APL 2022-00107

To be argued by:
R. GRACE PHILLIPS
(20 MINUTES REQUESTED)

Court of Appeals
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ANTHONY DEBELLIS,

Defendant-Appellant.

RESPONDENT'S BRIEF

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BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

By permission of the Honorable Jenny Rivera, Associate Judge of the Court of Appeals, granted August 8, 2022, Anthony DeBellis appeals from an order of the Appellate Division, First Department, entered May 19, 2022. *People v. DeBellis*, 205 A.D.3d 555 (1st Dept. 2022). That order affirmed a judgment of the Supreme Court, Bronx County (Lewis, J.), rendered October 3, 2019, convicting him, by jury verdict, of second-degree Criminal Possession of a Weapon (Penal Law § 265.03[3]), third-degree Criminal Possession of a Weapon (Penal Law § 265.02[1]), and Criminal Possession of a Firearm (Penal Law § 265.01-b[1]) and sentencing him, respectively to a determinate term of seven years' incarceration with five years' post-release supervision, an

indeterminate term of between two-and-one-third to seven years' incarceration, and an indeterminate term of between one-and-one-third to four years' incarceration.

Defendant is incarcerated pursuant to this judgment.

QUESTIONS PRESENTED

1. Whether experienced and engaged counsel provided effective assistance despite unsuccessfully seeking a temporary and innocent possession instruction and not seeking a voluntary surrender one where no reasonable view of the evidence warranted either instruction?

2. Whether counsel's brief, innocuous defense of his performance in response to defendant's conclusory and unsubstantiated attack on it created a conflict warranting assignment of new counsel?

INTRODUCTION

"New York State has regulated the public carry of handguns since at least the early 20th century," observed Supreme Court Justice Thomas while summarizing New York's history of firearms regulations. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2122 (2022). Defendant, a longtime New York resident, was well aware of New York's gun permitting process, having previously undergone it. Defendant was also well aware that he did not have a valid permit: his permit was revoked as a part of a 2016 plea deal and he was subsequently ordered to surrender his firearms by multiple orders of protection.

Just as defendant knew he did not have a valid firearm permit, he knew he was not supposed to go to the house he owned with his wife in Carmel, New York. Multiple orders of protection prohibited him from doing so. Despite these orders, defendant went to the home where he got into an argument with his wife. Upset, defendant left the home, grabbing, on the way out, his loaded firearm, an extra magazine, and spare ammunition. He took the loaded firearm and bag of ammunition on a public train from Carmel to White Plains where he then drove a "friend's" BMW.

Defendant was stopped by an officer on the Bronx River Parkway due to the car's suspended registration. When he was approached by the officer, defendant failed to produce a license or registration. Only when the officer spotted a magazine in defendant's pocket did defendant acknowledge he had one. Even then, defendant denied having a gun in the car. The officer eventually noticed the bag of ammunition

and spare magazine and asked again where the gun was. Again, defendant denied having a gun.

The officer issued defendant two summonses and called for a tow. Defendant asked if he could get his phone charger, and the officer agreed. Defendant, however, did not get his phone charger but instead seemed to be groping around the driver's seat area. The officer then searched that area and recovered a loaded firearm from below the driver's seat floor mat. Defendant provided no explanation for the gun until trial when, for the first time, he claimed he had been on his way to a gun buyback program in the Bronx.

At trial, counsel pursued two defense strategies and attacked the People's witnesses and evidence. Counsel argued defendant's possession was temporary and innocent given defendant's alleged intention to surrender the weapon. He also argued, in an appeal to the jurors' compassion, that defendant was a broken man who acted in desperation. While the court initially expressed its intention to deliver a temporary and innocent possession instruction, defendant's testimony—given against the advice of counsel—persuaded the court that no reasonable view of the evidence warranted the charge.

Indeed, defendant's testimony confirmed that his possession was anything but temporary. It also underscored the absurdity of his claim. Defendant had traveled miles on a public train with a loaded gun and extra ammunition, traveled even further in an unregistered car, failed to disclose the gun to an officer who pulled him over, and only

one year later claimed he was heading to a buyback program. The court thus sensibly declined to instruct the jury on temporary and innocent possession.

Nor did counsel have a basis for requesting the statutory defense of voluntary surrender pursuant to Penal Law § 265.20(a)(1)(f). Despite video evidence depicting a relaxed encounter, defendant repeatedly lied to the officer and ultimately snuck the gun beneath a floor mat in an effort to conceal it. In addition to the gun, defendant also possessed a large quantity of ammunition and a back-up magazine. These facts belied his claim that he intended to surrender the gun. Furthermore, defendant provided no evidence to corroborate his claim that there was a buyback program going on. In fact, when the court looked into this, it found no buyback program. This failure was critical given that the statutory defense requires that a person abide by a program's procedures for surrender. Therefore, the court had no basis for giving the instruction.

At sentencing, defendant again attempted to avoid the consequences of his actions by handing counsel three pieces of paper purporting to be a motion to vacate his conviction. The forms contained conclusory, factually barren allegations against the court, the prosecutor, and counsel. Counsel, attempting to explain to the court why he would not adopt defendant's motion, stated he believed he had been effective. He said nothing about the merits of the motion. After observing that the motion had not been properly filed or served, the court nonetheless rejected it on its merits. Regarding the perfunctory attack on counsel's performance, the court found the found it "a hard-

press to see how anything else … could have been done" for defendant beyond what counsel had done throughout the proceedings.

Having previously submitted a thorough pre-sentence memorandum, counsel proceeded to zealously advocate for leniency. Highlighting counsel's effective advocacy, the court referenced several of the mitigating factors artfully raised by counsel when it explained its reason for its well-below-the maximum sentence.

STATEMENT OF FACTS

The Suppression Hearing

The People's Case

On August 19, 2019, a *Huntley/Mapp* hearing was conducted before the Honorable David Lewis. A11. The People called New York City Police Department ("NYPD") Patrol Officer JUSTIN ALLEN and introduced dashcam video depicting the car stop. A43, A57.

Officer Allen was patrolling the area around Mosholu Parkway and Bronx River Parkway in Bronx County in a marked patrol car on the afternoon of September 19, 2018, when the car's license plate reader, a device connected to the New York State Police Inquiry System ("NYSPIN"), registered a hit for a suspended registration on a passing gray 2016 BMW. A44-46. Officer Allen activated his lights to initiate a car stop, but the vehicle proceeded through an exit ramp and crosswalk. Using his microphone, Officer Allen told the driver to pull over and activated his sirens. A45-46,

59. Once the car pulled over, Officer Allen verified that the New York State Department of Motor Vehicles ("DMV") had suspended its registration. A46.

Officer Allen approached the vehicle and twice asked the driver, defendant, for his license and registration before defendant admitted he had neither. A47. During their exchange, Officer Allen noticed a shiny object in defendant's right hand, which was in his jacket pocket, and asked defendant to step out of the vehicle. A48, 61. As defendant did, Officer Allen observed that the shiny object was a firearm magazine which defendant referred to as a "cartridge." A48. Now on alert, Officer Allen walked defendant to the rear of the vehicle and performed a safety frisk. A48-49. As he did, the pair talked.

Defendant initially claimed the car's owner, a "buddy of his," had left the cartridge in the car, but then stated that he had the magazine because he worked in the "security department" of "the courts." A49-51, 62, 66. Because of the magazine, Officer Allen asked defendant if there were weapons in the vehicle. A51. Officer Allen also noticed that the car smelled of alcohol, but defendant denied drinking. A64-65. Officer Allen observed a half-open bag on the floor of the front passengers' seat that contained additional ammunition, a holster, and another magazine. A51; A64.

When Officer Allen asked about the ammunition, defendant said his permit for a "Glock and a .45" had been revoked two days earlier. A51, A65. Officer Allen responded that defendant should "know what to do with it" and should "put it in a safe" since they "took [his] gun [a]way." A67. Defendant claimed that he had had a

fight with his wife and had grabbed the bag as he left in a hurry. A67. Officer Allen asked defendant to write down his name and date of birth, and defendant gave the name John Franco DeBellis and a birth date. Nonetheless, when Officer Allen ran this name through NYSPIN, he did not get a hit. A53, A85. Defendant claimed he worked for "sanitation." A71.

Lieutenant White arrived at the scene to assist Officer Allen. In the car trunk, he found a set of license plates belonging to a Lexus. A52. Defendant denied that the plates belonged to him, and Lieutenant White asked him to call the car's owner. A75-76. Defendant briefly "play[ed] around on his phone" before saying he could not get in contact with the owner. A76-77. Because defendant could not produce a license or registration and could not reach the owner, Officer Allen called for a tow truck and told defendant he was being issued two summonses. A78-79.

Once the tow truck arrived, defendant asked if he could get his phone charger from inside the car. Officer Allen allowed him to do so. A54. Officer Allen noticed that defendant did not grab his charger from its location on the passenger seat but appeared to be reaching for something. A54. As a result, Officer Allen directed defendant to step away from the car and searched the area where defendant had been rummaging. A54. Officer Allen found a gray Browning 1911 firearm concealed under the driver's seat floor mat. A54, 81. He handcuffed defendant and placed him in the back of his patrol car. A82. There, defendant told the officer there was a serial number on the grip of the gun and that he had purchased the gun in Florida. A123. Defendant

also slipped out of his handcuffs, reached into his pants, and pulled out two blue pills that Officer Allen confiscated and believed to be Xanax. A82-3.

Officer Allen drove defendant to the 52nd Precinct where he had to call for an ambulance because defendant claimed he had swallowed more than twenty Xanax pills and wanted to talk to his wife because he "check[ed] out." A84. At the precinct, defendant was fingerprinted revealing his real name, Anthony DeBellis. A85.

The Defense's Case

Defendant presented no evidence.

The Court's Decision

In oral and written decisions, the court credited Officer Allen's testimony and found the traffic stop, the vehicle search, and the arrest lawful. A191. Defendant did not challenge that ruling at the Appellate Division and does not challenge it now.

The Trial

The People's Case

On September 19, 2018, at approximately 3:30 PM, defendant drove a gray 2016 BMW past Officer JUSTIN ALLEN of the NYPD highway patrol as he headed southbound on the Bronx River Parkway in Bronx County. A825-27. Officer Allen was on routine patrol in the area, driving his marked cruiser which was equipped with a license plate reader, a dashcam that recorded video, and a detachable microphone that could record conversations. A864-65. As the BMW passed the cruiser, the license plate reader alerted the officer that the car's registration was suspended. Officer Allen

activated his lights to initiate a car stop. The car did not pull over, however, but proceeded through an exit ramp. Officer Allen utilized his microphone and sirens to direct the driver to pull over. The car then pulled over. A826-27.

Officer Allen approached the BMW and found defendant alone in the driver's seat. He asked for defendant's license and registration, but defendant provided neither. A828-29. As defendant removed his hand from his jacket pocket, Officer Allen noticed a shiny object and inquired about it. A829-30. Defendant said, "it's a magazine" and claimed the car's owner had left it in the car. A830. The magazine contained eight nine-millimeter bullets. A834. Officer Allen asked defendant to step out of the car and walked him to its rear to frisk him. A830-31. As he did, he asked defendant if there were any weapons in the car. Defendant said "no." A830; A853-54. Nonetheless, Officer Allen looked inside the car and noticed a half-open bag on the floor in front of the right passenger seat. It contained forty-three rounds of ammunition, a holster, and another firearm magazine. A831. When he asked defendant why he had the bag, defendant replied he had just had a fight with his wife and had grabbed the bag in a hurry as he left home. A831, 853.

Officer Allen asked defendant where the gun was, and defendant replied "[t]hey took it away from me." He claimed he had previously had a permit for two firearms but that it had been revoked "sometime in June." A853-54; Video at 15:42-44. Officer Allen asked defendant to write down his name and date of birth. Defendant wrote "Gianfranco Debellis" and gave a birthday of November 22, 1980, and an address in

Wappingers Falls, New York. A854; A868-869; Video at 15:47. While Officer Allen sat in his cruiser verifying the information defendant had given him, defendant approached and claimed he worked for the sanitation department. A854; Video at 15:48.

Lieutenant White assisted Officer Allen with the stop. A854-55. The officers instructed defendant to call the car's owner, but he was unable to. A855. The officers consequently called for a tow truck. Officer Allen advised defendant he was being issued two summonses. When the tow truck arrived, defendant asked if he could get his phone charger, and Officer Allen consented. However, instead of grabbing the charger from where it lay on the passenger seat, defendant began reaching around in the car, and Officer Allen ordered him to get out of it. Defendant grabbed the bag with the ammunition and holster and stepped back from the vehicle. A856, 873-874.

Officer Allen then searched the area where he had observed defendant reaching around in. Under the driver's seat floor mat, he found a black firearm with a loaded magazine. A857-61. He handed the firearm to Lieutenant White to secure it. A875. Officer White then handcuffed defendant and put him in the backseat of the patrol car. A875-76. There, defendant slipped out of the handcuffs, reached into his back pants pocket, and took out two Xanax pills. A876-77. After confiscating the pills, Officer Allen attempted to ascertain the firearm's make and model. Defendant said the serial number was under the grip and claimed he had bought the gun in Florida. A878.

Officer Allen transported defendant to the 52nd Precinct where he ultimately obtained his real name, Anthony DeBellis. A878, 880-81. There, defendant claimed he had taken over twenty Xanax pills and said he wanted to call his wife because he "was checking out." A878. As a result, he was transported to the hospital. A879.

NYPD Criminalist STEPHEN BYRNE tested the two blue pills via gas chromatography and mass spectrometry. He concluded that they were Alprazolam, the generic name for Xanax. A995-999.

Detective CHRISTOPHER TORRES of the NYPD's Evidence Collection Team processed the gun, magazines, and ammunition for evidence. A969; 972-74. He swabbed the trigger, handle, side grips, side grip grooves, slide release, magazine, and ammunition in the magazine. A976-80. He also fumigated the gun for fingerprints but could not retrieve any. A985. NYPD Firearm Analyst Detective CHRIS GIANNIOUDIS tested the gun— nine-millimeter semi-automatic pistol—and found it operable. A1147-48; 1150-51. Detective Giannioudis also tested the ammunition recovered from the bag in the car and found the rounds operable. A1153; 1156.

Office of the Chief Medical Examiner ("OCME") Criminalist KATRINA MADDELA analyzed the swabs taken by Detective Torres. A1066-68. The DNA profile from the front, back strap, and slide was ninety-one trillion times more likely to have come from defendant and two unknown individuals than from three unknown individuals. A1080-81. Defendant was 6.25 quadrillion times more likely than a random person to be a contributor to the sample taken from the trigger and trigger

guard. A1081-82. Criminalist Maddela also explained that, while it was possible for Officer Allen to have transferred defendant's DNA to the gun, the sample analysis was inconsistent with that type of transfer. A1092-93; 1095-96.

The Defense Case

Defendant ANTHONY DEBELLIS testified that he was married, had two children, aged seven and fifteen, and had spent fifteen years doing building maintenance work for New York City's Department of Citywide Administrative Services. A1304-05. Then, in 2014 and 2016, defendant was injured and prescribed Oxycodone for pain management. A1306-10. Defendant claimed he became so addicted to Oxycodone that at one point, he was taking 150 pills per month. A1310-11. As a result of his injuries, defendant testified, he could not work and applied for disability. A1313.

Defendant claimed he had legally purchased the firearm in question from a pawnshop while on a 2014 Florida family vacation to Disney World. A1314-15. He said he was a "gun enthusiast" who had purchased the gun because it was "a collector's item." A1316. While in Florida, defendant left the gun unattended in his car while he stayed in a hotel. A1316. He claimed he had obtained a hunting and shooting range permit in Carmel, New York, following the proper permitting "procedure" which "took almost a year between the application, the fingerprints," and some other requirements. A1318. Defendant testified that, pursuant to New York licensing requirements, he kept the firearm in a safe that was bolted to the ground in a closet in his Carmel home. A1322.

Defendant acknowledged that his permit had been revoked following a 2016 incident. A1320. He alleged that he was on his way to a shooting range with his other gun, a .45 Kimber pistol, when he stopped at an AutoZone and fell asleep, prompting a third-party to call 911 and report a suspicious car. A1320; 1341-42. When officers arrived and defendant consented to a car search, they recovered the Kimber pistol. A1320. Defendant claimed he was unaware that his shooting and hunting permit had only allowed him to go directly to the range. A1320; 1343. Nonetheless, defendant pleaded guilty to a class A misdemeanor, and his permit was revoked. A1321; 1342. On cross-examination, defendant conceded he had stopped to buy paint thinner but denied that he had been huffing it in the parking lot. A1342-43. Defendant also admitted that he had been convicted of filing a false instrument after drunkenly crashing his car into a tree and claiming it had been stolen. A1323-25.

Defendant acknowledged that several orders of protection had been issued against him directing him to turn in any weapons he possessed. A1321; 1344. One of those orders was issued by the Bronx Supreme Court on July 27, 2017, and two were issued by the Putnam County Family Court on August 29, 2017, and August 29, 2018. A1344-47. Defendant conceded that, despite these orders, he did not turn in his firearm. A1321, 1347. He claimed he had not read the orders—including the one issued while he was present in Bronx Supreme Court—and therefore did not know if they directed him to surrender his firearms. A1346-48. He testified that he "didn't

really pay much attention to" his gun despite numerous orders directing him to turn it in because "[i]t was in the safe." A1347-48.

According to defendant, on September 19, 2018, he was living with his mother in the Bronx because of his drug addiction problems.[1] A1326. He claimed he left his mother's house and went to the house he owned with his wife in Carmel to help her plan a birthday party for their son. A1326. Defendant alleged that while there, he and his wife argued about finances, causing him to become upset and leave. A1328; A 1349. On his way out, defendant grabbed the pistol from the safe and placed it in a bag along with ammunition and magazines. A1328-29. He then headed "down to the Bronx" on the train to "turn it in" because, "[a]s far as [he] knew" the NYPD was the "only department in the vicinity that took guns for cash." A1329. He claimed he had "nothing else to s[ell]" and "was down to nothing." A1329.

Defendant testified that he took the train to White Plains where he got into his friend's car to turn in the firearm when he was pulled over by Officer Allen. In addition to the loaded firearm, extra magazine, and extra ammunition, he had a ziplock bag with approximately twenty-five pills—a mix of Xanax and Oxycodone. A1330-32. Defendant acknowledged he had lied to Officer Allen about his name but claimed that was his only lie. He had given his brother's name because he did not have a valid

[1] Defendant only acknowledged on cross-examination that he was staying at his mother's house because of the multiple orders of protection against him (A1353).

driver's license. A1332. He also claimed he attempted to swallow the pills because he "didn't want to live anymore." He had "lost everything." A1332-33.

When asked on cross-examination if the only thing he had lied to Officer Allen about was his name, defendant conceded that he had also lied about having a gun in the car. He rationalized "it wasn't gonna do any good telling him I had a gun in the car." A1339. The prosecutor confronted defendant with the dashcam video showing him repeatedly lying to Officer Allen about having a gun in the car and, at one point, defendant replied that he had sold the Glock he referenced in the video to a friend "several years" earlier. A1341. Defendant testified that he had researched where he could sell his gun legally, which had prompted him to take the gun from Carmel in the hopes of exchanging it for "a $200 gift card" at a gun buyback program in the Bronx. A1352. Despite testifying that he had "check[ed] around locally," defendant claimed not to know there were gun buyback programs in upstate New York or Westchester County. A1353. He acknowledged that there were numerous police stations in Carmel and Westchester. A1354.

The Verdict, Defendant's Application, and Sentencing

Defendant was convicted of the weapon possession charges but acquitted of the controlled substance possession charge, and the case was adjourned to October 3, 2019, for sentencing. A1510. At sentencing, shortly after the court confirmed the parties had been able to examine the presentence reports, defense counsel said he had submitted a presentence memorandum. He then alerted the court that he had "just got a memo

from the defendant" who was "putting a motion on his own, pro se, to set aside the verdict." A1512. The court asked if it was "[a] memo or a motion" and counsel responded that it "look[ed] like a motion to set aside the verdict" on the grounds of "malicious prosecution by the DA, ineffective assistance by counsel, meaning Mr. Sanchez." A 1512-13.

Counsel offered to hand the papers to the court, and the court clarified its "understanding" that defendant had "certain sets of papers" he had "handed" to his counsel. A1513. The court "assume[d] this [was] an attempt to serve a motion" and counsel stated he "guess[ed] so." A1513. The court noted the motion would "functionally" be "timely" since it had not yet been thirty days since the verdict. A1513-14. It then stated it did not "know if [counsel] want[ed] to adopt the motion." Counsel interrupted to say, "I don't think I want to adopt the motion where I am accused of ineffective assistance of counsel." A1514. The court advised that while there was still time for the motion to be legally filed, the court did not "take filings in the part." There was "a method" to serve and file motions but defendant's papers had not "been filed" and were therefore not "in front of [the court]." A1514. As such, when counsel raised the possibility that he might need to be relieved, the court responded that it did not "have a basis to relieve" him because he was just "holding a piece of paper," not a filed motion. A1514.

Counsel acknowledged he understood but pointed out that defendant was "making allegations in" his papers that counsel was "not going to argue on his behalf"

because he would not "argue that [he] was ineffective." A1515. Counsel stated, "I think I was very effective," and the court interrupted to say counsel was "missing [its] point" which was that the court did not have "a motion properly filed, docketed, served." A1515. The court said that whether or not counsel adopted the motion, it would "not impact what [the court was] going to do." A1515. Counsel reaffirmed that he would not adopt the motion, and the court confirmed the People had not received a copy of it. A1515-16. Counsel handed up the motion, and the court summarized it on the record. A1516-17.

The court asked if the People objected to the court rendering a decision without their response, and the prosecutor said she did not. A1517-18. The court then denied each claim in the motion on its merits. A1517-20. It said "[w]ith regards to the ineffective assistance of counsel" claim that it was "a hard-press to see how anything else for [defendant] could have been done." A1518. The court also found that "these papers [were not] sufficient even if they were properly filed and served...and there is no basis to grant the motion, on the facts." A1520. The court then sentenced defendant.

The Appeal to the Appellate Division

On appeal to the Appellate Division, First Department, defendant alleged (1) counsel's failure to request a voluntary surrender instruction rendered him ineffective; (2) defendant's sentence was excessive; and (3) a new sentencing proceeding was required because counsel took a position adverse to defendant's motion to vacate.

The First Department unanimously affirmed defendant's conviction. *People v. DeBellis*, 205 A.D.3d 555 (1st Dept. 2022). It determined that defendant's ineffective assistance of counsel claim was unreviewable because it "involve[d] matters not reflected in, or fully explained by, the record" and defendant had not yet raised them in a CPL § 440.10 motion. *Id.* at 555. Alternatively, the First Department found, defendant received effective assistance from counsel because there was "no reasonable view of the evidence that defendant's conduct satisfied the requirements" of the voluntary weapon surrender statute. *Id.* And even if counsel had made that request, there was "no reasonable possibility that the outcome of the trial would have been different" given defendant's own "actions and statements before and during his arrest." *Id.*

The First Department also found that defense counsel "did not create a conflict of interest with respect to defendant's pro se motion" by making a "brief and conclusory remark" because the remark was merely a defense of his performance. *Id.* In any case, the First Department found, notwithstanding counsel's statement, the trial court, which was familiar with the case, recognized that the motion lacked merit. The First Department declined to reduce defendant's sentence.

ARGUMENT

POINT I

DEFENSE COUNSEL PROVIDED EFFECTIVE ASSISTANCE WHEN HE PURSUED TWO REASONABLE STRATEGIES, ATTACKED THE PEOPLE'S WITNESSES AND EVIDENCE, AND WOULD HAVE OBTAINED A JURY INSTRUCTION ON THE DEFENSE OF TEMPORARY AND INNOCENT POSSESSION BUT FOR DEFENDANT'S DECISION TO TESTIFY AGAINST HIS ADVICE.

In the face of defendant's (1) rejection of a beneficial plea deal despite ample evidence of his guilt and (2) determination to give testimony—over counsel's advice—that undermined his defense, Alexander Sanchez of the 18b panel was plainly effective. He recognized early on that the evidence against his client was overwhelming. Video captured defendant's crime, his statements inculpated him, and his DNA was on the gun he unlawfully possessed. Defendant's firearms permit had been revoked as a condition of a previous guilty plea, and multiple orders of protection barred him from possessing weapons. Facing an "uphill battle," counsel first focused on securing a beneficial plea offer. And though he negotiated an offer that would have covered three open felony cases, defendant rejected it.

Counsel worked diligently to suppress evidence. He repeatedly, strenuously, and successfully litigated to expand the pre-trial *Huntley* hearing to include a *Mapp* issue. At that hearing, Sanchez extensively cross-examined Officer Justin Allen seeking to undermine his credibility and cast doubt on the validity of the vehicle stop. He made extensive arguments in support of suppression.

Despite the denial of suppression and the overwhelming evidence of defendant's guilt, defendant had good reason to believe Sanchez could still prevail at trial. Sanchez, who had tried hundreds of cases, had secured an acquittal for defendant following a prior felony trial and a favorable disposition on another felony matter. And indeed, counsel approached the instant trial with a multifaceted strategy. He claimed defendant's possession was temporary and innocent because defendant was on his way to a gun buyback program to exchange the gun for cash. Simultaneously, Sanchez painted defendant as a broken man, hoping to prompt jury nullification should the jury reject his temporary and innocent possession defense. Finally, he repeatedly swiped at the People's evidence and witnesses in an effort to sow reasonable doubt.

Counsel's skillful advocacy initially persuaded the court to provide a temporary and innocent possession charge. Then, against Sanchez's advice, defendant chose to testify. His testimony dissuaded the court from giving the charge. It was not counsel's strategy that cost defendant the charge; it was defendant's. Any resulting prejudice was a direct consequence of defendant's testimony. Even still, Sanchez incorporated the temporary and innocent possession defense into his summation, painting a picture of defendant as a broken man worthy of compassion. Though defendant was convicted of the firearms charges, counsel's skill led the jury to acquit of the controlled substance charge.

In the face of strong evidence and a record of a fair trial, defendant resorts to attacking his counsel's advocacy. Having elected not to raise his claim in a post-

conviction motion to vacate, however, defendant has provided an insufficient record for the Court to evaluate experienced counsel's strategic decisions. Indeed, Alexander Sanchez performed exceedingly competently in the face of overwhelming evidence and an uncooperative client. This Court should roundly reject defendant's attempt to sully counsel's reputation and recast his representation as constitutionally defective.

A. Counsel Capably Pursued Reasonable Trial Strategies In The Face of Overwhelming Evidence, And Defendant Suffered No Prejudice.

The two-pronged federal test of ineffectiveness requires a defendant to prove that his counsel's performance fell below an "objective standard of reasonableness" as judged by "prevailing professional norms" and to "affirmatively prove prejudice" by demonstrating that, but for counsel's errors, the proceeding's outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 693-94 (1984). This standard is "highly deferential" to trial counsel, and courts "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697.

Under New York law, a defendant "must demonstrate that [he was] deprived of a fair trial by less than meaningful representation." *People v. Benevento*, 91 N.Y.2d 708, 713 (1998) (citation omitted). Where "the evidence, the law, and the circumstances of a particular case, viewed in totality" demonstrate that "the attorney provided meaningful representation, the constitutional requirement will have been met." *People v. Baldi*, 54 N.Y.2d 137, 147 (1981). While New York's standard "does not require a

defendant to fully satisfy the prejudice test of *Strickland*," a defendant's "showing of prejudice" is a "significant but no indispensable element in assessing meaningful representation" that "focuses on the fairness of the process as a whole." *People v. Caban*, 5 N.Y.3d 142, 155-56 (2005).

Notwithstanding the uphill battle he faced, counsel's performance here was exemplary. It more than met both the federal and state standards. Sanchez was an experienced attorney who had recently secured an acquittal for defendant following a felony trial with the same prosecutor he faced here. RA3. He also apparently obtained a favorable disposition in another felony prosecution against defendant that was repeatedly discussed at this trial but is now sealed.[2] *Cf. People v. Williams*, 124 A.D.2d 993, 993 (1st Dept. 1986) ("The fact that defendant was acquitted of... the most serious crimes... but was convicted of the lesser offense...belies any claim of ineffective assistance") (citations omitted). Counsel's successful advocacy in these other felony cases evinced his ability to work effectively and collaboratively with defendant—even though defendant did not always heed his advice.

Even before trial, counsel demonstrated his good judgment by recognizing the "uphill battle" defendant faced if this case went to trial and therefore seeking a

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[2] Both unrelated felony cases involved burglary and larceny accusations. In a letter attached to his motion to vacate judgment, dated October 4, 2019, defendant referenced "the trial for 2 counts of burglary, 1 count of grand larceny and 5 related misdemeanors w[h]ich began March 20, 2019, and ended on April 4, 2019, with a full acquittal" RA3. Prior to charging the jury, the court noted that "Mr. DeBellis's other case, the alleged shooting of the cab driver, [was] still on [the court's] docket." A1471.

beneficial plea offer. A195-96, 327, 545-46. And he secured one. Counsel convinced the People to reduce their offer on defendant's two open felonies to "two and two" consecutive and obtained assurances that a pending felony upstate would result in a "one to three" concurrent sentence. A33. This offer represented a substantial reduction of the proposed prison term to "about half of what the previous offer was." *Id.* Yet despite this hard-won favorable disposition covering three felony dockets, defendant refused the offer. Counsel thus turned his attention to the pre-trial hearing.

While the court initially ordered only a *Huntley* hearing, counsel skillfully persuaded the court to include a *Mapp* component. A18-19. At the hearing, he extensively cross-examined Officer Justin Allen, seeking to call into question Officer Allen's credibility, the stop's legality, and the accuracy of Allen's recounting of his client's statements. A87-124. He presented reasoned arguments in support of suppression, including a lack of evidence regarding the certification of the license plate reader device and pieces of the officer's testimony counsel found incredible. A151-79. Counsel's focus on averting a trial reflects his keen understanding of the challenges defendant would face at trial—a hallmark of effective advocacy.

Counsel explained to the court that his "[p]rimary defense" theory was "that the defendant was acting in a legal and proper ma[nn]er when he was going to turn over that gun to the police" because he "had no criminal intent" but was "harboring that item for a relative[ly] temporary period of time for the purpose of legally turning it over to police." A918. Simultaneously, counsel persisted in attacking Officer Allen's

credibility to sow reasonable doubt. A949. He also buttressed these efforts by pushing for jury nullification. A711 (prosecutor anticipating jury nullification defense), A1018-19 (court addressing concerns over nullification argument). When, as here, defense counsel is faced with "truly overwhelming evidence," and "constrained by the limited legitimate defense strategies available," "cogent opening and closing arguments, a motion to dismiss after the People's case-in-chief, and thorough cross-examination of the People's witnesses" alongside a jury nullification argument may constitute effective representation. *See People v. Mendoza*, 33 N.Y.3d 414, 419 (2019) (counsel not ineffective for pursuing jury nullification in the face of overwhelming evidence where he had a consistent and cogent argument).

From the beginning of his opening, Sanchez depicted defendant as "a broken man" who was "much like" the members of the jury. A810. He described defendant as a "married man" who "had a good job" with the Office of Court Administration as a "fix-it man" doing "all kinds of odd jobs... respectfully" "for many years." A811. While acknowledging defendant had "ma[d]e some mistakes" "because he's not perfect" counsel reminded the jury that "[t]here are no perfect people in this courtroom" and highlighted that defendant helped take care of his family, including his autistic child. A812. Counsel argued that defendant's everyman life had been upended by injuries that engendered his addiction to pain medication. A812-13. Initially, defendant had legally purchased and possessed his gun before his "license had expired." A816. "[I] n a fit of desperation" defendant had grabbed his gun following a financial

argument with his wife "for a perfectly legitimate reason" – "[t]o get a gift card for turning in weapons." A816-17. Counsel preemptively explained that defendant was not "completely upfront" with Officer Allen because "he was scared, as one might expect" of "a broken man." A817. That opening presented a "coherent, cogent defense." *People v. Taylor*, 1 N.Y.3d 174, 176 (2003); *see also Mendoza*, 33 N.Y.3d at 419.

While Sanchez continued to press this theme throughout the trial, he also attacked the credibility of the People's witnesses. On cross-examination, he attacked Officer Allen's credibility and, when the OCME Criminalist testified, he raised the issue of "touch DNA" to explain why defendant's DNA could have ended up on the firearm without defendant having touched it. A1087-89. Nimbly managing multiple strategies, counsel also utilized his cross-examination of Officer Allen to underscore both of his defenses. He amplified defendant's alleged cooperation throughout their interaction in a bid to buttress defendant's temporary and innocent possession defense. A886, 888-89. Sanchez also elicited testimony that defendant's "wife threw him out" that day and that, after his arrest, defendant allegedly attempted to commit suicide, highlighting his "broken man" nullification theme. A894-95.

Significantly, Sanchez sought, and initially secured—though the court called it "very close"— a jury instruction on the temporary and innocent possession defense. A1103-06. After considering "the whole picture" including the court's "rulings," "the defendant's potential testimony," and, "the evidence that the district attorney" had, Sanchez advised his client not to testify. A1227-28. Initially, defendant agreed, and

counsel so advised the court. A1240. Then, against counsel's advice, defendant elected to take the stand. A1303.

Defendant's testimony hewed closely to the picture Sanchez had painted. He described himself as a good father and hard-working employee who had been injured on the job in 2014 but had to return to work because he relied on "overtime as income to provide for" his family. A1304, 1306-08. He explained his second injury in 2016 and discussed the addiction to pain medication he consequently developed. A1308-11. He testified that it had taken him "almost a year" to complete all the appropriate procedures to obtain his gun permit. A1318. He also claimed he kept the gun in a "safe in a secured area bolted to the ground," as required by New York law. A1322.

Discussing the day of his arrest, defendant testified that he had gone home to Carmel to help his wife plan a birthday party for his youngest son when they began arguing about finances. A1326. Following that argument, he claimed, he decided to turn in his gun at an NYPD buyback program because he "had nothing else to [sell]" and "was down to nothing." A1329. His highlighted his compliance with Officer Allen during the car stop and explained that he had only lied about the gun because "it wasn't gonna do any good telling him [I] had a gun in the car." A1330.

Plainly, defendant hoped that by testifying, he would bolster the twin defense strategies counsel had pursued. Defendant painted himself as a fundamentally good man who had fallen on hard times—testimony designed to enhance the broken-man narrative counsel sought to leverage into jury nullification. He also described his hopes

of turning the gun in for a reward. Following defendant's testimony, the parties reconvened for a second charge conference. A1369. At that conference, counsel zealously argued for the temporary and innocent possession charge. He invoked defendant's testimony to buttress his argument, arguing that defendant did not possess and could not have surrendered the gun during the period when an order of protection excluded him from the home, thereby reducing his period of possession. A1371-72. While Sanchez acknowledged that no case had said possession of a gun for over a year was temporary, he countered that all cases said this was a question of fact for the jury. A1372. The court ultimately found that defendant's testimony had "altered whether th[e] charge can be given" and declined to deliver it. A1379. Despite defendant's goal, his testimony induced the court not to charge temporary and innocent possession. Counsel, who had advised defendant not to testify, cannot be faulted for defendant's contrary decision—which he was constitutionally entitled to make. *See People v. White*, 73 N.Y.2d 468, 478 (1989) (decision to testify rests with defendant) (citations omitted).

On summation, Sanchez again focused on defendant's good character and relatability. He portrayed defendant as a once-respectable family man with a good job who enjoyed "the things that all Americans would want to do," like family trips to Disney World. A1405. He described defendant's decline, charting his injuries and subsequent drug addiction. A1406-08. Counsel echoed defendant's account of the day of his arrest, highlighting that he had gone to Carmel to "resolve some important domestic issues" but found that "things just kept going downhill," leading him to grab

his gun "in a fit of frustration, because he says he was broke." A1409-10. While he acknowledged defendant was "not as forthcoming as he could have been" with Officer Allen, he emphasized that defendant "was cooperative" and "was not in any way aggressive." He was instead a "heavy addict" who appeared to be under the influence. A1414-15. Counsel also again raised the idea that defendant had attempted suicide before addressing reasonable doubt and questioning Officer Allen's credibility. A1418; A1419-20. In conclusion, counsel argued defendant "may have exercised poor judgment" but that he was "not a criminal" and "was going there to turn that gun over to the local authorities." A1420.

On summation, counsel presented the same "coherent, cogent defense" that he had presented in his opening and throughout the trial. *Taylor*, 1 N.Y.3d at 176-77. This included alleging that defendant's conduct was temporary and innocent, which minimized any prejudice defendant suffered by not receiving the charge following his testimony. In the face of "overwhelming evidence," Sanchez's cogent theory, which incorporated a "jury nullification summation," was plainly effective. *Mendoza*, 33 N.Y.3d at 419. Defendant was acquitted of the controlled substance charge he faced. That counsel's "trial tactics" "terminate[d] unsuccessfully" as to the firearms charges does not "automatically indicate ineffectiveness." *Baldi*, 54 N.Y.2d at 146-47.

B. The Record—And, Particularly, The Evidence Of Counsel's Strategy—Is Insufficiently Developed To Support Defendant's Ineffective Assistance Claim, Which Should Have Been Raised In A CPL § 440.10 Motion.

In 2020, this Court reiterated that "[g]enerally, the ineffectiveness of counsel is not demonstrable on the main record but rather requires consideration of factual issues not adequately reflected on that record." *People v. Maffei*, 35 N.Y.3d 264, 269 (2020) (quotation and citations omitted). In *Maffei*, this Court observed that "[b]y codifying the writ of error coram nobis in CPL article 440, the Legislature crafted a procedure" to allow defendants "to complete the record by putting forth sworn factual allegations" regarding ineffective assistance of counsel claims. *Id.* This case provides another example of why CPL § 440 motions remain the preferred vehicle for ineffective assistance claims. Indeed, the First Department began its decision by holding that defendant's "ineffective assistance of counsel claims [were] unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record." *DeBellis*, 205 A.D.3d at 555. Although defendant broadly claimed to have suffered ineffective assistance in a pre-appeal post-conviction motion to vacate, he raised no factual allegations whatsoever at that point.

For instance, defendant argues his counsel was ineffective because he ignorantly pursued a common law temporary and innocent possession charge instead of a statutory voluntary surrender defense. DB3. Yet the record is silent as to why Sanchez elected to argue the common law defense of temporary and innocent possession instead of the voluntary surrender defense provided by Penal Law § 265.20(a)(1)(f). Counsel may well

have arrived at his decision after reading the practice commentary to Penal Law § 265.20(a)(1)(f), which cautions that the 1995 amendments to the statutory defense could render the defense inapplicable where a defendant fails to surrender to an "officer [who] is a designated recipient." William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 265.20(a)(1)(f). Significantly, however, the commentary observes that even if a defendant "voluntarily surrenders a weapon to a non-designated police officer" and is nonetheless ... prosecuted for criminal possession, that person might be able to invoke the ordinary defense of 'temporary and lawful possession.'" *Id.* Without input from counsel, it is unclear if his decision to pursue a temporary and lawful possession defense was really the blunder defendant now claims it was or, more likely, another of many strategic choices demonstrating that counsel was, in fact, particularly effective.

C. Defendant Was Not Entitled To An Instruction On Either The Common Law Defense Of Temporary And Innocent Possession Or The Statutory Defense Of Voluntary Surrender Because There Was No Reasonable View Of The Evidence Supporting Either Charge.

As the trial court found, there was no reasonable view of the evidence that defendant lawfully possessed the firearm. Defendant met neither the requirements for the common law defense of temporary and innocent possession nor those for the Penal Law § 265.20(a)(1)(f) voluntary surrender defense.

To determine whether a jury instruction on a claimed defense is warranted, "the court must view the evidence adduced at trial in the light most favorable to the

defendant." *People v. Zona*, 14 N.Y.3d 488, 493 (2010) (citations omitted). While a "jury must be instructed on all claimed defense which are supported by a *reasonable view* of the evidence," the rule does not extend to "any view of the evidence, however artificial or irrational." *People v. Butts*, 72 N.Y.2d 746, 750 (1988) (citations omitted). Where "no reasonable view of the evidence would support a finding of the tendered defense, the court is under no obligation to submit the question to the jury." *People v. Watts*, 57 N.Y.2d 299, 301 (1982).

The court here provided several reasons for declining to charge temporary and innocent possession. Multiple orders of protection mandated that defendant surrender his firearms, including one "issued in July of 2017 on the case where he shot the cab driver" which defendant "signed in open court" a month before two subsequent orders barred him from going to his home in Carmel. A1377-78. Additionally, defendant's testimony did not explain how "that gun g[ot] under the floorboard in the car" or why he "sa[id] no" "when the cops asked him whether or not he ha[d] a gun" if he intended to surrender it. A1377-78. Finally, although "[t]here are all sorts of way[s] to [surrender a weapon] when you want to," and if defendant had gone "to the Putnam County Sheriff it would all have been arranged," defendant attempted to conceal his gun and was relieved of it only because Officer Allen found it. A1378-80. Collectively, this evidence eliminated any reasonable view that defendant's possession was temporary and innocent.

Defendant likewise failed to meet the voluntary surrender criteria of Penal Law § 265.20(a)(1)(f). To qualify for amnesty under this provision, a weapon must: (1) be surrendered (2) in accordance with such terms and conditions as may be established by such police force or department (3) to a specified law enforcement officer. *Id.* The provision specifies that surrender may be made to: (1) the superintendent of the state police (or a member designated by the superintendent); (2) the sheriff of the surrenderer's county of residence; or (3) the head of the police force of the surrenderer's city of residence (or a member designated by the head of the police force). *Id.*

Two years before defendant's trial, the First Department held that to qualify for this defense, a "defendant's conduct" had to satisfy "the requirements of this exemption," including, "[i]n particular, ... that the surrender be in accordance with terms and conditions established by the police (such as an amnesty program)." *People v. D'Attore*, 151 A.D.3d 548, 550 (1st Dept. 2017), *lv. denied* 30 N.Y.3d 948 (2017). Defendant failed to meet the requirements of this exemption. He did not voluntarily surrender his firearm but attempted to secrete it away to maintain his unlawful possession. He did not provide any evidence that any buyback program existed at the time of his arrest. Indeed, at sentencing, the court found "no gun buy[]back program...anywhere during the period of time" defendant claimed to be on his way to surrender his firearm. A1530. Defendant's failure to identify a buyback program means he also failed to demonstrate that he acted in accordance with any such program's surrender policies. Finally, defendant, who considered his residence to be his Carmel

home where the gun was located, did not surrender the loaded gun to local law enforcement in Carmel, as required, but instead traveled over fifty miles on public transit with it. Therefore, he was not entitled to the statutory defense.

The court was not bound to give the voluntary surrender instruction by the Second Department's decision in *People v. Watson*, 163 A.D.3d 855, 862 (2d Dept. 2018). *See* DB31. Initially, as discussed, the First Department, had pronounced only a year before *Watson,* in *People v. D'Attore,* that a defendant had to demonstrate compliance with an amnesty program to merit the instruction. *D'Attore*, 151 A.D.3d at 550 (charge inappropriate where an in-custody defendant's request that a relative abandon a bag at a police station was not in accordance with terms and conditions established by police). Therefore, defendant wrongly relies on *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dept. 1984) for the proposition that the trial court was bound by *Watson* in the absence of First Department authority.

Furthermore, *Watson* primarily dealt with whether the defendant's alleged prior statements that he was heading to a gun buyback program could be elicited from two defense witnesses as prior consistent statements even though the defendant had not testified. *Watson*, 163 A.D.3d at 861-68. The court referenced the voluntary surrender instruction only to observe that the defense had been raised because the defendant had promptly told the officer who stopped his car that he was on his way to surrender the gun at a police precinct. *Id.* at 862. Significantly, the defendant had also introduced at trial photographs of the buyback program posters and called his mother-in-law, who

worked at the precinct, to testify that he had seen the posters when he visited her there. *Id.* at 867. And despite all this, the court found that the People had disproved the defense by introducing evidence that the defendant, who was stopped in a livery vehicle, was not heading to a precinct, had a loaded gun in a hip holster, and had backup ammunition. *Id.* at 862. *Watson* thus only underscores that the paltry evidence here did not warrant the instruction.

D. The Legislature Did Not Intend To Retroactively Legitimize Protracted Unlawful Firearm Possession When It Enacted The Voluntary Surrender Statute.

The Legislature did not intend for the voluntary surrender defense to shield extended unlawful firearm possession—like defendant's—from criminal liability. This is evident when one considers the incongruous results adopting defendant's argument would yield.

In determining the goal of a statute, "[t]he primary consideration of the courts... is to ascertain and give effect to the intention of the Legislature." McKinney's Statutes § 92. From its inception, the voluntary surrender defense was designed to "protect[] a person who innocently comes into possession of a weapon and then voluntarily turn[s] it over to a police officer." *People v. Estenson*, 88 A.D.2d 776, 776 (4th Dept. 1982) (citing Sponsor's Memorandum, *contained in* bill jacket to L. 1940, Ch. 259). In 1995, the last time the statute was amended, the Legislature gave additional "rule-making power to the local police" in recognition of their unique position "to develop community-specific procedures best suited to that locality for the implementation of surrenders." William

C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 265.20(a)(1)(f) (citing Legislative Memorandum).

Defendant contends he was entitled to a voluntary surrender instruction because he testified that, at the time he was stopped, he intended to surrender his weapon to the 49th NYPD Precinct in exchange for a gift card. DB30. Critical to defendant's claim is the premise that his testimony alone sufficed to trigger the court's instruction. This premise is undercut by the legislative intent to empower local law enforcement to dictate the appropriate methods of surrender for their localities. That purpose is not served by allowing defendants to invoke the defense regardless of how far they travel with an unlicensed firearm.

Here, defendant traveled fifty miles on a public train before driving an unregistered car into the Bronx when he had no valid driver's license. If defendant were entitled to the defense, an individual arrested for firearms possession in Buffalo could claim he was en route to a gun buyback program in Queens. This Court should reject defendant reliance on this absurd and incorrect interpretation of the voluntary surrender defense to advance his feeble ineffective assistance of counsel claim.

POINT II

COUNSEL'S DECISION NOT TO ADOPT DEFENDANT'S UNFILED, UNSERVED, AND UNSUBSTANTIATED PAPERS AND TERSE STATEMENT THAT HE BELIEVED HE WAS EFFECTIVE IN RESPONSE TO DEFENDANT'S ATTACK ON HIS REPRESENTATION DID NOT CREATE A CONFLICT OF INTEREST.

On October 3, 2019, counsel appeared at defendant's sentencing, ready to argue for leniency. Counsel had already submitted a pre-sentence memorandum that included a letter from defendant's wife, certifications from his former jobs, evidence of defendant's attempts to seek drug treatment while incarcerated, and information gleaned from defendant's family. Defendant, who had refused to be interviewed by probation, surprised counsel with a three-page document at the start of the proceedings. The papers purported to be a CPL § 440.10 motion. They contained no evidential facts, but only the following allegations:

> A NEW TRIAL; OR DISMISSAL OF INDICTMENT SHOULD BE GRANTED DUE TO MALICIOUS PROSECUTION BY ADA KOVES INEFFECTIVE ASSISTENCE [sic] OF COUNSEL BY MR. SANCHEZ, 4TH AMENDMENT VIOLATION, People vs. Miguel Torres, Coolidge vs. NEW HAMPSHIRE, IMPROPER CONDUCT BY THE COURT, JURY WAS MISLEAD [sic] BY ADA KOVES.

A8. At the bottom of the page, defendant had also written "*There was Absolutely NO INTENT TO USE UNLAWFULLY AGAINST ANOTHER PERSON!" *Id.*

Counsel immediately alerted the court to the papers, but the court responded that the papers had neither been filed with the court nor served on the People. Counsel declined to adopt the motion. He said he was concerned he may need to be relieved,

but the court reiterated that it had no motion before it and, therefore, no basis to relieve him. Counsel explained that he would not argue that he was ineffective and that he thought he was "very effective." Defendant did not respond. The court repeated that no motion was before the court because it had not been "properly filed, docket, served" and, thus, remained a mere "piece of paper." It advised counsel that whether or not he adopted the motion would not impact the court's handling of the application. A1515.

The court then read defendant's allegations into the record and the prosecutor, hearing the utter lack of substance, waived objection to the court rendering a decision. A1516-17. Intimately familiar with the case it had just overseen, the court addressed each claim and articulated why none was meritorious before denying the motion. The court found it was "a hard-press to see how anything else for [defendant] could have been done" beyond what counsel had done. A1518.

The People requested a sentence of nine years' incarceration. Counsel requested the minimum and engaged in a robust back-and-forth that amounted to nine transcript pages. A1525-33. The court sentenced defendant to an aggregate term of seven years' incarceration. It invoked several of counsel's arguments in support of mitigation, including defendant's drug addiction and disability. A1525-33, 1539.

A. Defendant's Application Was Rife With Procedural Infirmities Warranting Summary Denial.

Defendant's application was not properly before the court because it had not been properly filed or served. It was also insufficient because defendant's allegations

were unsupported by specific facts. Moreover, the ineffective assistance of counsel claim should have been raised in a CPL § 440.10 motion. These collective infirmities warranted summary denial, and that denial is reviewed under an abuse-of-discretion standard. *See People v. Ventura*, 66 N.Y.2d 693, 695 (1985).

Defendant's papers were dated October 1, 2019, just two days before sentencing, and were provided to counsel only as sentencing began. A1512. No copy was filed with the court or served on the People. The court thus correctly observed that no motion was pending before it. After hearing the substance of the application, however, the prosecutor waived objection to the court's rendering a decision.

Though defendant's papers were labeled a CPL § 440.10 motion, such motions are authorized only "after the entry of judgment." CPL § 440.10(1). Liberally construed, the papers were a CPL § 330.30 motion. Under § 330.30, courts have discretion to modify or vacate verdicts where the motion raises (1) a record-based claim that, if pressed on appeal, would warrant reversal or modification of the judgment; (2) juror misconduct; or (3) newly discovered evidence that would have altered the probability of defendant's verdict.

Defendant's malicious prosecution was improper because it is civil tort cause of action. *See Broughton v. State*, 37 N.Y.2d 451, 456 (1975). His lack of intent claim was improper because intent was not an element of his crime of conviction. *See* Penal Law § 265.03(3). Moreover, as movant, defendant bore the burden of supporting his application with evidential facts, yet the court correctly found his application was not

"sufficient" and left it with "no basis to grant the motion on the fact[s]." A1520. The perfunctory nature of defendant's papers made it impossible to assess whether his claims were record-based or would warrant reversal or modification of the judgment. On that basis alone, defendant's application was properly denied.

Defendant's ineffective assistance of counsel claim was particularly ill-suited for a 330.30 motion. "Generally, the ineffectiveness of counsel is not demonstrable on the main record"; therefore, a CPL § 440.10 motions isthe preferred procedural vessel for such a claim. *People v. Brown*, 45 N.Y.2d 852, 853 (1978); *see also, Maffei*, 35 N.Y.3d at 269. Accordingly, the Appellate Division correctly found that defendant should have raised this claim by way of a CPL § 440.10 motion because his claims "involve[d] matters not reflected in, or fully explained by, the record." *DeBellis*, 205 A.D.3d at 555 (citations omitted). The trial court attempted to guess at what facts might support defendant's claims but, despite its familiarity with the case, could discern none. Accordingly, the court's summary denial of the claims was both authorized by § 330.30 and a sound exercise of discretion.

Significantly, defendant did not request new counsel in his oral application or at sentencing. Indeed, it was *counsel* who raised the prospect that he might need to be relieved. Even so, defendant was not legally entitled to new counsel. To obtain new counsel, a defendant must demonstrate "good cause." *People v. Medina*, 44 N.Y.2d 199, 207-208 (1978). In assessing good cause, courts consider whether counsel is likely to provide effective assistance and whether defendant has unduly delayed in making his

request. *Id.* Courts must be mindful not to let defendant's abuse substitution requests. Therefore, "[i]f a last-minute motion for substitution of counsel is made for the purpose of delay, the court can recognize it as such," and deny the request. *Id.*

Here, the court assessed counsel's effectiveness and found it was "a hard-press to see how anything else for [defendant] could have been done" by counsel. A1518. This positive endorsement reflects the court's confidence in counsel's skill after having presided over the entirety of the proceedings. Furthermore, defendant proffered no explanation for his delay in alerting the court to his dissatisfaction with counsel.

For all the foregoing reasons, defendant's motion was providently denied.

B. Counsel's Innocuous And Brief Statement That He Believed He Was Effective Was A Defense Of His Performance That Did Not Address The Merits Of Defendant's Claims And Did Not Create A Conflict.

Counsel's unelaborate statement "I think I was very effective" did not create a conflict of interest. A1515. It did not address the merits of defendant's claim—to the extent the merits were even discernable—but was merely a six-word defense of counsel's performance. This sort of comment has consistently been found by this Court not to give rise to a conflict of interest.

An actual conflict of interest arises when counsel takes a position adverse to the client. A prime example is an affirmative statement that a motion lacks merit. *People v. Mitchell*, 21 N.Y.3d 964, 967 (2013). No conflict arises, however, when an attorney explains or defends the adequacy of his performance when it is challenged. *People v. Nelson*, 7 N.Y.3d 883, 884 (2006); *accord People v. Washington*, 25 N.Y.3d 1091, 1095

(2015). Counsel may even provide facts contradicting a client's allegations so long as they do not comment on the merits of the claim. *Washington*, 25 N.Y.3d at 1095. Indeed, counsel can call a client's allegations "incorrect" without generating a conflict. *Id.* at 1093 (referencing allegations of ineffective assistance). Accordingly, where counsel offers only a "brief, generalized and completely innocuous defense of his own performance, made in response to the court's inquiry" his comments fall "far short of providing damaging factual information, and could not have [] an adverse impact on defendant." *People v. Quintana*, 15 A.D.3d 299, 299 (1st Dept. 2005) (*cited favorably in Nelson*, 7 N.Y.3d at 884).

Here, counsel's terse, innocuous defense of his performance did not create a conflict. Counsel did not provide damaging facts contradicting defendant's perfunctory allegations and did not comment whatsoever on their legal merit. He merely relayed his belief that he was effective. The innocuous nature of counsel's statement is underscored by the court's subsequent comment that counsel's statements "would still not impact what [the court] was going to do." A1515.

Counsel's comment was also responsive to the court's inquiry and clarified counsel's own concern about whether he needed to be relieved. Counsel expeditiously alerted the court to defendant's application and immediately pointed out that it contained an ineffective assistance claim. The court first asked if counsel wanted to adopt the motion, then, when counsel declined, pointed out that the motion had not been properly filed or served. A1514. Addressing the ineffective assistance claim,

counsel suggested he may need to be relieved. *Id.* The court responded that it had "no basis to relieve him" because defendant's motion had not been properly filed and served. *Id.* Counsel clarified why he was concerned: he would not press defendant's ineffective assistance claim because he believed he was effective. *Id.* Therefore, counsel's statement merely provided information that the court needed to resolve the issue before it. *See Washington*, 25 N.Y.3d at 1095 (finding no conflict where counsel merely "informed the judge" of facts that helped him assess defendant's claims).

Significantly, as discussed defendant did not request new counsel or demonstrate good cause warranting substitution. Courts are required to conduct a "minimal inquiry" when a defendant raises a "seemingly serious" complaint about counsel supported by specific factual allegations. *People v. Porto*, 16 N.Y.3d 93, 99-100 (2010). Where a defendant fails to provide specific factual allegations, however, summary denial is proper. *Id.* at 101. The court therefore appropriately denied the motion on that basis. Defendant's continued silence, even as the court "provided the space to develop" his complaint, underscores the lack of conflict and that there was no basis to relieve counsel. *Id.* at 101-102.

C. This Case Underscores The Wisdom Of The Legislature's Grant Of Discretion To Trial Courts To Summarily Dispose Of Baseless And Dilatory Motions.

The court providently exercised its discretion to summarily dispose of defendant's perfunctory application instead of allowing defendant to use the motion as a dilatory tactic that would unnecessarily delay his sentencing. In doing so, the court

gave due consideration to defendant's claims but also to the need to move criminal cases forward and not unnecessarily expend judicial resources. This case illustrates why the Legislature wisely vested discretion in trial courts to dispense with baseless motions.

Trial courts have broad discretion to dispose of insufficiently substantiated motions. CPL § 330.40(2)(e) expressly states that a court "may" summarily deny a 330.30 motion if the moving papers (1) are legally baseless or (2) are unsupported by "sworn allegations of all facts essential to support the motion." This allows courts to utilize their "familiarity with the case" to "readily recognize[] [a] motion's lack of merit, independently of anything said by counsel." *People v. Torres*, 159 A.D.3d 473, 473 (1st Dept. 2018). Similarly, courts have discretion to summarily deny conflict claims raised in CPL § 440.10 motions where the "defendant's actual conflict claim consists of unsubstantiated and conclusory allegations." *People v. Wright*, 27 N.Y.3d 516, 521 (2016) (citing CPL § 440.30[4][b]).

Courts also have broad discretion when assessing whether a conflict has arisen warranting the substitution of counsel. *See Watson*, 26 N.Y.3d at 624; *see also Medina*, 44 N.Y.2d at 207 (court providently declined to appoint new counsel on eve of trial where defendant failed to show good cause or explain reason for his delay in raising concerns about counsel). While defendants are guaranteed the right to counsel, this does not translate to a "right to appointment of successive lawyers at defendant's option." *People v. Sides*, 75 N.Y.2d 822, 824 (1990) (citation omitted). The discretion afforded trial courts faced with last-minute substitution requests allows them to navigate the

"dilemma of having to choose between undesirable alternatives" by balancing a defendant's claims against "judicial economy" and the "integrity of the criminal process." *People v. Tineo*, 64 N.Y.2d 531, 536-37 (1985). In short, this legislative grant of judicial discretion allows trial judges to expend time on legitimate, substantiated motions and to quickly dispose of transparently frivolous ones filed to delay criminal proceedings.

Here, the court exercised sound discretion by affording defendant due process—indeed, by exceeding due process requirements by considering an unfiled, unserved motion—while avoiding unnecessary delay in the proceedings. Further, the court ensured the integrity of the proceedings by rejecting defendant's transparently baseless claims and dilatory tactics. The way it handled this motion underscores the importance of allowing trial courts some wiggle-room to manage their caseloads. *See People v. Williams*, 92 N.Y.2d 993, 995 (1998) ("Trial courts have broad discretion to control and manage their courtrooms and court proceedings..." [internal citation omitted]). This Court has consistently reaffirmed the broad discretion of trial courts—particularly when that discretion has been expressly authorized by the legislature. This reflects a longstanding appreciation of the unique role trial courts play in ensuring a fair process while moving cases forward. To disturb the trial court's provident exercise of discretion here would invite parties to game the system to delay the prompt dispensation of justice. This hurts both victims and criminal defendants. It should not be countenanced by this Court.

* * *

In sum, counsel effectively pursued multiple pragmatic trial strategies in the face of overwhelming evidence and a defendant who rejected his advice. Indeed, counsel rendered very effective assistance when he requested the more viable common law transitory possession instruction instead of the statutory one. Counsel's six-word defense of his performance in the face of defendant's attack on it did not create a conflict. Further, the trial court providently exercised its discretion when it denied defendant's last-minute, perfunctory, and transparently baseless application attacking counsel's performance on the eve of sentencing.

CONCLUSION

The order of the Appellate Division should be affirmed.

Respectfully submitted,

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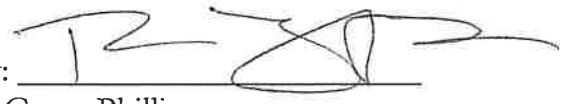
By: 
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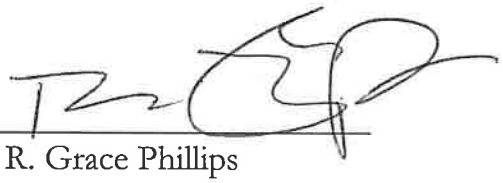
BY: 

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