STATE OF NEW YORK
COUNTY COURT: COUNTY OF NASSAU

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THE PEOPLE OF THE STATE OF NEW YORK
ex. rel.

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner,

-against-

Docket No.: 2009NA026180

MICHAEL J. SPOSATO, SHERIFF OF
NASSAU COUNTY

Respondent.

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STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

MEHMET F. GOKCE, being duly sworn, deposes and says:

1. That he is an attorney duly admitted to practice law before the Courts of the State of New York and is a member of the law firm of ROBERT P. MACCHIA & ASSOCIATES, the attorneys for the above named Petitioner in the case of the People of the State of New York against , Nassau County Index Number , and is fully familiar with the facts of this case. That is the person on whose behalf this petition is made, and that your deponent is authorized by him to institute this proceeding.

2. That (D.O.B. 3/28/1989) is currently detained at the Nassau County Correctional Center located in Nassau County, New York, under the custody of the Sheriff, Michael J. Sposato. That the detention of by virtue of bail in the amount Ten Thousand ($10,000.00) Dollars bond or Five Thousand ($5,000.00) Dollars cash in connection with an accusatory instrument charging Mr. with the crime of Assault in the Third Degree in violation of Section 120.00(1) of the New York State Penal Law.

3. That a court or judge of the United States does not have exclusive jurisdiction

to order the release of .

4. That this court is authorized to hear and decide this petition pursuant to C.P.L.R. §§7004(c) and 504(b); People ex. re. Klein v. Krueger, 25 N.Y.2d 497 (1969).

5. That the basis for venue and jurisdiction is that Petitioner is currently detained at the Nassau County Correctional Center located in East Meadow, NY, County of Nassau.

6. That on October 11, 2009, was arrested and charged with Assault in the Third Degree in violation of §120.00(1) of the New York State Penal Law. On or about October 11, 2009, an accusatory instrument, was filed with the local criminal court against him. The supporting depositions of and were filed in connection with said accusatory instrument; copies of the accusatory instrument and the two supporting depositions are annexed hereto as **EXHIBIT "A"**.

7. That on October 28, 2009, your affirmant made an oral application before the

Honorable Judge Susan Kluewer in Part 3 at the courthouse located at 99 Main Street, Hempstead, NY, for the release of Petitioner pursuant to Criminal Procedure Law §170.70. Said application was denied.

8. That Petitioner has been in the custody of the Nassau County Sheriff for a period of more than five (5) days. The current accusatory instrument filed against Petitioner is facially insufficient and does not meet the criteria of Criminal Procedure Law §100.40.

9. That in consequence of the aforesaid, Petitioner, is unlawfully detained in

violation of the Fifth Amendment of the United States Constitution and Article 5, §6 of the New York State Constitution.

10. That no appeal has been taken from the order of detention.

11. That no previous application for the writ asked for herein has been made.

ARGUMENT

12. Beginning with the supporting deposition of the alleged victim,

the last sentence reads as follows: "I am having Police Officer Lopez Shield # 2232 write this for me in English, he has read it to me in Spanish and it is the truth." Based on these words, it is clear that Mr. communicated what happened to him to Officer Lopez in Spanish and then Officer Lopez translated those words and made them the substance of the supporting deposition which Mr.

then signed.

13. In 1997 and then again in 2002, two separate trial courts have held that a supporting deposition written in English and signed by a complainant whose words were translated from the complainant's native language to English, failed to satisfy the statutory requirements of a sufficient information. See, People v. Banchs, 173 Misc.2d 415; see also, People v. Wang, 190 Misc. 2d 815. The court in Banchs ordered the prosecution to file a certificate of interpretation. When the prosecution moved to reargue this Order, the court held that its "...ruling that a certificate of interpretation [wa]s required for the proper conversion of the misdemeanor complaint st[ood]." In Wang, the court dismissed the accusatory instrument filed against the defendant in its entirety. In reaching this conclusion, the court stated that

> "Even if the translator in the instant case were completely free of any bias either for or against the defendant, there

> nevertheless [wa]s nothing to suggest that the translation [wa]s accurate. The translation was not, for example, made by a certified or official translator. Rather, it appears that the Court is being asked to blindly accept that the words of the deponent's daughter [we]re in fact the accurate and actual allegations of the deponent. For these reasons, the allegations set forth in the accusatory instrument *must be deemed hearsay*."

Wang at 817 (emphasis added).

14. During the C.P.L 170.70 oral application on October 28, 2009, your affirmant presented the Honorable Judge Kluewer with these arguments which she found persuasive; Judge Kluewer deemed that the supporting deposition of was inadmissible hearsay and, as such, failed to properly satisfy the requirements of Criminal Procedure Law §100.40. This Court should come to the same conclusion as did Judge Kluewer on this issue. There is no dispute that the supporting deposition of Mr. was a translation of Mr. words. Moreover, there are no certificates of interpretation or any documents attesting to the accuracy of Officer Lopez's translation of the written words in the supporting deposition. The supporting deposition of Mr. is therefore inadmissible hearsay and should be set aside in its entirety.

15. Although Judge Kleuwer agreed with your affirmant's arguments regarding Mr. supporting deposition, she determined that the supporting deposition of the witness, , satisfied the requirements of Criminal Procedure Law §100.40. Specifically, she found that Mr. 's supporting deposition was not hearsay and that his description of Mr. 's injuries were sufficient to establish every element of the offense charged.

16. Penal Law §120.00(1) reads that a person is guilty of assault in the third

degree when:

> With intent to cause physical injury to another person, he causes such injury to such person or to a third person.

As such, there are two elements that must be established in order for a person to be guilty of the crime of assault in the third degree: (1)the actor must intend on causing physical injury to another, and (2) physical injury must result. Logically, it must follow that these two elements must be satisfied in the information in order to be facially sufficient. If either element fails to be sustained, the information does not meet the criteria as set forth in C.P.L §100.40(1)(c).

17. Assuming arguendo that this Court were to find that the first element of intent

has been established, 's supporting deposition does not establish that the alleged victim actually sustained a physical injury as defined in §10.00(9) of the New York State Penal Law. There is absolutely no indication that the complainant sustained an impairment of physical condition or suffered substantial pain. Judge Kluewer determined that Mr. 's observations of Mr. 's injuries, which Mr. Gonzalez described as a "severe laceration" and "sever bleeding" were enough to infer that Mr. suffered "substantial pain." Since pain is a subjective sensation, it is impossible for Mr. to know whether the laceration and/or bleeding caused Mr. any pain. There is no indication in Mr. 's supporting deposition that Mr. was yelling, screaming, or even commenting on his injuries. Furthermore, any comments about what his injuries felt that Mr. would have made to Mr. would have been inadmissible hearsay. Nothing in Mr. 's supporting deposition clearly lays out anything that Mr. may or may not have been feeling as a result of his alleged injuries. The Court of Appeals has made it clear that the "substantial pain" threshhold must be clearly delineated in unequivocal terms. See,

People v. Henderson, 92 N.Y.2d 677 (1999). There are no such words in Mr. 's supporting deposition and there is nothing indicating that Mr. observed Mr. to be experiencing "substantial pain."

18. Based on the foregoing, Petitioner's C.P.L. §170.70 application was wrongfully denied. As such, Petitioner is currently being held in the custody of the Nassau County Sheriff's Department in violation of both State and Federal law and must be released forthwith.

WHEREFORE, your Petitioner prays that a Writ of Habeas Corpus issue directed to the Sheriff of the County of Nassau, his deputies and assistants, commanding him and them to bring and produce before the Honorable Judge Frank A. Gulotta, Jr., County Court Justice, at his Chambers in the Nassau County Courthouse located at 262 Old Country Road, Mineola, NY 11501, for hearing and determination concerning the detention of and why he should not have been given his liberty and why he should have such other and further relief as this Court may seem just and proper.

Dated: Mineola, New York
October 30, 2009

Yours, etc.,

LAW OFFICES OF
ROBERT P. MACCHIA & ASSOCIATES

By:_____
MEHMET F. GOKCE
Attorney for Petitioner
Damien Whitmore
98 Front Street
Mineola, New York 11501
(516) 873-6200

STATE OF NEW YORK
COUNTY COURT: COUNTY OF NASSAU

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THE PEOPLE OF THE STATE OF NEW YORK
ex. rel. DAMIEN WHITMORE

Petitioner,

-against-

MICHAEL J. SPOSATO, SHERIFF OF
NASSAU COUNTY

Respondent.

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VERIFICATION

Docket No.: 2009NA026180

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

MEHMET F. GOKCE, being duly sworn, deposes and says:

That he is the attorney for Petitioner in the within action, that he has read the foregoing petition and knows the contents thereof, that the same is true to his knowledge except as to the matter therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

Dated: Mineola, New York
October 30, 2009

_____

MEHMET F. GOKCE
Attorney for Petitioner
Damien Whitmore
98 Front Street
Mineola, New York 11501
(516) 873-6200

Sworn to before me this
day of October, 2009

_____
NOTARY PUBLIC