No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ELLIOT MORALES,

Applicant,

v.

STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari
to the Appellate Division, Supreme Court of
New York, First Judicial Department.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

Matthew Bova
Counsel of Record
Center For Appellate Litigation
120 Wall Street, 28th Floor
New York, New York 10005
(212) 577-2523 ext. 543
mbova@cfal.org

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

TO: Justice Sonia Sotomayor, Circuit Justice for the United States Court of Appeals for the Second Circuit:

Petitioner Elliot Morales respectfully requests an extension of sixty (60) days in which to file his petition for writ of certiorari, challenging the decision of the New York Appellate Division, First Department denying Mr. Morales' federal-constitutional claims. *See People v. Morales*, 225 A.D.3d 549 (1st Dep't 2024), leave to appeal denied, 41 N.Y.3d 1020 (2024). Copies of both decisions are here in the Appendix. This Court has jurisdiction to review the federal constitutional question presented under 28 U.S.C. § 1257(a); U.S. Const. amends. VI; XIV.

In support of this application, Mr. Morales provides the following information:

1. On June 4, 2024, the New York Court of Appeals denied Mr. Morales permission to appeal the Appellate Division, First Department's decision in *People v. Morales*, 225 A.D.3d 549. The First Department's decision arose out of a jury verdict in New York County Supreme Court, resulting in a sentence of 25 years to life for a hate-crime murder, to run consecutively with a weapons-possession sentence of 15 years, for an aggregate sentence of 40 years to life.

2. Thus, the petition for certiorari is currently due on September 4, 2024. Granting this extension would make it due on November 4, 2024.

3. This case involves whether a criminal trial court violates *Iowa v. Tovar*, 541 U.S. 77 (2004), in failing to advise a defendant, before he waives his right to trial counsel, about his actual sentencing exposure upon conviction.

4. Before Petitioner represented himself at trial, the trial court mistakenly advised him that his "maximum sentence [was] 25 years to life" and his minimum was "20 years to life[.]" His actual maximum sentencing exposure was 78 years to life. The court never corrected the sentencing range it had provided.

5. On appeal, the State argued that no sentencing advisal was required under *Tovar* "so long as the court's inquiry is sufficient to 'accomplish the goals of adequately warning a defendant of the risks inherent in proceeding *pro se*, and apprising the defendant of the singular importance of the lawyer in the adversarial system of adjudication'." State's App. Div. Br. 45 (quoting *People v. Arroyo*, 98 N.Y.2d 101, 104 [2002]). The State took this approach despite the common-sense view that the *most* important risk "inherent in proceeding *pro se*" is the sentence one faces upon conviction. *See Arroyo*, 98 N.Y.2d at 104.

6. The highest court to have examined the issue in this case, the Appellate Division, First Department, found that although the trial court did not advise Mr. Morales of his actual sentencing exposure before he waived

counsel for trial, the "court satisfied its duty of ensuring that [he] was aware of the 'range of allowable punishments'." *Morales*, 225 A.D. at 550.

7. A Judge of the New York Court of Appeals denied leave to appeal in a short-form order that lacked any reasoning.

8. Mr. Morales' case is a serious candidate for certiorari review. It raises the important and recurring question of whether *Tovar* applies in cases where a defendant waives counsel before trial.

9. *Tovar* held that a waiver of plea counsel is valid where "the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea[,]" yet declined to "prescribe[] any formula or script to be read to a defendant who states that he elects to proceed without counsel." *Tovar*, 541 U.S. at 81, 88. The Court wrote that at an uncounseled plea, "a less searching or formal colloquy may suffice" because, at a that juncture, "the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial." *Id.* at 89-90 (quoting *Patterson v. Illinois*, 487 U.S. 285, 299 [1988]); *see also United States v. Cash*, 47 F.3d 1083, 1088 (11th Cir. 1995) ("[t]he closer to trial an accused's waiver of the right to counsel is, 'the more rigorous, searching and formal the questioning of the trial judge should be.'") (quoting *Strozier v. Newsome*, 926 F.2d 1100, 1105 [11th Cir. 1991]).

10. Despite *Tovar*'s clear language that a waiver of the right to counsel in invalid absent conveyance of the "range of allowable punishments," courts throughout the nation have split on (1) whether *Tovar* requires such a warning in trial cases and, (2) how specific that warning must be. *Compare Arrendondo*, 763 F.3d at 1132 ("*Tovar*'s statement concerning the defendant's knowledge of possible punishments is clearly established Supreme Court law and was at the time of the Court's decision on the merits . . . . [*Tovar*'s] express holding is clearly established Supreme Court law . . . .") *with Pouncy v. Macauley*, 546 F.Supp.3d 565, 592 (E.D. Mich. 2021), *appeal docketed*, No. 21-1811 (6th Cir. Dec. 17, 2021) ("On first blush, [*Tovar*'s] statement seems to provide strong support for Poucy's claim [that his waiver was invalid because he was not informed of his sentencing exposure]. But a careful review of *Tovar* reveals that this statement did not reflect the *holding* of the Supreme Court."); *see also Arrendondo*, 763 F.3d at 1130 (holding that although *Tovar* requires a sentencing-range warning, "[n]o clearly established Supreme Court case law requires trial courts to apprise defendants in any particular form of the risks of proceeding *to trial* pro se.").

11. Consequently, there is no uniformity in answering the question presented: whether a court must advise a defendant seeking to forego counsel at trial of his sentencing exposure. *Compare United States v. Erskine*, 355 F.3d 1161 (9th Cir. 2004) (waiver invalid where court failed to advise defendant of possible penalties); *United States. v. Hakim*, 30 F.4th 1310 (11th

Cir. 2022) (waiver invalid where lower court gave incorrect information on sentencing); *State v. Diaz*, 878 A.2d 1078, 1086 (Conn. 2005) (waiver invalid where defendant knew he faced "substantial prison time" and that offense carried a potential sentence of "nearly fifty years") *with United States v. Schaefer*, 13 F.4th 875, 888 (9th Cir. 2021) (waiver valid because defendant "substantially understood the severity of his potential punishment . . . and the approximate range of his penal exposure" even though "[i]deally . . . court should strive to ensure that the defendant unquestionably understands all possible penalties, including any statutory minimums, maximums, and stacking provisions); *Glass v. Pineda*, 635 F. App'x 207, 214 (6th Cir. 2015) (waiver valid despite no discussion of sentencing range); *United States v. Fore*, 169 F.3d 104 (2d Cir. 1999) (waiver valid where the court misinformed the defendant about his maximum sentence because an "explicit accounting" of the sentencing range was unnecessary); *see also Depp v. Com.*, 278 S.W.3d 615 (Ky. 2009) (where majority found waiver valid, two-justice dissent would have concluded that the waiver of counsel at trial necessitates an advisal of "the nature of the charges against [the defendant] and the range of punishments.").

12. Resolution of this conflict in our nation's Sixth Amendment law is critical to the proper administration of the criminal justice system and the protection of the right to intelligently waive counsel.

13. This case also implicates the difficult position in which criminal-trial courts find themselves: if a court declines to permit the defendant to proceed *pro se* at trial, despite the defendant's constitutional right, that decision is generally appealed. Conversely, if a court allows the defendant to proceed without counsel, that decision is *also* generally appealed. This Court has an opportunity to help lower courts escape this difficult dilemma by clarifying whether a sentencing advisal is necessary before a defendant proceeds to trial *pro se*.

14. This case is an ideal vehicle for resolving the question presented. It is procedurally clean and does not implicate standards applicable under 28 U.S.C. § 2254(d)(1) as would apply on *habeas* review.

15. The issue presented is exclusively a question of what the Federal Constitution requires. It is a single, clear-cut issue that was properly presented on direct appeal in the state court below, where the prosecution forcefully argued that no sentencing advisal was required.

16. Further, this Court's decision will be outcome-determinative. If the Court holds that *Tovar* requires a judge to inform the defendant of his sentencing exposure before the defendant represents himself at trial, Mr. Morales will be entitled to reversal and a new trial.

17. The undersigned's current case load justifies this request for a 60-day extension of time. Undersigned counsel has been assigned to numerous appeals of felony convictions and must, in the upcoming months, file briefs

and/or post-conviction motions in those matters in the Appellate Division First Department and New York trial courts. Additionally, undersigned counsel has a deadline of September 27, 2024 to file a brief in the New York Court of Appeals challenging a New York County judgment of conviction that resulted in a 20-year prison sentence and must file a petition for a writ of certiorari in another matter – *Watkins v. New York* – by September 20, 2024. And as a supervisor at the Center for Appellate Litigation, the undersigned's supervisory obligations are extensive in reviewing numerous filings for submission to the New York Courts.

18. The time requested is necessary to ensure that Petitioner can carefully craft a petition for a writ of certiorari in this matter.

RESPECTFULLY SUBMITTED on August 21, 2024

By: Matthew Bova

Matthew Bova
Counsel of Record
Center for Appellate Litigation
120 Wall Street, 28th Floor
New York, New York 10005
(212) 577-2523, ext. 543
mbova@cfal.org

APPENDIX

OPINION OF THE NEW YORK COURT OF APPEALS UNDER REVIEW (JUNE 4, 2024)

State of New York
Court of Appeals

BEFORE: HON. MICHAEL J. GARCIA
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

ELLIOT MORALES,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: June 4, 2024

at Albany, New York

Associate Judge

*Description of Order: Order of the Supreme Court, Appellate Division, First Department, entered March 26, 2024, affirming (1) a judgment of the Supreme Court, New York County, rendered June 14, 2016, and (2) an order, same court, entered on or about March 28, 2023.

APPENDIX

OPINION OF THE APPELLATE DIVISION, FIRST DEPARTMENT
(MARCH 26, 2024)

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Webber, J.P., Kern, Kennedy, Higgitt, Michael, JJ.

1916 THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

ELLIOT MORALES,
Defendant-Appellant.

Ind. No. 2274/13
Case Nos. 2023-02950
2017-2569

Jenay Nurse Guilford, Center for Appellate Litigation, New York (Carola M. Beeney of counsel), for appellant.

Alvin L. Bragg, Jr., District Attorney, New York (Philip Vyse Tisne of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J., at suppression hearing; A. Kirke Bartley, J., at trial and sentencing), rendered June 14, 2016, convicting defendant, after a jury trial, of murder in the second degree as a hate crime, criminal possession of a weapon in the second degree (four counts), menacing a police officer or peace officer, and menacing in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 40 years to life, and order, same court (Cori Weston, J.), entered on or about March 28, 2023, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis to disturb the jury's credibility determinations. The jury could reasonably infer that defendant intended to kill the victim from the evidence that defendant shot the

victim in the face at close range (*see People v Bryant*, 36 AD3d 517, 518 [1st Dept 2007], *lv denied* 8 NY3d 944 [2007]; *see generally People v Bracey*, 41 NY2d 296, 301 [1977]). The credible testimony does not support defendant's claim that he was heavily intoxicated at the time of the incident.

There was ample evidence to support the finding that defendant selected the victim based, at least in substantial part, on the victim's perceived sexual orientation (*see* Penal Law § 485.05[1][a]). Defendant instigated the encounter when, for no apparent reason, he commented to the victim and his companion that they looked like "gay wrestlers" as they walked past him in the street. He used homophobic slurs and epithets during the verbal altercation leading up to the shooting, and made further derogatory remarks about the victim's companion at the time of his arrest (*see People v Wallace*, 113 AD3d 413, 414 [1st Dept 2014]; *People v Marino*, 35 AD3d 292, 293 [1st Dept 2006]; *see also People v Spratley*, 152 AD3d 195, 200 [3d Dept 2017]). The testimony concerning defendant's use of homophobic slurs toward employees at a restaurant earlier in the night provided further evidence of his motive and intent.

Defendant's waiver of his right to counsel was knowing, intelligent, and voluntary. The court conducted an extensive and thorough searching inquiry (*see People v Crampe*, 17 NY3d 469, 481-482 [2011]), which defendant does not substantively challenge except with regard to his sentencing exposure and the nature of the charges against him. The court satisfied its duty of ensuring that defendant was aware of the "range of allowable punishments" (*People v Cole*, 120 AD3d 72, 75 [1st Dept 2014] *lv denied* 24 NY3d 1082 [2014]) when it informed defendant, multiple times, that he could face the maximum term of life imprisonment if convicted of the top count of the indictment (*see People v Coleman*, 213 AD3d 464, 464 [1st Dept 2023], *lv denied* 39

NY3d 1141 [2023]; *cf. People v Rodriguez*, 158 AD3d 143, 152-153 [1st Dept 2018], *lv denied* 31 NY3d 1017 [2018]). That the court did not apprise defendant of the highest aggregate minimum sentence he faced does not warrant a different conclusion. There is no rigid formula for conducting the inquiry, and no requirement that the trial court provide an explicit accounting of the potential sentencing and all hypothetical outcomes (*see People v Arroyo*, 98 NY2d 101, 104 [2002]; *Coleman*, 213 AD3d at 464; *see also United States v Schaefer*, 13 F4th 875, 887-888 [9th Cir 2021]; *United States v Fore*, 169 F3d 104, 108 [2d Cir 1999], *cert denied* 527 US 1028 [1999]). The record establishes the defendant was aware of the nature of the charges against him, as the charges were set out in the indictment, and defendant admitted in a letter to the court that he was "very well familiar" with them.

The People's failure to produce the contact information of a potential defense witness from defendant's cellphone, which had been seized by the police, in advance of the suppression hearing did not violate *Brady v Maryland* (373 US 83 [1963]). Even assuming that the People had suppressed the requested information, defendant has not established that the information was exculpatory in nature or that he was prejudiced by its suppression (*see People v Rong He*, 34 NY3d 956, 958 [2019]). At the suppression hearing, defendant sought to introduce an intoxication defense, through testimony of the potential witness, to challenge the voluntariness of statements he made to the police. The potential witness, however, was not present when defendant made those statements, and the hearing court, which heard relevant testimony from multiple witnesses and viewed video evidence, apparently determined that defendant was not so intoxicated that he was unable to understand the meaning of his statements.

Defendant received effective assistance of counsel at the suppression

hearing, under both the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not demonstrated an absence of strategic explanations for counsel's alleged shortcomings (*see People v Honghirun*, 29 NY3d 284, 289 [2017]), or that he was otherwise prejudiced by counsel's performance.

Defendant did not preserve his current claim that the court should have submitted to the jury the issue of the voluntariness of his statements, and we decline to consider it in the interest of justice. As an alternative holding, we find that there was insufficient evidence in the record to create a factual dispute on this issue (*see People v Cefaro*, 23 NY2d 283, 285-289 [1968]; *People v Silvagnoli*, 251 AD2d 76, 76-77 [1st Dept 1998], *lv denied* 92 NY2d 882 [1998]). In any event, any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant's challenges to the prosecutor's comments on summation are unpreserved because defendant failed to object, made only general objections, or failed to request further relief after the court sustained his objections (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to consider them in the interest of justice. As an

alternative holding, we find no basis for reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 26, 2024

Susanna Molina Rojas
Clerk of the Court