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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Mr. Debellis submits this reply brief in response to the prosecution's brief, filed on February 16, 2023 ("Pros. Br.").

POINT I

Counsel was ineffective in failing to pursue a voluntary-surrender defense.

A. The prosecution's "terms and conditions" argument fails.

The prosecution does not deny that Mr. Debellis' testimony, if credited, satisfies the "terms and conditions" (Penal Law § 265.20(a)(1)(f)) of the

NYPD buyback-program policy. Debellis Brief 36-37.[1] Nor does the prosecution deny that this Court should judicially notice the "readily available and indisputably accurate" NYPD policy. *Id.* at 37 n.14. Still, the prosecution argues that counsel reasonably conceded guilt and failed to pursue a voluntary-surrender defense because the "terms" of the NYPD buyback program were not formally in evidence, thus precluding the voluntary-surrender instruction. *Id.* at 34-35. This argument fails.

Even assuming the buyback program's terms and conditions must be introduced into evidence to secure the instruction (*but see* Reply, below, at 3-5), counsel was ineffective in failing to introduce them. Instead of giving up and conceding guilt because a government website was not in evidence, any reasonable attorney would have introduced the NYPD buyback program's terms into evidence or asked the court to judicially notice them. *See*, *e.g.*, *Strickland v. Washington*, 466 U.S. 668, 686-91 (1984); *People v. Pisani*, 48 N.Y.2d 725, 726-27 (1979) (upon taking judicial notice, the court can instruct the jury regarding the noticed

[1] Appellant's Compendium: NYPD Buyback Policy ("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").

facts). It is hardly too much to ask that counsel take that simple step instead of conceding guilt of a C-violent felony.[2]

In any event, the program's terms did not need to be in evidence for defense counsel to have pursued the defense. As *People v. Watson* held, Mr. Debellis' testimony that he was "on his way to the precinct station house to turn the gun in for payment under the 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 852, 857, 862 (2d Dept. 2018); Debellis Br. 31-32. As Mr. Debellis' testimony "raised" the defense, it would have been unreasonable for counsel to abandon it because the terms of the buyback program were not formally in evidence.[3]

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[2] Oddly, the prosecution quotes the sentencing court's inaccurate statement—apparently based on that court's personal internet searches—that there was no buyback program at all. A1530; Pros. Br. 34-35. But, as the prosecution knows this to be inaccurate, it does not assert that, as a factual matter, the buyback program did not exist.

[3] *People v. D'Attore*, 151 A.D.3d 548 (1st Dept. 2017) (cited at Pros. Br. 34-35), is obviously distinguishable. *D'Attore* found—on extreme facts—no reasonable view that D'Attore satisfied the buyback program's terms because he engaged in a clandestine coverup operation from jail that involved calling a relative and asking her to drop off a "certain bag [from his house] at a police station, anonymously, and without looking in it or giving the police any information." *Id.* at 550. It is impossible to imagine that such a scheme could satisfy any conceivable set of buyback-program terms and conditions. That is why *D'Attore* found "no reasonable view of the evidence

To be sure, the prosecution could have, in response to the defense request for the § 265.20(a)(1)(f) instruction, sought to establish non-compliance with the NYPD's terms and conditions by presenting evidence to that effect (and a properly instructed jury could have resolved the issue). *Watson*, 163 A.D.3d at 862. But it is unlikely the prosecution would have even tried to advance such a theory, let alone succeeded. After all, even now, before this Court, the prosecution tacitly admits it could not have proven non-compliance as it does not deny that Mr. Debellis complied with the NYPD buyback program's publicly available terms. *See id.*; Compendium.[4]

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that defendant's conduct satisfied the requirements of this exemption." *Id.* This case, however, involves an individual driving to a police precinct to surrender a firearm in exchange for cash, precisely what someone must do to participate in the NYPD buyback program. *E.g.*, *Watson*, 163 A.D.3d at 857, 862. No sensible lawyer would have categorically abandoned the *only* defense available and conceded guilt because he feared the easily distinguishable *D'Attore* decision.

[4] The prosecution suggests Mr. Debellis was not entitled to the defense because he travelled from Carmel to the Bronx to surrender the firearm. Pros. Br. 36-37. But the prosecution cites nothing in the statute or NYPD buyback policy that prohibits such travel. If anything, the voluntary-surrender statute indicates that Mr. Debellis had to surrender the firearm in the "city" in which he "resides" (Penal Law § 265.20(a)(1)(f)), which was the Bronx. A1325-27. Ultimately, the suggestion that the voluntary-surrender statute contains some sort of travel-distance limitation improperly adds a vague limitation to the statute that is simply not there. *E.g.*, *Matter of Richmond Constructors v. Tishelman*, 61 N.Y.2d 1, 6 (1983) (courts cannot "add words to a statute"); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) ("It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts.") (cleaned up).

Finally, even if a defendant must present evidence of the "terms and conditions" of the policy, there was evidence of those terms and conditions before the jury. *People v. Watts*, 57 N.Y.2d 299, 301 (1982). Mr. Debellis testified he researched the NYPD buyback program and learned that he could surrender the firearm to an NYPD precinct in exchange for cash. A1328-29, A1349-53. Through that testimony, Mr. Debellis provided "some evidence" of the terms of the buyback program—all without dispute from the prosecution. *People v. Ortiz*, 76 N.Y.2d 446, 448 (1990) ("if some evidence, however slight," supports the defense, the reasonable-view standard has been satisfied) (quotation marks omitted). That testimony was more than sufficient to justify a reasonable view that Mr. Debellis was doing precisely what the NYPD's terms and conditions require: surrendering the firearm to an NYPD precinct in exchange for cash. *Watson*, 163 A.D.3d at 857, 862; Compendium.

B. The ineffective-assistance inquiry focuses on the reasonableness of the *identified* error, not a subjective assessment of everything counsel did in the case.

The prosecution provides a tedious account of numerous things counsel did, such as move to suppress, "swipe" at prosecution evidence, deliver a "cogent" opening, and cross-examine police officers. Pros. Br. 21-26. The prosecution even references defense counsel's victory in a prior unrelated trial. *Id.* at 24.

This is all irrelevant. The controlling inquiry is whether, as *Strickland v. Washington* itself held, the "identified" error—counsel's concession of guilt and his failure to pursue a voluntary-surrender defense—was ineffective. *Strickland*, 466 U.S. at 690 ("[A defendant alleging] ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the *identified acts or omissions* were outside the wide range of professionally competent assistance.") (emphasis added). Counsel's unreasonable and prejudicial blunder cannot be offset by counsel's purportedly effective performance at other trial/pretrial stages, let alone other trials. *Kimmelman v. Morrison*, 477 U.S. 365, 385-86

(1986) (where counsel makes a prejudicial blunder at one stage, good performance at another cannot, as the prosecution argued there, "lift counsel's performance back into the realm of professional acceptability"; counsel's performance during other stages is only relevant to the extent it "sheds" "light" on the "reasonableness" of the identified omission) (citing and quoting *Strickland*, 466 U.S. at 690); *accord Cronic v. United States*, 466 U.S. 648, 657 n.20 (1984). As Judge Wesley, a former Judge of this Court and now a Judge on the Second Circuit, has explained, courts cannot "look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial. That would produce an absurd result inconsistent with New York constitutional jurisprudence and the mandates of *Strickland*." *Rosario v. Ercole*, 601 F.3d 118, 125-26 (2d Cir. 2010) (majority op.); *accord People v. Jones*, 167 A.D.3d 443, 443 (1st Dept. 2018) (quoting *Rosario*, 601 F.3d at 124-26).

The prosecution's attempt to whitewash counsel's blunder by citing other things he did is particularly "absurd" (*Rosario*, 601 F.3d at 126) in the context of the identified error at issue: an unreasonable *concession* of guilt. The right to effective assistance is quite useless if it permits counsel

to unreasonably concede guilt—rendering the jury trial academic—merely because counsel may have previously done other things competently, such as cross-examine witnesses.

Nor could any court predictably and consistently apply the prosecution's subjective approach, which basically requires a reviewing court to: (1) tally up all of counsel's seemingly good and bad performance, (2) assess that mix of conduct against counsel's professional experience and prior win/loss record, and then (3) determine, on balance, whether the "good" factors on one side of the ledger outweigh the attorney's prejudicial blunder or blunders. Pros. Br. 21-26; *id.* at 3 (defining the question presented as whether "experienced and engaged counsel" was ineffective). If there ever were a subjective, arbitrary, and unworkable standard, that's it.

C. Direct-appellate review is required.

Contrary to the prosecution's strained procedural argument, a 440 motion is only necessary where *material* questions of fact exist regarding counsel's performance. Pros. Br. 31-32; Debellis Br. 45-46. And here, there are none. As the prosecution concedes, counsel pursued the factual theory that Mr. Debellis possessed the firearm because he was

surrendering it under the NYPD's buyback program. Pros. Br. 31-32. But counsel then conceded guilt without any defense at all because he chose the wrong defense, pursuing a baseless common-law defense instead of the statutory defense tailor-made for the very factual theory he had already presented to the jury. The direct appellate record thus conclusively shows that counsel simply made an objectively unreasonable blunder in failing to request the only applicable defense that fit the facts he had developed. *See generally Hinton v. Alabama*, 571 U.S. 263, 264 (2014) (per curiam) (*Strickland* focuses on objective reasonableness). We do not need a wasteful hearing to tell us that. *E.g.*, *People v. Heidgen [McPherson]*, 22 N.Y.3d 259, 278 (2013) (direct-appellate review of ineffective assistance claim required); *People v. Clermont*, 22 N.Y.3d 931, 933 (2013) (ineffectiveness claim reviewable on direct appeal because "this is not a case where any of these errors can be explained as part of a strategic design (assuming one could be imagined)"); *see also People v. Holland*, 115 A.D.3d 492, 493 (1st Dept. 2014); *People v. Logan*, 263 A.D.2d 397, 397-98 (1st Dept. 1999).

While the prosecution suggests counsel must testify at a 440 hearing regarding his *legal* analysis (such as how he interpreted the McKinney's

"practice commentaries") that testimony would be irrelevant. Pros. Br. 31-32. Even if, as the prosecution hypothesizes,[5] counsel determined that the voluntary-surrender defense was "'so weak as to not be worth raising'" (*Heidgen [McPherson]*, 22 N.Y.3d at 278 (quoting *People v. Turner*, 5 N.Y.3d 476, 483 (2005)), that determination's reasonableness is a pure question of law that requires an assessment of the law and the record—not counsel's subjective account of his legal research. *E.g.*, *id.* (ineffectiveness claim stemming from counsel's failure to move to dismiss was reviewable on direct appeal).

* * *

In sum, counsel's failure to request the only available defense instruction was ineffective assistance of counsel. A new trial is required.

POINT II

Sentencing counsel was conflicted.

The prosecution concedes that, under conflict-of-interest rules, defense counsel cannot adversely "comment on the merits" of a pro se motion.

[5] The suggestion that "experienced and engaged" counsel (Pros. Br. 3) pursued a voluntary-surrender factual theory but then, after spotting the voluntary-surrender statutory defense, *knowingly* declined to pursue it (instead conceding guilt) defies credulity. There is no doubt that counsel failed to pursue the statutory defense because he was simply unaware of it.

Pros. Br. 42-43; Debellis Br. 47-53; *People v. Washington*, 25 N.Y.3d 1091, 1095 (2015); *People v. Mitchell*, 21 N.Y.3d 964, 967 (2013). That should end the matter. Defense counsel specifically stated at sentencing, "I was very effective" after his client filed a pro se motion alleging that he was "ineffective." A8-10, A1515. Counsel's adverse comment on the merits of the pro se motion created a conflict mandating assignment of new counsel. *Mitchell*, 21 N.Y.3d at 967.

Nevertheless, the prosecution advances what appear to be three arguments: (1) counsel's declaring that "[he] was very effective" was not "adverse" because it was "brief," "terse," and "innocuous"; (2) the sentencing court properly exercised its discretion in summarily denying the motion; (3) Mr. Debellis did not properly file his pro se motion because he did not file an additional copy with the Clerk's Office. Pros. Br. 39-47. These arguments are either illogical or irrelevant given the record.

First, there is no word-count exception to the basic rule that counsel cannot take a position adverse to the merits of a client's pro se motion. *Mitchell*, 21 N.Y.3d at 967. Whether with a few "terse" words or a lengthy speech, counsel's words cannot, as here, declare that his client's motion lacks merit. *Id.*

The prosecution's related contention that counsel's words were "innocuous" and thus not "adverse" fails too. The plain language of counsel's statement confirms the opposite. Counsel stated that he was "very effective" (A1515), which, by definition, was adverse to Mr. Debellis' claim that he was ineffective (A8-10). No reasonable person standing in that courtroom that day, and no reasonable defendant, would have concluded that counsel had *not* taken a position adverse to his client.

The prosecution's vague position is unworkable. Courts cannot predictably and meaningfully administer the prosecution's novel word-count standards or assess whether counsel's statements, although adverse on their face, are really "bad enough" to create a conflict. The prosecution's subjective approach will lead to arbitrary resolution of adverse-position conflict claims. Instead of that arbitrary approach, this Court should apply the workable standard established by its own cases: counsel can state *facts* in response to a pro se motion but cannot, as here,

take a position adverse to the motion's *merits*. Debellis Br. 47-50; *Washington*, 25 N.Y.3d at 1095; *Mitchell*, 21 N.Y.3d at 967.[6]

The prosecution adds that the trial court exercised its "discretion" to summarily deny the motion that counsel opposed. Pros. Br. 44-47. While a court can summarily deny a pro se motion *without first* receiving an adverse position from counsel (Debellis Br. 53 n.19; *Mitchell*, 21 N.Y.3d at 967), that is not what happened here. The trial court ruled on the motion's merits *after* defense counsel took an adverse position to the motion. A1515-20. A court lacks "discretion" to decide a motion after the defendant's own lawyer has taken a position adverse to that motion. Instead, under those circumstances, the Constitution requires that new, conflict-free counsel be assigned. *Mitchell [Deliser]*, 21 N.Y.3d at 967.[7]

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[6] Because the decision contains no facts, it is unclear whether counsel in *People v. Quintana*, 15 A.D.3d 299 (1st Dept. 2005) (cited at Pros. Br. 43) actually took a position adverse to the merits of the client's pro se motion. To the extent counsel did so and the First Department nevertheless found no conflict on the subjective grounds that the adverse position was "brief, generalized and completely innocuous," that lower-court authority from 2005 is not persuasive and violates this Court's later precedents. *Mitchell*, 21 N.Y.3d at 966-67; *see also* Reply Br. 11-12.

[7] The prosecution cites an irrelevant line of cases involving substitution-of-counsel requests. *E.g.*, Pros. Br. 44 (citing *People v. Porto*, 16 N.Y.3d 93 (2010)). The issue here is not whether the court should have granted a request for substitution of counsel; it's whether counsel was conflicted due to his adverse position. *Mitchell*, 21 N.Y.3d at 967.

When all else fails, the prosecution claims that Mr. Debellis did not properly file his pro se motion from jail because, although he filed it with the correct court (the sentencing court), he did not file a copy with the Clerk's Office or serve it on the prosecution. Pros. Br. 39-40. But as the prosecution's brief readily acknowledges, the prosecution "waived objection to the court rendering a decision" and the court resolved the motion "on its merits" (A1517-21; Pros. Br. 19, 39-40). Thus, these technical filing/service problems are both academic and waived.

In any event, a potential "procedural infirmity" (Pros. Br. 39) with a pro se motion—quite common given that a pro se motion is, by definition, filed by a lay individual—does not authorize counsel to take a position adverse to its merits. The prosecution cites no authority for this additional new exception to the right to conflict-free counsel. None exists.

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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WORD-COUNT CERTIFICATION

This brief contains 2,892 words and uses 14-point Century Schoolbook font.