.2d 751, 752 (1986)); A1420 ("The determination about whether or not a judgment is criminal or isn't[,] is a jury determination based on the instructions of the law.");

(footnote continued on next page…)

jury nullification instead of a valid defense rooted in the law, particularly a defense that covers the precise factual theory counsel has developed at trial: voluntary surrender. Instead of seeking a lawless acquittal on the grounds that Mr. Debellis was "doing the right thing," the right to effective assistance required counsel to seek an acquittal based on the applicable law. Counsel unreasonably failed to do so here because of a legal mistake. *Nesbitt*, 20 N.Y.3d at 1081-82 (failure to raise a "good-faith" defense because of a mistaken belief that none existed is ineffective); *Capps v. Sullivan*, 921 F.2d 260, 262 (10th Cir. 1990) ("[W]hen a defendant takes the stand in his own behalf and admits all of the elements of the crime, exactly in accord with the court's instructions to the jury, it is surely inadequate legal representation to hope that the jury will ignore the court's instructions and acquit from sympathy, rather than to raise an entrapment defense that has some support in the evidence").

A1422 (when counsel said, "do the right thing," the court again corrected him: "the jury is only to do what they are instructed to do"); Pros. Summation: A1434 ("listen to the law as the Judge instructs. Everything about defendant turning the gun in, that is not for you to consider. Consider the Judge's instruction on the law"); *People v. Baker*, 14 N.Y.3d 266, 274 (2010) ("jurors are presumed to follow the legal instructions they are given").

In this way, *People v. Mendoza*, 33 N.Y.3d 414, 417-19 (2019), is readily distinguishable. There, unlike here, counsel strategically and reasonably opted for jury nullification because there was no defense available. *Id.* at 419 (counsel was "constrained" by the absence of any available defense). Here though, counsel had a readily available defense supported by Mr. Debellis' testimony; he just failed to request the correct instruction. *Capps*, 921 F.2d at 261-62 (having "little difficulty" concluding that "it is surely inadequate legal representation" to ask the jury to ignore the law instead of pressing a valid defense supported by the evidence).[17]

C. Counsel's failure to request a voluntary-surrender instruction doomed the defense.

Counsel's failure to request the voluntary-surrender instruction doomed the defense to failure, thus prejudicing the defense under the state and federal constitutions. N.Y. Const. Art. I § 6; U.S. Const. Amend. VI.

[17] Counsel's desperate nullification effort was based on the same operative facts as a statutory voluntary surrender defense: Mr. Debellis "did the right thing" by "voluntarily surrendering" the firearm. Penal Law § 265.20(a)(1)(f); A1412, A1420-22. Therefore, any reasonable lawyer would have, to the extent he was interested in seeking an acquittal based on the jury's moral compass, pursued *both* a statutory defense and this appeal to morality. No sensible lawyer would have gone all in on a lawless morality appeal at the expense of a legal defense. *See generally Strickland*, 466 U.S. at 688 (objective reasonableness is the touchstone).

Counsel's egregious and pervasive blunder essentially led to Mr. Debellis pleading guilty before the jury with no defense at all. *Strickland*, 466 U.S. at 696 ("pervasive" errors are prejudicial). Legal representation is not "meaningful" when, due to ignorance of the law, counsel presents the jury with a concession of guilt and abandons the only legitimate defense. *Benevento*, 91 N.Y.2d at 712-14. Counsel's concession of guilt and his failure to present a readily available defense "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Ultimately, no real jury trial occurred here because, due to counsel's blunders, there were no factual issues for the jury to resolve. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (the "right to a jury trial is 'fundamental to the American scheme of justice'") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968)). That reality is impossible to square with the right to a fair trial and the "integrity of the judicial process." *Benevento*, 91 N.Y.2d at 714 ("The safeguards provided under the Constitution must be applied in all cases to be effective and, for that reason, 'our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence.'") (quoting *People*

v. Donovan, 13 N.Y.2d 148, 153-54 (1963)); *Logan*, 263 A.D.2d at 397-98 (counsel's "mistaken understanding of the law" caused him to pursue a baseless theory while abandoning a valid agency defense; this ignorance of the law was "extremely prejudicial" as it, "[i]n essence," "led defendant to admit to facts establishing both of the charged crimes, and prevented the jury from considering the only means of transforming those admissions into a true defense. [This] failure to know or investigate these basic principles of criminal law deprived defendant of meaningful representation, and doomed the defense to failure") (internal quotation marks, alterations, and citations omitted).

The particular facts of this case reinforce the unfairness of this trial. Mr. Debellis took the stand, conceded weapon possession, and provided a factual predicate for a statutory voluntary-surrender defense. But defense counsel failed to convert that admission into a valid defense, leaving the jury with nothing but an admission of guilt. In effect, counsel's deficient performance misled Mr. Debellis into pleading guilty right before the jury. *See Logan*, 263 A.D.2d at 397-98.

This Court has never found counsel's representation meaningful where counsel's deficient performance led to a concession of guilt and the

absence of an available defense. This Court should reject that unprecedented dilution of the state constitutional right to effective assistance here.

As counsel's blunders deprived Mr. Debellis of meaningful representation under the State Constitution, this Court need not reach the question of *Strickland* prejudice. *Benevento*, 91 N.Y.2d at 712-714. Nevertheless, Mr. Debellis can satisfy the federal-prejudice standard too as counsel's deficient performance "undermines confidence" in this trial's outcome. *Strickland*, 466 U.S. at 693-94.

The voluntary-surrender defense was supported by Mr. Debellis' express testimony. He testified that he was surrendering the weapon to the 49th Precinct in exchange for money after he argued with his wife over finances and removed the weapon from his safe. A1328-29, A1349-52. That testimony was corroborated by: (1) Mr. Debellis' financial motive, which stemmed from grave financial problems and his inability to work due to debilitating accidents; (2) video/police-witness corroboration of his account of that day, which confirmed that he argued with his wife earlier that day and left the house with the bag later found in the car (Video at 15:42-15:46; Allen: A831, A853); and (3) the particular

route Mr. Debellis was travelling that day, as he was about two miles from the 49th Precinct (where he testified he was going to surrender the weapon) and was travelling in that Precinct's direction.[18] In the face of this evidence, the prosecution offered no counter-theory about what Mr. Debellis was doing with the weapon that day.

The Appellate Division erred in finding no prejudice because Mr. Debellis did not admit possession of the gun to the arresting officer and inform him that he was in the process of surrendering it. A3. This theory violates the very "reason, commonsense and experience" that the jury was instructed to apply. A1438. Even when surrendering the firearm under the buyback program, an individual could easily fear that the police would not believe that explanation and would decline to risk prison by admitting possession. Debellis: A1339 (testifying that "it wasn't gonna do any good telling him [the officer] I had a gun in the car"). The NYPD

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[18] *See* Video at 15:36 (indicating that Mr. Debellis was driving southbound on the Bronx River Parkway near the Allerton/Mosholu exit (Exit 8W-E)).

According to Googlemaps, Mr. Debellis was approximately two miles from the 49th NYPD Precinct (2121 Eastchester Road, Bronx) and on route from White Plains to that precinct when the officer pulled him over. *See* Debellis: A1328-30, A1337; *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of Googlemaps); *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012); *Connor v. City of New York*, 2010 WL 4008542, *2 (Sup. Ct., N.Y. County 2010); *see also* C.P.L.R. § 4532-b.

has even formally recognized that buyback participants may have such fear, as its buyback program promises, "No questions asked and no identification will be required, as the identity of all individuals will remain anonymous." NYPD Website: Compendium. At a minimum, there is a reasonable probability a jury would have declined to infer that Mr. Debellis was not actually in the process of surrendering the firearm simply because he did not advertise that fact to the police. *People v. Bennett*, 79 N.Y.2d 464, 469-70 (1992) ("Consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous. Even innocent persons, fearing wrongful conviction, may . . . lie to extricate themselves from situations that look damning.") (internal citations omitted).

There is also no evidence that Mr. Debellis knew that, if he was in the process of voluntarily surrendering the firearm, he had a legal defense. Penal Law § 265.20(a)(1)(f). Even his own attorney did not know about that defense. If a person does not know that a defense is available, his failure to invoke it when stopped by the police does not justify an inference of guilt.

In any event, as shown above the fundamental problem here is that the jury never had the opportunity to resolve *any* factual questions because counsel failed to request the applicable defense instruction. Instead, the jury heard nothing but an admission of guilt and no defense instruction at all. This basic breakdown in the process—which effectively deprived Mr. Debellis of the right to a jury trial—deprived Mr. Debellis of effective assistance under both the Sixth Amendment and Article I § 6. *Benevento*, 91 N.Y.2d at 714 (New York's standard "is ultimately concerned with the fairness of the process as a whole"); *see also Strickland*, 466 U.S. at 686 (prejudice is established under the Sixth Amendment where counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

D. Direct appeal is the proper procedural vehicle.

This "ineffective assistance of counsel claim may be reviewed on direct appeal since this Court [can] determine from the record that there was no conceivable strategic purpose for counsel's conduct." *Holland*, 115 A.D.3d at 493; *People v. Wright*, 25 N.Y.3d 769, 780-82 (2015) (finding counsel ineffective on direct appeal for failing to object to prosecutor's

summation because the record confirmed that no reasonable strategy justified that omission); *People v. Brown*, 45 N.Y.2d 852, 853 (1978) (direct-appellate review permitted because "[t]he record, unlike as in most 'ineffective counsel' cases, demonstrates beyond cavil that defendant was lacking effective counsel"). No reasonable strategy could justify conceding the charged offenses while failing to present the jury with the only applicable legal defense. Thus direct-appellate review is permissible. *Nesbitt*, 20 N.Y.3d at 1081-82.

E. Conclusion

As counsel was ineffective, this Court should reverse and order a new trial on all counts.

POINT II

Counsel was also ineffective at sentencing on conflict-of-interest grounds as he took an adverse position to Mr. Debellis' motion to set aside the verdict.

A. Overview

In response to Mr. Debellis' pro se motion for a new trial on ineffective-assistance grounds (A8-10; C.P.L. § 330.30), sentencing counsel stated on the record: "[Mr. Debellis] is making allegations in here that I am not going to argue on his behalf. I am not going to argue that I was

ineffective. *I think I was very effective*." Sentencing Hearing Transcript: A1515 (emphasis added). By opining that Mr. Debellis' motion lacked merit, sentencing counsel took a position adverse to his client, creating a conflict of interest. *People v. Mitchell*, 21 N.Y.3d 964 (2013). Accordingly, as sentencing counsel himself even recognized, the court should have relieved counsel and appointed new sentencing counsel. A1514 (sentencing counsel told the court that he had "to be relieved").

B. This Court's precedents confirm that while counsel can provide *factual* information about the steps taken on the client's behalf, counsel cannot offer the *legal* conclusion that the client's pro se motion lacks merit.

The right to effective assistance guarantees the accused the right to an "attorney devoted to the client's best interests. The right to effective assistance of counsel encompasses the right to conflict-free counsel." *People v. Ortiz*, 76 N.Y.2d 652, 656 (1990); U.S. Const. Amend. VI; N.Y. Const. Art. I § 6. The hallmark of conflict-free representation is "single-minded protection of defendant's interests." *People v. Carncross*, 14 N.Y.3d 319, 329 (2010). Conflict-free representation ensures not only that the process is actually fair, but that it appears fair too. *Wheat v. United States*, 486 U.S. 153, 160 (1988) (courts must guard against conflicts of interest to "ensur[e] that criminal trials are conducted within

the ethical standards of the profession and that legal proceedings appear fair to all who observe them").

In *People v. Mitchell*, 21 N.Y.3d 964 (2013), where the defendant filed a pro se motion to withdraw his plea because "counsel coerced" it, this Court held that counsel creates a conflict of interest when counsel takes "a position on [a pro se] motion that is adverse to the defendant." *Id.* at 966, 967. On the other hand, when "certain actions or inaction on the part of defense counsel is challenged on the motion, it may very well be necessary for defense counsel to address the matter when asked to by the court. When doing so, defense counsel [can] explain his performance." *Id.*

Applying those standards, *Mitchell* held that the sentencing court correctly found a conflict where defense counsel stated that he did not "adopt the merits or factual assertions relative" to his client's motion to withdraw a plea and "expressed his concern to the court that if he did not respond to the motion, his silence might be deemed an acknowledgment that there was merit to the claim." *Id.* at 966-67. Similarly, in *Deliser* (*Mitchell*'s companion case), a conflict existed where counsel "took a position contrary to the one taken by his client on the motion" by offering legal conclusions regarding the strength of the prosecution's case and the

plea's voluntariness. 21 N.Y.3d at 966-67 (Deliser filed a pro se motion to withdraw the plea because counsel applied "undue pressure on him"; "[a]sked for his response, defense counsel explained the actions he took on defendant's behalf. He [added] that, in his opinion, the People had 'two strong cases against [defendant] and I think he made a knowing plea and I think it was in his best interest.'").

This Court later explained in *People v. Washington*, 25 N.Y.3d 1091 (2015), that although counsel has "no obligation to comment on a client's pro se motion," counsel "may address allegations of ineffectiveness 'when asked to by the court' and 'should be afforded the opportunity to explain his performance.'" *Id.* at 1095 (quoting *Mitchell*, 21 N.Y.3d at 967 and citing *People v. Nelson*, 7 N.Y.3d 883, 884 (2006)). *Washington* confirmed that this Court has "held that counsel takes a position adverse to his client when stating that the defendant's motion lacks merit or that the defendant, who is challenging the voluntariness of his guilty plea, 'made a knowing plea that was in his best interest.'" *Id.* (citing *Mitchell*, 21 N.Y.3d at 966 and quoting *Deliser*, 21 N.Y.3d at 966) (ellipsis/brackets removed). "Conversely, we have held that counsel does *not* create an actual conflict merely by 'outlining his efforts on his client's behalf' and

'defending his performance.'" *Id.* (quoting *People v. Nelson*, 27 A.D.3d 287, 287 (1st Dept. 2006) and quoting *Nelson*, 7 N.Y.3d at 884).

Washington found no conflict because counsel did not opine on the legal "merits" of the pro se motion but instead provided a "factual explanation" of his performance. 25 N.Y.3d at 1095 (counsel did "not suggest that his client's claims lacked merit. Rather, he informed the judge when he met with defendant and for how long, what they discussed, what the defense strategy was at trial and what discovery he gave or did not give to defendant. Thus, he never strayed beyond a factual explanation of his efforts on his client's behalf").

C. Counsel's declaration that Mr. Debellis' motion lacked merit created a conflict of interest.

Under *Mitchell* and *Washington*, sentencing counsel was ineffective because he took an adverse position to his client's motion. At the sentencing hearing, counsel stated that his client's pro se ineffective-assistance claim "lacked merit" (*Washington*, 25 N.Y.3d at 1095) when he stated: "he is making allegations in here that I am not going to argue on his behalf. I am not going to argue that I was ineffective. *I think I was very effective*." A1515 (emphasis added). That adverse position created a conflict of interest. *Washington*, 25 N.Y.3d at 1095 (counsel "takes a

position adverse to his client when stating that the defendant's motion lacks merit"); *Mitchell*, 21 N.Y.3d at 966-67 (confirming the same rule and finding a conflict where counsel indicated to the court that he believed the motion lacked merit); *Deliser*, 21 N.Y.3d at 966-67 (same; counsel "took a position contrary to the one taken by his client on the motion" by opining on the motion's lack of merit); *accord People v. Phillip*, 200 A.D.3d 1108, 1109-10 (3d Dept. 2021) (counsel ineffective for opining that the defendant's pro se motion lacked a "factual or legal basis"); *People v. Lee*, 188 A.D.3d 1685, 1685-86 (4th Dept. 2020) (Troutman, J., on panel); *People v. Caputo*, 163 A.D.3d 983, 983-84 (2d Dept. 2018). Accordingly, as sentencing counsel himself specifically requested, the court had a constitutional obligation to relieve him. A1514-15.

Nevertheless, citing to *Washington*, the First Department found no adverse-position conflict because, in stating that "he believed that he had provided effective assistance," counsel "never went beyond 'defending his performance.'" A3 (quoting *Washington*, 25 N.Y.3d at 1095). In interpreting *Washington*'s statement that counsel can "defend his performance" to mean that counsel can deny the *merits* of an ineffective-assistance claim, the First Department misinterpreted *Washington*.

Washington reconfirmed the *opposite* rule, holding that while counsel can "outline" the steps counsel took "on the client's behalf" (25 N.Y.3d at 1095), counsel creates a conflict when counsel opines that a pro se motion "lacks merit." *Id.* (citing *Mitchell*, 21 N.Y.3d at 966). In turn, *Washington* found no conflict because counsel provided a "factual explanation of his efforts on his client's behalf" but "did not suggest that his client's claim lacked merit." *Id.* *Washington* thus confirms a critical distinction between providing facts (no conflict) and offering legal conclusions about the pro se motion's merits (conflict). *Washington*, 25 N.Y.3d at 1095; *Mitchell*, 21 N.Y.3d at 966-67.

Washington's reliance on *Nelson* further confirms that counsel cannot opine that a pro se motion lacks merit. *Washington* quoted *Nelson* for the proposition that an attorney can "defend[ ] his performance." 25 N.Y.3d at 1095 (quoting *Nelson*, 7 N.Y.3d at 884). *Nelson* held that "defending [one's] performance" means offering *facts* about that performance, not legal conclusions against the client's position. *Nelson*, 27 A.D.3d at 287 (no conflict where because counsel merely "outlin[ed] his efforts on his client's behalf"), *affd.* *Nelson*, 7 N.Y.3d at 884.

This Court's distinction between providing facts and offering legal conclusions is workable and makes good sense. When counsel relays facts regarding his/her performance, counsel is providing material information that can help the court resolve a pro se application. On the other hand, where an attorney attacks the motion's merits with a conclusion about its validity—e.g., "I was very effective" or "this motion lacks merit"—the attorney is fighting the client's legal position without assisting the court at all. That is precisely what the right to conflict-free counsel is designed to prevent. *Carncross*, 14 N.Y.3d at 329 (the right to conflict-free representation guarantees "single-minded protection of defendant's interests").[19]

D. The Appellate Division's harmless-error theory fails too.

Quoting its own authority, the First Department alternatively held that the conflict claim failed because the court "'readily recognized the motion's lack of merit, independently of anything said by counsel.'" A3

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[19] To be sure, under certain circumstances, a court has the authority to deny a pro se motion that it finds meritless *without* hearing from counsel, thereby avoiding the possibility of any conflict. *Washington*, 25 N.Y.3d at 1095 (counsel need not comment on a pro se motion); *Mitchell*, 21 N.Y.3d at 966-67. But here, the court did not summarily deny the motion without hearing from counsel. Instead, the Court denied the motion after denying counsel's motion to be relieved and after counsel took a position adverse to Mr. Debellis' claim. A1514-18.

(quoting *Torres*, 159 A.D.3d 473).[20] By relying on the theory that counsel's adverse position did not impact the court's ultimate decision on the pro se motion, the First Department improperly grafted a prejudice/harmless-error rule onto this conflict claim.

Contrary to the First Department's theory, conflict claims are immune from harmless-error or prejudice analysis. Instead, once an actual conflict is shown, the right to counsel is violated because it is presumed that a conflicted attorney cannot safeguard the client's interests throughout the proceeding. *Ortiz*, 76 N.Y.2d at 656-57 (a defendant alleging a conflict need not "show specific prejudice"); *see also People v. Solomon*, 20 N.Y.3d 91, 96-98 (2012) (once an "actual conflict" exists, the right to conflict-free representation is violated); *Strickland*, 466 U.S. at 692-94 (distinguishing traditional ineffectiveness claims from conflict claims as far as a prejudice requirement goes). It is therefore irrelevant whether conflicted counsel's conduct impacted the court's ultimate resolution of the motion.

The Appellate Division's prejudice theory also fails on its own terms. To the extent the motion court "recognized the motion's lack of merit"

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[20] *Torres* cited no case for this proposition.

independent of counsel's adverse position, it only did so *after* counsel declined to amplify and develop the motion and instead argued that it was meritless. A1514-16. Had new counsel stepped in, the merits of the new-trial application could have been developed.

As Mr. Debellis was represented on the motion to set aside the verdict and at sentencing by a conflicted attorney, the sentence must be vacated. *See Phillip*, 200 A.D.3d at 1109-10.

CONCLUSION

This Court should vacate the judgment and order a new trial. Point I. At a minimum, this Court should vacate the sentence and order a new sentencing hearing. Point II.

Respectfully submitted,

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